United Nations A/CN.4/722

General Assembly

Distr.: General
12 June 2018
English
Original: Spanish

International Law Commission
Seventieth session
New York, 30 April to 1 June 2018
Geneva, 2 July to 10 August 2018

Sixth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*

Contents

* The Special Rapporteur wishes to thank Ms. Soledad Román Pérez-Moreira, who is studying for a Master's degree in Diplomacy and International Relations at the Escuela Diplomática de España, and Mr. Fernando Val Garijo, Professor of Public International Law at the Universidad Nacional de Educación a Distancia.

18-09631 (E) 090718 100718

Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006), on the basis of the proposal in the report of the Commission to the General Assembly on the work of that session.[1] At its fifty-ninth session (2007), the Commission decided to include this topic in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[3]

2. The Special Rapporteur submitted three reports,[4] in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction. The International Law Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008[5] and 2011[6] respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, notably in 2008 and 2011.

3. At its sixty-fourth session (2012), the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur for the topic to replace Mr. Kolodkin, who was no longer a member of the Commission.[7]

4. At the same session, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction.[8] The preliminary report helped to clarify the terms of the discussion theretofore, identified the principal remaining points of contention, the topics to be considered and the methodology to be followed, and set out an indicative workplan for consideration of the topic. The Commission considered the Special Rapporteur's preliminary report at the same session[9] and the Sixth Committee of the General Assembly examined it at its sixty-seventh session.[10] In both cases, the Special Rapporteur's proposals were approved.

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[1] See *Yearbook of the International Law Commission*, *2006*, vol. II (Part Two), para. 257 and annex.

[2] *Yearbook… 2007*, vol. II (Part Two), para. 376.

[3] *Ibid*., para. 386. The Secretariat study is contained in memorandum A/CN.4/596 and Corr.1 (mimeographed version available on the website of the Commission, documents of the sixtieth session, 2008. The final text will be issued as an addendum to the *Yearbook of the International Law Commission*, *2008*, vol. II (Part One).

[4] *Yearbook of the International Law Commission, 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); A/CN.4/631 (second report, 2010); and A/CN.4/646 (third report, 2011).

[5] See *Yearbook… 2008*, vol. II (Part Two), paras. 266–311.

[6] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 104–203.

[7] *Ibid*., *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 84.

[8] A/CN.4/654.

[9] Concerning the Commission's discussion on the topic, see *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 86–139. See also the provisional summary records of the Commission contained in documents A/CN.4/SR.3143–SR.3147, available on the Commission's website.

[10] The Sixth Committee considered the item "Immunity of State officials from foreign criminal jurisdiction" at the twentieth to twenty-third meetings of its sixty-seventh session. In addition, two delegations referred to the topic at the nineteenth meeting. The statements made by delegations at those meetings may be consulted in the summary records contained in documents A/C.6/67/SR.19–SR.23. See also the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its sixty-seventh session (A/CN.4/657), paras. 26–38.

5. The Special Rapporteur subsequently submitted four more reports, in 2013, 2014, 2015 and 2016.[11] Since considering those reports,[12] the Commission has so far provisionally adopted the following draft articles together with the commentaries thereto: draft article 1 (on the scope of the draft articles);[13] draft article 2 (e) and (f) (definition of "State officials" and of "acts performed in an official capacity");[14] draft articles 3 and 4 (on normative elements of immunity *ratione personae*);[15] draft articles 5 and 6 (normative elements of immunity *ratione materiae*);[16] and draft article 7 (crimes under international law in respect of which immunity *ratione materiae* shall not apply) and annex.[17] The text of the draft articles and of the annex to draft article 7 provisionally approved so far by the Commission is included in the annex to this report.

6. For its part, the Sixth Committee of the General Assembly considered the reports of the Commission on this topic at its sessions from 2013 to 2017.[18]

7. At its sixty-eighth session (2016), the Commission had before it the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction,[19] which was devoted to limitations and exceptions to that immunity and contained a draft article. Since at the time of its consideration by the Commission the report was available only in two languages (English and Spanish), the Commission decided to start discussing it so that delegations which so wished could make comments and observations but agreed that the discussion would remain open and would not be concluded until the sixty-ninth session, when the report had been distributed in all the official languages. It was not until then that the Sixth Committee would have a complete report on the debate, including the summary prepared by the Special Rapporteur.[20] At its sixty-ninth session (2017), after resuming the discussion on the fifth report, the Commission decided to refer draft article 7 to the Drafting Committee[21] and then provisionally adopted draft article 7, together with the

[11] A/CN.4/661 (Second report), A/CN.4/673 (Third report), A/CN.4/686 (Fourth report) and A/CN.4/701 (Fifth report).

[12] For a detailed account of the consideration of the item by the Commission, see its reports to the General Assembly on the work of its sixty-fifth to sixty-seventh sessions: *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras 43 to 49; *ibid*., *Sixty-ninth Session* (A/69/10), paras. 126–132; and *ibid*., *Seventieth Session, Supplement No. 10* (A/70/10), paras. 174–243. The discussion on the Special Rapporteur's fifth report is analysed in this chapter.

[13] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49.

[14] *Ibid*., *Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 132; and *ibid*., *Seventy-first Session, Supplement No. 10* (A/71/10), para. 250.

[15] *Ibid*., *Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49.

[16] *Ibid*., *Sixty-ninth session, Supplement No. 10* (A/69/10), para. 132; and *ibid*., *Seventy-first Session, Supplement No. 10* (A/71/10), para. 250.

[17] *Ibid*., *Seventy-second session, Supplement No. 10* (A/72/10), para. 141.

[18] See documents A/CN.4/666, paras. 10 to 30; A/CN.4/678, paras. 37 to 51, and A/CN.4/689, paras. 68 to 76, which contain the topical summaries prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth to seventieth sessions. The discussions held in the Sixth Committee may be consulted in the summary records contained in documents A/C.6/68/SR.17 to SR.19, A/C.6/69/SR.21 to SR.26 and A/C.6/70/SR.20 and SR.22 to SR.25. The full text of the statements made by the delegations which participated in the discussion may be consulted at http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda, http://papersmart.unmeetings.org/es/ga/sixth/69th-session/agenda and http://papersmart.unmeetings.org/es/ga/sixth/70th-session/agenda. The Sixth Committee's discussions on the fifth report are analysed in this chapter.

[19] A/CN.4/701.

[20] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10*, (A/71/10), para. 193.

[21] *Ibid., Seventy-second Session, Supplement No. 10* (A/72/10), para. 73. The report of the

commentaries thereto. Draft article 7 was adopted by recorded vote, with 21 votes in favour, 8 votes against and 1 abstention.[22] In addition, the Commission approved both footnotes to the titles of Parts Two (Immunity *ratione personae*) and Three (Immunity *ratione materiae*).[23]

8. The issue of limitations and exceptions to immunity is undoubtedly the most controversial and politically sensitive aspect of this topic. It is therefore not surprising that the discussion both in the International Law Commission and in the Sixth Committee of the General Assembly was very heated and reflected the differences between members of the Commission and between States on this question. As stated previously, this discussion continued through the sixty-eighth session (2016) and the sixty-ninth session (2017) and thus covered two quinquenniums. In view of the importance of the topics covered in the fifth report, it was decided to include in this sixth report a brief summary of the comments and observations made both in the International Law Commission and in the Sixth Committee of the General Assembly, without prejudice to coverage of this discussion both in the annual reports of the Commission[24] and in the useful topical summary prepared by the Secretariat on the discussions held in the Sixth Committee.[25] The following paragraphs should therefore be read in conjunction with those documents, as well as with the summary records of the International Law Commission[26] and of the Sixth Committee of the General Assembly,[27] to which the reader is referred.

9. In the Commission, the discussion on the fifth report can be analysed both from a general and methodological viewpoint and from the specific viewpoint of draft article 7.

10. As regards methodological issues, the discussion among Commission members focused on the following points: (*a*) the scope of the Commission's mandate concerning the progressive development and codification of international law and its application in the case of immunities of State officials from foreign criminal jurisdiction; (*b*) the need to determine whether or not the various draft articles adopted by the Commission constitute progressive development or codification; or, if appropriate, whether certain drafts should be described as "new law" (the term which is used by some Commission members but does not appear in its Statute); (*c*) the advisability of engaging in a process of progressive development in relation to immunity of State officials from foreign criminal jurisdiction or, alternatively, the advisability of simply reflecting *lex lata* and therefore engaging only in codification in the strict sense of the term; (*d*) the type of final result to be desired for work on the topic, since some members draw a distinction between draft articles (that should essentially be based on codification and international practice) and a draft treaty (which would thus not be subject to such methodological limitations); and (*e*) whether limitations and exceptions to immunity should be considered simultaneously with and be conditional on procedural safeguards.

Chairperson of the Drafting Committee may be consulted on the Commission's website.

[22] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74 and 75, and the provisional summary record of the Commission contained in document A/CN.4/SR.3378.

[23] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[24] See *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 190 to 250, and *ibid., Seventy -second Session, Supplement No. 10* (A/72/10), paras. 68 to 141.

[25] See A/CN.4/703, paras. 51 to 61 and A/CN.4/713, paras. 29 to 44.

[26] See the provisional summary records of the Commission in documents A/CN.4/SR.3328 to SR.3331 (2016); and A/CN.4/SR.3360 to SR.3365, SR.3378 and SR.3387 to SR.3389 (2017).

[27] See summary records A/C.6/71/SR.20 and SR.24 to SR.30 (2016); and A/C.6/72/SR.18, SR.19 and SR.21 to SR.26 (2017).

11. Concerning draft article 7, the issues raised in the Commission's discussion can be divided into the following categories: (*a*) the distinction between immunity *ratione personae* and immunity *ratione materiae* for the purpose of limitations and exceptions to immunity; (*b*) whether a practice exists that could serve as a basis for a customary norm or a trend in international law establishing limitations and exceptions to immunity; (*c*) criteria for the identification of crimes to be covered in article 7, in respect of which immunity *ratione materiae* does not apply; (*d*) the relationship between immunity and impunity and the rationale for limitations and exceptions to immunity; and (*e*) the possible influence on the draft articles of the system of immunities applicable in the international criminal tribunals and any implications for them of the obligation of States to cooperate with those tribunals.

12. All these issues were raised both in 2016 and in 2017, without any solution carried over from one quinquennium to the next, so that similar arguments on each of the issues were advanced at both sessions. Throughout the discussion there was a clear difference of views between a large number of Commission members favouring limitations and exceptions to immunity *ratione materiae* and a smaller number of members expressing reservations or opposition to limitations and exceptions. On the other hand, there was a broad consensus that there should be no limitations or exceptions on immunity *ratione personae*. As a result, draft article 7 and the commentaries thereto were adopted by a vote and not by consensus, as was the Commission's usual practice.

13. For its part, the Sixth Committee of the General Assembly also considered limitations and exceptions to immunity from foreign criminal jurisdiction in 2016 and 2017, with most of the statements made in 2017. Delegations' comments revealed the same divisions as had previously been apparent in the International Law Commission, with greater emphasis on the more politically sensitive aspects of limitations and exceptions to immunity.

14. Firstly, it should be emphasized that delegations welcomed the conclusion that limitations and exceptions to immunity apply only to immunity *ratione materiae* and that immunity *ratione personae* remains fully applicable.[28] Secondly, a number of delegations were in favour of a system of limitations and exceptions to immunity *ratione materiae* as contained in draft article 7.[29] Although the arguments in favour of draft article 7 were diverse, it was apparent that there is a need to avoid any contradiction between the norms barring impunity for the most serious crimes under international law and the Commission's draft articles, by preserving in all cases the progress achieved by the international community in recent decades and particularly the Rome Statute of the International Criminal Court.[30,31] On the other hand, while some States concluded that no provision concerning exceptions would be needed, that was because in their view international crimes could never be considered as acts performed in an official capacity,[32] and that conclusion could not be understood as a substantive rejection of draft article 7. In any case, it is noteworthy that there were differing rationales for the opinion in favour of draft article 7: one State maintained

[28] Chile, Cuba, El Salvador, Estonia, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America.

[29] Austria, Chile, Czechia, El Salvador, Greece, Hungary, Italy, Mexico, Netherlands, New Zealand (but advocating a contextual approach), Norway (on behalf of the Nordic countries), Peru, Portugal, Romania, Slovakia, Slovenia, South Africa, Ukraine and Viet Nam.

[30] Austria, El Salvador, Estonia, New Zealand and Norway (on behalf of the Nordic countries).

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

[32] Netherlands and Switzerland.

that a customary norm already exists[33] but a number of other States detected a trend that would justify a progressive development proposal.[34] Other States added that limitations and exceptions to immunity are justified by the need to preserve the essential values of the international community[35] and by the existence of *jus cogens* rules.[36] For those States, the practice described in the fifth report, as well as the analysis of the rationale for limitations and exceptions contained therein, were sufficient grounds for reaching those conclusions.[37]

15. However, another group of States maintained that international practice did not demonstrate the existence of a custom[38] or even of a trend[39] establishing limitations or exceptions to immunity. For those States, the practice to which the fifth report refers is not sufficient or relevant and its treatment poses methodological problems.[40] Consequently, some of those States were of the view that it would not be possible to proceed with the codification of international law, which was the only option that they found acceptable for this topic.[41] In any case, it should be noted that the States which did not consider that sufficient practice existed for a decision to be taken on limitations and exceptions to immunity did not seem to be pursuing the same goal. Suffice it to say that some of them simply concluded that it was not possible to point to the existence of a custom and that any proposal by the Commission must be *de lege ferenda* and therefore linked to progressive development; others were of the opinion that it was unacceptable to adopt a provision such as the one contained in draft article 7 on the basis of the fifth report and that further study was needed or a new analysis of practice on the part of the Commission;[42] one State suggested that consideration of the topic should be suspended until there was consensus in the Commission regarding limitations and exceptions;[43] and one State suggested that the Commission's consideration of the topic should be permanently suspended until State practice evolved and it was possible to clearly determine whether custom existed regarding limitations and exceptions to immunity *ratione materiae*.[44]

16. Regarding crimes in respect of which immunity *ratione materiae* does not apply, some States supported the entire list of crimes given in paragraph 1 of draft article 7,[45] whereas others supported the inclusion only of the crimes of genocide, crimes against humanity and war crimes.[46] There was extensive disagreement regarding the

[33] Italy. Viet Nam stated that draft article 7 reflected treaty-based practice.

[34] Austria, Chile, Czechia, Greece, Netherlands, Peru, Slovakia, Slovenia, South Africa and Spain.

[35] El Salvador, Greece, Portugal, Romania and Slovenia.

[36] Portugal and Slovenia. The opposite view was expressed by China and the Russian Federation. The Islamic Republic of Iran, Singapore and the United States of America were of the opinion that immunity from jurisdiction was unrelated to the gravity of crimes.

[37] See, for example, Mexico.

[38] Australia, Belarus, China, France, Germany, India, Ireland, Islamic Republic of Iran, Israel, Japan, Malaysia, Poland, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, and United States of America.

[39] Australia, Germany, France, Ireland, Israel, Japan, Russian Federation and United States of America.

[40] Belarus, China, Cuba, France, Germany, India, Indonesia, Ireland, Islamic Republic of Iran, Israel, Malaysia, Poland, Republic of Korea, Singapore, Spain, Sri Lanka, Switzerland and United States of America.

[41] Russian Federation, Sri Lanka and Thailand.

[42] In this connection, France suggested that a working group should be established to analyse practice.

[43] United States of America.

[44] China.

[45] Czechia and Estonia.

[46] Belarus, Hungary, Islamic Republic of Iran (which, in any case, is not in favour of a listing), Malaysia (against inclusion of torture and forced disappearances), Norway (on behalf of the Nordic countries) and Slovakia.

possible inclusion of the crime of aggression.[47] In addition, some States suggested the inclusion of other crimes[48] and one pointed out that no criterion existed to justify inclusion of any particular crime.[49] The inclusion of corruption and the territorial tort exception in the original proposal for draft article 7 was also the subject of divergent views.[50] In general, States were in favour of listing crimes in respect of which immunity *ratione materiae* does not apply,[51] although some States saw merit in replacing the list by an open wording simply mentioning crimes under international law.[52] In addition, one State proposed that the list of crimes in respect of which immunity does not apply should be deleted and replaced by a different approach consisting of specifying who decides on immunity, what the criteria are and what the standard of proof is.[53] Lastly, it should be noted that the annex mentioned in paragraph 2 of draft article 7 was supported by several States,[54] although there was some discussion about the choice of treaties mentioned,[55] the failure to refer to the Geneva Conventions on the Protection of Victims of War[56] for the purpose of defining war crimes,[57] the differing number of ratifications of the treaties mentioned in the annex[58] and the different ways in which such crimes are categorized in domestic legislation.[59]

17. Finally, as regards substantive issues, mention should also be made of the general reference by States participating in the discussion to the need to strike a balance between preservation of immunity as a guarantee of the principle of sovereign equality and maintenance of the instruments existing to combat impunity for the most serious crimes under international law:[60] on several occasions, this prompted a general statement that immunity is not equivalent to impunity.[61] However, although

[47] In favour of inclusion of the crime of aggression: Estonia, Slovenia, Portugal and Ukraine. Against: Belarus, Czechia, Hungary and Mexico. El Salvador suggested that the Commission should postpone a decision until the Assembly of States Parties to the International Criminal Court had decided to activate the Court's jurisdiction over that crime (a decision to do so was taken in December 2017).

[48] Germany and the Netherlands referred to slavery and human trafficking.

[49] Germany, Japan and United States of America.

[50] The United States of America noted that no clear reason had been adduced for not including both exceptions in draft article 7. Regarding corruption, a number of States supported its non-inclusion in paragraph 1 of draft article 7 because they considered that it did not constitute acts performed in an official capacity and was therefore not covered by immunity (Austria, Czechia, Greece, Hungary, Italy, Mexico, United Kingdom of Great Britain and Northern Ireland, and Viet Nam). Germany and El Salvador stated that it should not be included because the concept itself was not sufficiently clearly defined. Austria, while considering that corruption was not an act performed in an official capacity, drew attention to the need for procedural safeguards to ensure that State officials cannot be prosecuted for crimes of corruption abusively and for political reasons. With regard to the territorial tort exception, Viet Nam noted that it should be analysed further and Mexico concluded that it did not need to be included because it was presumed in the context of application of territorial jurisdiction. Opposition to its inclusion was also voiced by Greece, Italy and Malaysia, which considered it to be an exception that was more relevant to immunity from civil jurisdiction.

[51] Austria, Cuba, Greece, Hungary, Italy, Romania and Slovakia.

[52] Islamic Republic of Iran and Netherlands.

[53] Singapore.

[54] Hungary, Norway (on behalf of the Nordic countries), Romania and South Africa.

[55] Hungary, Slovenia and Spain.

[56] Geneva Conventions on the Protection of Victims of War (Geneva, 12 August 1949), *United Nations Treaty Series*. vol. 75, Nos. 970–973.

[57] Slovenia.

[58] Islamic Republic of Iran and Slovenia.

[59] Malaysia and Slovenia.

[60] Australia, Austria, Chile, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Islamic Republic of Iran, Israel, Japan, Norway (on behalf of the Nordic countries), Peru, Poland, Portugal, Russian Federation, Slovenia, South Africa and Viet Nam.

[61] Australia and Russian Federation.

this statement has almost acquired the status of a declaration of principle, States have drawn different conclusions from it regarding the effect that this balance would have on the establishment of limitations and exceptions to immunity. Suffice it to say that for some States this balance has no effect on immunity, which is purely procedural,[62] while others believe that recognition of unlimited immunity from jurisdiction could in practice become a form of impunity.[63] Some other States have concluded that the Commission has not clearly defined this balance,[64] or have limited themselves to stating that the principle of sovereign equality should always take precedence.[65]

18. In addition to the questions just mentioned, special attention was paid in the discussions in the Sixth Committee to three questions of methodology that need to be emphasized. The first involves the relationship between progressive development and codification in the work of the Commission. This focus was reflected in two ways in the comments of States. Firstly, the distinction between the two concepts was interpreted by some States as excluding any form of progressive development in the topic under study, which should be limited to the sphere of codification;[66] another group of States considered that the Commission's work should combine codification and progressive development.[67] The second more nuanced focus basically involved the request made by some States for the Commission to clearly establish whether a provision amounted to progressive development or to codification, without ruling out the possibility of submitting proposals for progressive development.[68] Some States also used the term "new law" to describe a situation different from progressive development and codification, even alleging that the Commission was using this technique not envisaged in its Statute.[69] In addition, some States used these distinctions to bolster their views on the final form of the Commission's draft, which they believed should be a draft treaty.[70] Since these comments directly concern the definition of its mandate and its working methods, the Commission may wish to devote attention to this matter in the future.

19. Secondly, it is noteworthy that States have also echoed the Commission's discussion about the procedural safeguards that would be needed to prevent abuses and politically motivated prosecutions of foreign officials. The delegations which participated in the Sixth Committee discussions, like those in the Commission, generally recognized the need to establish such safeguards and some of them referred to specific mechanisms. However, only a few States supported a linkage between such safeguards and the limitations and exceptions to immunity. A more detailed analysis of this issue is provided in chapter II of this report, to which the reader is referred.

20. However, the main methodological concern of States was the way in which the Commission provisionally adopted article 7. It should be noted that a number of States

[62] Australia, Germany, Israel, Netherlands, Republic of Korea, Russian Federation, Switzerland and United States of America.

[63] Peru and Portugal.

[64] Australia and Germany.

[65] Islamic Republic of Iran and Sri Lanka.

[66] In this connection, several States drew attention to the need to focus on current law in order to avoid confusion, especially as national authorities will turn to the draft articles for guidance (Germany, France, Ireland, Switzerland, United Kingdom of Great Britain and Northern Ireland, and United States of America).

[67] Chile, El Salvador, Greece, Mexico, Portugal, Romania and Slovenia.

[68] Australia, Austria, France, Germany (noting that not to do so would undermine the Commission's legitimacy), India, Ireland, Israel, Poland, Singapore, Spain, Switzerland and United Kingdom of Great Britain and Northern Ireland.

[69] China, Russian Federation, United Kingdom of Great Britain and Northern Ireland and United States of America.

[70] Australia, Germany, Sudan and United Kingdom of Great Britain and Northern Ireland.

expressed concern about the fact that the Commission had resorted to voting,[71] contrary to its most recent practice, and had stated that the Commission should act by consensus.[72] However, it should also be pointed out that one State had expressed the view that, even if voting is not the most desirable method, it is one of the methods that the Commission can use.[73] The concern of States about the fact that the Commission had needed a vote to adopt draft article 7 was justified on several counts. For example, some States expressed the view that the vote reflected the lack of consensus among Commission members on a topic of particular importance and would therefore complicate the task of States when the time came to adopt a position in the Sixth Committee.[74] One State also expressed the view that it might create uncertainty among the organs and institutions required to deal with immunity issues, complicating interpretation and contributing to the fragmentation of international law.[75] Lastly, it was also said that the voting cast serious doubt as to whether the proposal was in the nature of codification or progressive development.[76] In any case, it should be noted that only one State had concluded that the voting undermined the prestige of the Commission and jeopardized its work and future impact.[77] Since States' concerns also affect the working methods of the Commission, the latter may wish in the future to consider the question of the decision-making system in general and on this topic in particular. In any case, the Special Rapporteur wishes also to state for the record that voting, while rarely used in practice, can in no way be interpreted as undermining the legitimacy of the Commission's work or of its decisions.

21. In concluding this summary of the work done on this topic, it should be recalled that since 2013 the Commission has been asking States various questions about matters concerning the topic of immunity of State officials from foreign criminal jurisdiction. In 2014, the following States submitted comments: Belgium, Czechia, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[78] In 2015, the following States sent contributions: Austria, Cuba, Czechia, Finland, France, Germany, Netherlands, Peru, Poland, Spain, Switzerland and United Kingdom of Great Britain and Northern Ireland.[79] In 2016, written contributions were

[71] Australia, Austria, Chile, China, France, Germany, Greece, India, Indonesia, Ireland, Islamic Republic of Iran, Israel, Italy, Japan, Malawi, Malaysia, Norway (on behalf of the Nordic countries), Poland, Republic of Korea, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, United Kingdom of Great Britain and Northern Ireland, and United States of America.

[72] Australia, China, France, Greece, Ireland, Malawi, Norway (on behalf of the Nordic countries), Slovakia, Sri Lanka and United States of America. Some countries stated that the Commission should undertake progressive development only if there is consensus (Spain, Sri Lanka and Thailand). France suggested that the Commission should take the time to reach consensus on the text adopted in first reading.

[73] Portugal.

[74] France, Singapore and Slovakia.

[75] France and United States of America.

[76] In the view of the United States of America, voting may have given the impression that draft article 7 was neither codification nor progressive development.

[77] Germany. Similarly, it affirmed that the Commission was not a non-governmental organization and should meet the highest standards.

[78] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 25. The Commission requested States "to provide information, by 31 January 2014, on the practice of their institutions, and in particular on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity', in the context of the immunity of State officials from foreign criminal jurisdiction."

[79] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 28. The Commission requested States "to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (*a*) the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction; and

received from the following States: Australia, Austria, Netherlands, Paraguay, Spain, Switzerland and United Kingdom of Great Britain and Northern Ireland.[80] In 2017, the following States sent written comments: Austria, Czechia, France, Germany, Mexico, Netherlands and Switzerland.[81] In addition, in their statements in the Sixth Committee, several delegations referred to the issues mentioned in the questions addressed to them by the Commission. The Special Rapporteur wishes to thank those States for their comments, which are invaluable for the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments, as well as the observations contained in the oral statements by delegations in the Sixth Committee of the General Assembly, were duly taken into account in the preparation of this report.

22. Based on the programme of work proposed by the Special Rapporteur and approved by the Commission, this report deals with the procedural aspects of immunity from foreign criminal jurisdiction. Although it would have been the intention of the Special Rapporteur to exhaust this topic in the sixth report, as announced in her preceding report, this did not prove possible. Consequently, this report initiates consideration of the procedural aspects of immunity, analysing first the way in which these topics were dealt with previously in the work of the Commission, how procedural aspects fit within the overall boundaries of this topic and the approach which the Special Rapporteur intends to follow when analysing procedural aspects, including identification of which elements should be considered under this heading (chapter II). In addition, this report deals with three of the components of procedural aspects, noteworthy for being closely related to the concept of jurisdiction (chapter III), namely: when immunity should be considered by the authorities of the forum State (section B), the acts of the forum authorities that are affected by immunity (section C) and the determination of immunity (section D).

Chapter I
Procedural aspects of immunity of State officials from foreign criminal jurisdiction: Introduction

A. General considerations

23. As correctly indicated in the 2008 memorandum by the Secretariat, the treatment of the topic of immunity of State officials from foreign criminal jurisdiction in the doctrine has traditionally focused on the substantive dimension of immunity and given only peripheral consideration to the related procedural aspects.[82] That is still largely the case in 2018. Very little attention has been paid to the procedural aspects of immunity in the specialized literature on the topic. Similarly, they have received little attention in private codification efforts, in particular those of the Institute of International Law, which, in its resolutions on the immunity of State officials, has

(*b*) any exceptions to immunity of State officials from foreign criminal jurisdiction."

[80] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 29. The Commission stated that it "would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction."

[81] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 35; and *ibid, Seventy-second Session, Supplement No. 10* (A/72/10), para. 30. For the text of the question, see paragraph 42 *infra*.

[82] A/CN.4/596 [and Corr.1] (see footnote 3 *supra*), para. 213.

explicitly referred only to the issue of waiver of immunity and, indirectly, to the timing of the recognition of the immunity of the Head of State.[83]

24. However, the procedural aspects of immunity of State officials from foreign criminal jurisdiction cannot be ignored, nor can their importance be underestimated. It must be borne in mind that the immunity of State officials comes into play in connection with the exercise of criminal jurisdiction by the forum State and that, consequently, the definition of the legal regime applicable to such immunity must necessarily take into account a large number of issues including, among others, the timing of consideration of immunity by the courts of the forum State; the jurisdictional or other acts affected by immunity; the question of which organ must determine the applicability of immunity, and according to what procedure; invocation of immunity and the manner in which immunity can be invoked; waiver or lifting of immunity; and the role and rights of the foreign official and the foreign State in the process of determining immunity. It is therefore unsurprising that there is increasing interest in the procedural aspects of immunity.

B. Procedural aspects in the work of the International Law Commission on the topic

25. The need to address the procedural aspects of immunity has not been ignored by the Commission. An initial analysis was provided in the memorandum by the Secretariat,[84] following which the former Special Rapporteur, Mr. Kolodkin, devoted a substantial part of his third and final report to procedural aspects of immunity.[85] In the report, he analysed three of the above-mentioned issues: timing of consideration of immunity, invocation of immunity and waiver of immunity. He had already covered acts affected by immunity in his second report.[86]

26. The current Special Rapporteur has also given attention to the importance of procedural aspects of immunity of State officials from foreign criminal jurisdiction. She discussed procedural aspects in her preliminary report and included them in the workplan that she presented to the Commission in 2012,[87] analysed the concept of jurisdiction and, in 2013, referred to acts that could be affected by immunity,[88] and referred to waiver of immunity and the relationship between limitations and exceptions to immunity and procedural safeguards in 2016.[89] She also submitted an informal document entitled *Concept paper for informal consultations on procedural provisions and safeguards* to the Commission for consideration in 2017. The concept paper, which indicated in general terms the aspects of the topic that the Special Rapporteur intended to address in later reports, was the subject of open-ended informal consultations on 18 July 2017.[90] Thus, the members of the Commission have

[83] *See Institute of International Law*, resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, *Annuaire de l'Institut de droit international*, vol. 69 (session of Vancouver, 2001), pp. 742 *et seq*., in particular arts. 6 and 7. Available at www.idi-iil.org, *Resolutions*.

[84] See A/CN.4/596 [and Corr.1] (see footnote 3 *supra*), paras. 213–269.

[85] See A/CN.4/646, para. 11–57.

[86] See A/CN.4/631, paras. 38–51.

[87] See the preliminary report on immunity of State officials from foreign criminal jurisdiction of Ms. Concepción Escobar Hernández, Special Rapporteur (A/CN.4/654), paras. 69–70.

[88] See the second report on immunity of State officials from foreign criminal jurisdiction of Ms. Concepción Escobar Hernández, Special Rapporteur (A/CN.4/661), paras. 36–42.

[89] See the fifth report on immunity of State officials from foreign criminal jurisdiction of Ms. Concepción Escobar Hernández, Special Rapporteur (A/CN.4/701), para. 245 and 247.

[90] The concept paper is too long to be included in full in this report. For access, please contact the secretariat of the Commission, which has the document in its archives.

already had the opportunity to share their initial thoughts on the approach that the Special Rapporteur intends to take in her work on this important topic.[91]

27. Lastly, the importance attached to the procedural aspects of immunity from foreign criminal jurisdiction was reflected at the sixty-ninth session of the Commission in the Commission's decision to include a footnote in part two (Immunity *ratione personae*) and part three (Immunity *ratione materiae*) of the draft articles stating that "the Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session."[92]

C. Discussions on procedural aspects in the International Law Commission and in the Sixth Committee of the General Assembly

28. The procedural aspects of immunity from foreign criminal jurisdiction were first discussed by the Commission in 2011, on the basis of the third report of the former Special Rapporteur, Mr. Kolodkin.[93] While the debate on procedural aspects was less contentious than the one on Mr. Kolodkin's second report, which was submitted the same year, some members of the Commission expressed the opinion that it was too early for in-depth consideration of the procedural aspects of immunity, as the Commission had not yet reached an agreement on the substantive elements mentioned in the second report. They considered that procedural issues could only be addressed in depth once the Commission had taken a position on possible exceptions to immunity, an issue that they felt must be dealt with before any further work was done on the topic and on which there was a very wide divergence of views among the members of the Commission.[94] The Sixth Committee of the General Assembly also discussed procedural aspects of immunity, at its sixty-sixth session.[95]

29. Over the past five years, the need to take the procedural aspects of immunity into consideration has been referred to on various occasions during the discussions in the International Law Commission and the Sixth Committee of the General Assembly. However, it should be noted that since the discussions in 2011, the focus of the members of the Commission with regard to the procedural aspects of immunity of State officials from foreign criminal jurisdiction has shifted somewhat towards the need to establish procedural safeguards to prevent the politicization and abuse of criminal jurisdiction in respect of foreign officials. From that standpoint, the procedural aspects to be considered should (according to some members of the Commission) essentially comprise clauses safeguarding the sovereignty of the foreign State. A similar approach has emerged in the Sixth Committee of the General Assembly. The interest in the procedural aspects of immunity from foreign criminal jurisdiction has thus shown itself to be closely linked to the safeguarding and strengthening of immunity and of the principle of the sovereign equality of States. In any case, attention should be drawn to the fact that the discussion on the procedural

[91] See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 77, and the provisional summary record of the Commission contained in document A/CN.4/SR.3378.

[92] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[93] See *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 141–203. See also the provisional summary records of the Commission contained in documents A/CN.4/SR.3111 and A/CN.4/SR.3113 to A/CN.4/SR.3115.

[94] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 160–161.

[95] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650 and Add.1), para. 13. See also summary records A/C.6/66/SR.18 to A/C.6/66/SR.28 and A/C.6/66/SR.30.

aspects of immunity has acquired greater presence and weight in the two most recent sessions of the Commission, since the Special Rapporteur addressed the issue in her fifth report, which was on limitations and exceptions to immunity.[96]

30. Thus, the issue of the relationship between exceptions and procedural aspects, which came up in 2011, although in an entirely different context, has re-emerged. In 2011 a group of members of the Commission emphasized a need to reach a consensus on exceptions to immunity before taking any decisions on procedural aspects, while in 2016 and 2017 a different group of members stressed a need to achieve a prior consensus on procedural safeguards. Moreover, in 2011 procedural aspects were understood in a generic sense as proceedings and instruments of a procedural nature related to immunity, whereas in 2016 and 2017 they were viewed essentially as procedural safeguard clauses that should be offered to the State of the official.

31. However, the need to analyse and establish procedural safeguards to prevent politically motivated proceedings and the abuse of jurisdiction is not a new subject. The concern was raised in earlier discussions, and the Special Rapporteur herself stated in her fifth report that "lastly, the Special Rapporteur wishes to underscore that the application of this draft article [Crimes in respect of which immunity does not apply] should be understood in the light of the procedural rules on the application of immunity that may be established in the future. Although such rules would not change the substantive content of the draft article with regard to the identification of situations in which immunity does not apply, it will be possible at such time to establish specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protect both States and individuals."[97] Similarly, although during the discussions in 2016 and 2017 most members of the Commission ascribed great importance to addressing procedural safeguards, a significant number indicated that they were in favour of considering safeguard clauses in the future and not making such consideration a condition for the adoption of a draft article on limitations and exceptions to immunity. Those members also expressed support for the consideration of other procedural aspects related to the exercise and operation of immunity.

32. The divergence of positions on how procedural aspects and their relation to exceptions to immunity should be addressed reflects, in a way, the differing positions of members of the Commission on the underlying question of whether or not it would be appropriate to establish exceptions or limitations to immunity from foreign criminal jurisdiction, in particular in relation to crimes under international law. The situation even affected the process of adopting draft article 7, which, as noted above, was adopted by a recorded vote in 2017. The explanations of vote given by a good number of members of the Commission clearly show the different positions that exist with regard to this controversial issue.[98]

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[96] On this topic, see *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 190–248, in particular para. 247, and the provisional summary records of the Commission contained in documents A/CN.4/SR.3330 and A/CN.4/SR.3331. See also *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 68–141, and the provisional summary records of the meetings of the Commission contained in documents A/CN.4/SR.3360 to A/CN.4/SR.3365 and A/CN.4/SR.3378.

[97] A/CN.4/701, para. 247.

[98] On the occasion of the adoption of the report of the Drafting Committee at the 3378th meeting of the Commission, on 20 July 2017, various members expressed their opinions and made explanations of vote before and after the vote. Mr. Murphy, Sir Michael Wood, Mr. Huang, Mr. Rajput and Mr. Nolte, who were among those who voted against the adoption of the draft article, expressed the view that the draft article on limitations and exceptions must be adopted alongside the relevant procedural provisions. They considered that it was not possible to take a decision on exceptions without knowing what procedural safeguards would be available to the

33. The debate that had taken place in the International Law Commission was echoed in the Sixth Committee at the seventy-second session of the General Assembly. In that connection, it should be highlighted that a number of States made general comments on the importance of addressing procedural aspects as part of the work on immunity.[99] Some drew attention to the need to ensure that abusive or politically motivated exercise of criminal jurisdiction against a foreign official was not possible,[100] mentioned the need to establish procedural safeguards concerning limitations and exceptions to immunity,[101] or even called for the two topics to be considered simultaneously.[102] However, other States affirmed that the topic had already been adequately addressed in the third report by the former Special Rapporteur, Mr. Kolodkin.[103] Two States suggested that it might be useful to reflect on a proposal made by a member of the Commission during the discussions ("prosecution or waiver of immunity"),[104] one suggested that it would be beneficial to establish a mechanism for dispute resolution between the forum State and the State of the official,[105] and another suggested establishing procedural safeguards to ensure that the exercise of jurisdiction did not undermine due process guarantees.[106] Another State recalled in positive terms the informal consultations held by the Commission in July 2017.[107] There was a general interest expressed by States in receiving the new report on procedural aspects of immunity.[108]

34. It should be recalled that interest in the matters covered by the present report has also been shown during the interactive dialogue that takes place annually as part of International Law Week. For that reason, the Special Rapporteur was invited to participate in the interactive dialogue last autumn. She took advantage of that opportunity to communicate to the representatives of Governments the essential points of the concept paper that had formed the basis for the Commission's informal

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State of the official to prevent politicization and abusive exercise of criminal jurisdiction by a State against a foreign official. The members of the Commission who voted in favour of the adoption of the report did not generally mention any need to deal with exceptions and procedural safeguards jointly, although Mr. Hmoud expressed a hope that the future work on procedural aspects of immunity would allay the concerns of those who had voted against the adoption of draft article 7. See the provisional summary record of the 3378th meeting of the Commission (A/CN.4/SR.3378).

[99] Cuba, Italy, Romania and Spain.

[100] Austria, China, Mexico, Norway (on behalf of the Nordic countries), Peru, Singapore, Slovenia and Switzerland.

[101] Austria, Cuba, Estonia, Germany, Greece, Ireland, Israel, Japan, Malaysia, Mexico, New Zealand, Norway (on behalf of the Nordic countries), Peru, Singapore, Slovakia, Sri Lanka and United States of America.

[102] Germany, Ireland, Israel, Netherlands, Russian Federation, Sri Lanka and United States of America.

[103] Italy and United Kingdom of Great Britain and Northern Ireland.

[104] Australia and New Zealand. This concerned Mr. Nolte's suggestion to explore the possibility of establishing a mechanism whereby the State of the official could either prosecute the official or waive immunity to allow the official to be prosecuted in another State. The Special Rapporteur had already included the suggestion in the concept paper produced in July 2017 for the purposes of the informal consultations.

[105] Austria. The idea would be to establish an international mechanism to prevent the inappropriate and politically motivated use of prosecution of a foreign official. The mechanism could be based on the institution of interim measures or on urgent procedures already in use at international courts and tribunals.

[106] Mexico.

[107] Greece.

[108] Austria, Chile, France, India, Ireland, Islamic Republic of Iran, Japan, Malaysia, Mexico, Netherlands, New Zealand, Peru, Republic of Korea, Romania, Slovakia, United Kingdom of Great Britain and Northern Ireland, and United States of America.

consultations, and to exchange views with them on the future approach to the question of procedural aspects of immunity of State officials from foreign criminal jurisdiction.

D. Significance of procedural aspects in the treatment of immunity of State officials from foreign criminal jurisdiction

35. If we take as a starting point the idea that the immunity of State officials is claimed against a foreign criminal jurisdiction, the need to analyse the procedural aspects involved becomes clear. From that perspective, the work of the Commission on the topic will not have its maximum effect unless it provides adequate answers to a number of distinctly procedural questions, such as what is meant by "jurisdiction"; what types of acts of the forum State are affected by immunity from foreign criminal jurisdiction; who determines the applicability of immunity, and what effect that determination has; when immunity from foreign criminal jurisdiction begins to apply; whether or not it is necessary to invoke immunity, and who may do so; how and by whom the waiver or lifting of immunity may be effected, and what effects the waiver or lifting of immunity has on the exercise of jurisdiction; how to ensure communication between the forum State and the State of the official, and what mechanisms can be used for such communication; whether or not there are mechanisms in place that enable the State of the official to have its legal positions made known and taken into consideration by the courts of the forum State when determining whether or not immunity applies in a specific case; how to facilitate international judicial cooperation and assistance between the forum State and the State of the official; to what extent and through what procedures the obligation to cooperate with an international criminal court should be taken into consideration; and how to transfer proceedings begun in the forum State to the State of the official or an international criminal court, as necessary.

36. There is no doubt as to the relevance of examining those issues. The immunity of State officials comes into play *vis-à-vis* the exercise of a foreign criminal jurisdiction that operates through the application of rules, principles and procedural processes that cannot be ignored. However, it must also be borne in mind that immunity from criminal jurisdiction in the context of this topic involves a foreign element (the State official), which the courts must necessarily take into consideration in order to decide whether or not to exercise jurisdiction. That requires them to evaluate factors such as whether the individual can be considered a "State official", whether the act giving rise to the potential exercise of jurisdiction can be considered to have been "performed in an official capacity", and whether the official was acting "in exercise of official functions" at a given moment. None of those elements can be fully assessed without taking into account relevant information from the State of the official. Furthermore, the courts of the forum State must also consider whether or not the State of the official has an interest in protecting the immunity of the official, which requires an analysis of institutions such as the invocation of immunity and the waiver or lifting of immunity and the effects thereof. None of that would be possible without adequate communication between the State of the official and the forum State.

37. All of these matters should be addressed through procedural arrangements that provide certainty to both the forum State and the State of the official and reduce as far as possible the involvement of political factors and the possibility of jurisdiction being exercised over an official of a foreign State abusively or for political reasons or ends. This procedural approach to the above-mentioned problems could introduce an element of neutrality into the treatment of immunity from foreign criminal jurisdiction. It could also help build trust between the forum State and the State of the official and reduce an effect that has been cited quite frequently as a justification for

having immunity without any limitations or exceptions, namely instability in international relations.

38. The inclusion of procedural aspects in the treatment of immunity from foreign criminal jurisdiction is also interesting when examining immunity from the perspective of the sovereign equality of two jurisdictions that may be competent to hear a certain case, namely the jurisdiction of the forum State and the jurisdiction of the State of the official. When the topic of immunity is viewed from this angle, it is possible to state in general terms that the jurisdiction of the State of the official takes precedence over any foreign criminal jurisdiction, which means that the State of the official can claim immunity for its officials before a foreign criminal jurisdiction. In such a case, immunity would be a mere procedural bar to that jurisdiction. That arrangement, which has already been set out by the International Court of Justice in the *Arrest Warrant of 11 April 2000* case,[109] calls for an analysis of potential mechanisms to ensure respect for that claim to precedence in the exercise of jurisdiction.

39. However, this analysis must also be carried out in the light of the balance between respecting and guaranteeing the principle of the sovereign equality of States and respect for other legal principles and values of international society as a whole. This is particularly significant in relation to the non-applicability of immunity *ratione materiae* in respect of the crimes under international law listed in draft article 7, and also warrants an analysis from the procedural perspective. It seems to be generally accepted that striking the appropriate balance with regard to the topic at hand involves simultaneously guaranteeing the principle of sovereign equality and ensuring that combating impunity continues to be an objective of the international community. If that is the case, there is in principle nothing to prevent the immunity of State officials from foreign criminal jurisdiction from being maintained and the primacy of the jurisdiction of the State of the official to prosecute crimes under international law allegedly committed by that official from being ensured, provided that the exercise of such jurisdiction is effective. Suffice it to say at this time, as an example, that efforts to combat impunity for the most serious crimes under international law would not be affected by the application of immunity, provided that the jurisdictional principles of territoriality and personality, which are recognized as basic principles in the international criminal justice system, were applied. That is because, to paraphrase the International Court of Justice in the *Arrest Warrant of 11 April 2000* case, immunity would serve as a mere procedural bar and international responsibility for the commission of the serious crimes would be deduced through the exercise of criminal jurisdiction by the State of the official. However, in such a case it would also be necessary to analyse what procedural elements and institutions would be needed to achieve that dual objective.

40. To properly determine the significance of procedural aspects with regard to the immunity of State officials from foreign criminal jurisdiction, a final concern expressed by a number of States should be taken into account: the need to ensure that a State official who may be affected by the exercise of foreign criminal jurisdiction enjoys all of the procedural safeguards recognized under international law, in particular international human rights law. While it is true that the recognition of the right to a fair trial will operate as normal in cases in which immunity does not apply, certain rights of the official may be affected even before the competent foreign jurisdiction takes a decision on the applicability of immunity. It therefore seems necessary to include in this part of the topic the issue of the procedural treatment that

[109] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment, *ICJ Reports 2002*, p. 3.

must always be guaranteed for the official over whom a foreign criminal court is exercising, or attempting to exercise, jurisdiction.

E. Scope of the procedural aspects of immunity: questions to be considered

41. In light of the above-mentioned considerations, the Special Rapporteur considers that the approach to the analysis of the procedural aspects of immunity of State officials from foreign criminal jurisdiction should be broad and comprehensive and take into account four distinct but complementary dimensions:

(*a*) The procedural implications for immunity arising from the concept of jurisdiction, in particular the identification of the point of the proceedings at which immunity should begin to operate, the identification of the acts of the authorities of the forum State that may be affected by immunity, and the consideration of issues related to the determination of immunity.

(*b*) The procedural elements that have autonomous procedural significance as a result of their instrumental nature and direct links to the application or non-application of immunity in a given case, and that serve as a first-level safeguard for the State of the official, in particular invocation and waiver of immunity.

(*c*) The elements that should preferably fall under the category of procedural safeguards for the State of the official, in particular mechanisms to facilitate communication and consultation between the forum State and the State of the official, mechanisms for transmitting information from the State of the official to the courts of the forum State and vice versa, and instruments concerning international legal cooperation and assistance that may be applied between the two States.

(*d*) The procedural safeguards inherent in the concept of a fair trial.

42. The first two groups of issues were analysed in the memorandum by the Secretariat and the third report by the former Special Rapporteur, Mr. Kolodkin, which have been taken into due account in the present report. However, the other issues have not yet been addressed in the Commission's work. In order to obtain first-hand information on the various above-mentioned procedural aspects, in 2016 the Commission asked States to provide "information on their national legislation and practice, including judicial and executive practice, with reference to the following issues: (a) the invocation of immunity; (b) waivers of immunity; (c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution); (d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered; (e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered."[110] This request was reiterated in 2017.[111] To date, Austria, Czechia, France, Germany, Mexico, the Netherlands and Switzerland have submitted written responses.[112] The Special Rapporteur wishes to express sincere thanks to those States and highlight that she would equally appreciate any additional information that States may be able to provide with regard to those issues, which are of central importance to the work on this topic.

[110] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 35.

[111] *Ibid., Seventy-second session, Supplement No. 10* (A/72/10), para. 30.

[112] Written submissions by States are available on the website of the Commission.

43. The Special Rapporteur considers that the Commission should analyse, in addition to the issues mentioned above, another matter that has a clear procedural component: the effect that the obligation to cooperate with an international criminal court may have on the immunity of State officials from foreign criminal jurisdiction and the related procedures. While the scope of the Commission's topic is limited to immunity from the criminal jurisdiction of a State, the practice that has been emerging in recent years makes it advisable to take this matter into consideration. The issue came up in the Special Rapporteur's fifth report, although it was addressed only in connection with limitations and exceptions to immunity.[113] However, during the discussions in the Commission, a number of members stated that the issue could be better examined by taking a broader perspective that did not concern only limitations and exceptions to immunity. In response to that concern, the issue of cooperation with international courts was not mentioned in draft article 7 as provisionally adopted by the Commission in 2017.[114] The Special Rapporteur intends to examine this issue in the context of the procedural aspects of immunity, taking especially into account its particular connection with international legal cooperation and assistance mechanisms.

44. Although, as indicated above, the various procedural aspects of immunity are interrelated and should be analysed holistically, this report examines only the first group of issues set out above, namely the implications of the concept of jurisdiction for the procedural aspects of immunity, in particular the timing of the consideration of immunity, the acts of States that are affected by immunity, and the determination of immunity. Chapter II of this report is devoted to those issues.

Chapter II
Concept of jurisdiction and procedural aspects

A. General considerations

45. As noted above, the immunity of State officials from foreign criminal jurisdiction operates in respect of a forum State court that has general competence to exercise jurisdiction, including in relation to the matter than may be affected by the application of immunity from criminal jurisdiction. That was why the Special Rapporteur referred to the concept of criminal jurisdiction in her second report,[115] as the former Special Rapporteur, Mr. Kolodkin, had done previously.[116] The concept had also been previously examined in the memorandum by the Secretariat.[117]

46. The Special Rapporteur also included a draft definition of jurisdiction in her second report, which led to an interesting debate in plenary.[118] The debate was focused

[113] See A/CN.4/701, paras. 156–169.

[114] Draft article 7 as proposed by the Special Rapporteur in her fifth report contained a "without prejudice" clause worded as follows: "3. Paragraphs 1 and 2 are without prejudice to: (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable; (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State." (*Ibid*., para. 248).

[115] See A/CN.4/661, paras. 36–42.

[116] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), paras. 43–55.

[117] See A/CN.4/596 [and Corr.1] (see footnote 3 *supra*), paras. 7–13.

[118] The draft definition of the concept of jurisdiction proposed in 2013 is as follows: "The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence

primarily on whether it was necessary and useful to include the definition in the draft articles, particularly since the Commission had not attempted to define the concept in its previous work on topics related to jurisdiction and immunity from jurisdiction. However, some members of the Commission also expressed their views on the concept of jurisdiction itself and its scope for the purposes of the present topic.[119] The draft definition of jurisdiction was referred to the Drafting Committee, where some comments were made on it.[120] However, it should be recalled that the Drafting Committee decided to postpone the specific analysis of the draft definition to a later stage of the Commission's work.[121]

47. In any case, and regardless of the decision that the Drafting Committee may take with regard to the draft definition, the fact remains that it is not possible to examine the procedural aspects of immunity without referring to the concept of jurisdiction. This is because the meaning that is given to the concept may affect the scope of immunity from two perspectives: the timing of consideration of immunity and the acts of the forum State authorities that may be affected by the application of immunity. Furthermore, those two issues are related to a third, which also depends on the concept of jurisdiction: the identification of the organ competent to decide whether immunity applies.

48. However, this report is not intended to open a general discussion on the concept of jurisdiction; it will simply examine those three issues separately.

B. Timing: when should immunity be considered?

49. Since the immunity of State officials from foreign criminal jurisdiction has the effect of blocking the exercise of such jurisdiction, the competent organs of the State should consider whether or not immunity exists at an early stage in the process. However, it is not easy to define what is meant by "an early stage", as demonstrated by the fact that the meaning has not been established in any of the various existing instruments on immunity from jurisdiction. Neither the Vienna Convention on Diplomatic Relations[122] nor the Vienna Convention on Consular Relations[123] contains a provision in that regard, and the Convention on Special Missions[124] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[125] are similarly silent on the matter. The same is true of instruments concerning State immunity; there is no reference to the matter in the United Nations Convention on Jurisdictional Immunities of States and Their

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to exercise jurisdiction is irrelevant." (A/CN.4/661, para. 42).

[119] See the provisional summary records of the Commission contained in documents A/CN.4/SR.3164 to A/CN.4/SR.3168.

[120] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 45.

[121] See the statement of the Chairman of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction, which is available on the website of the Commission.

[122] Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[123] Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid*., vol. 596, No. 8638, p. 261.

[124] Convention on Special Missions (New York, 8 December 1969), *ibid*., vol. 1400, No. 23431, p. 231.

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

Property[126] or the European Convention on State Immunity.[127] Likewise, national laws on the immunity of States (or their officials) from jurisdiction do not definitively establish the point at which immunity should be considered by the courts of the forum State.

50. The point at which immunity should be considered by the courts of the forum State seems to be mentioned only, and indirectly, in the 2001 resolution of the *Institute of International Law* on immunities from jurisdiction and execution of Heads of State and of Government in international law.[128] Article 6 of the resolution states that "the authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them." However, it should be taken into account that this provision refers solely to the Head of State (and, by extension, the Head of Government). Moreover, the article does not specifically indicate the stage of the proceedings at which the courts of the forum State should consider immunity from jurisdiction; it refers only to the point at which the courts of the forum State become aware that the person concerned is the Head of State, which, at least in theory, could occur at any stage of the criminal proceedings.

51. The determination of the point at which the national courts should take the question of immunity into consideration is particularly relevant in answering two questions: (a) whether or not immunity from foreign criminal jurisdiction applies to investigatory acts carried out before the trial begins, and (b) at what point of the actual judicial phase immunity should be considered. The answers to both of those questions should take into account at least two elements. The first is the diversity of national procedural legislation, which makes it impossible to provide an answer based exclusively on the identification of a specific procedural phase (such as inquiry, investigation, indictment or commencement of oral proceedings) in which immunity must always be taken into account. The second is the nature and purpose of immunity, which is exercised before a national "jurisdiction" in order to ensure respect for the principle of the sovereign equality of States and the independent exercise of duties by State officials.

52. In connection with those questions, it is worth highlighting that the International Court of Justice has made explicit pronouncements on both the preliminary nature of the institution of immunity and the types of acts of the forum State authorities that may be affected by immunity, thereby providing an indirect path to the identification of the procedural phases in which immunity should be taken into account.

53. The timing of the consideration of immunity was examined by the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which it provided insight into the applicability of the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations[129] in relation to the prosecution in Malaysia of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, who had been put on trial for statements made during an interview. The Court, at the request of the United Nations Economic and Social Council, issued an advisory opinion in which it stated that "questions of immunity are ... preliminary issues which must be expeditiously decided *in limine*

[126] United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.

[127] European Convention on State Immunity (Basel, 16 May 1972), United Nations, *Treaty Series*, vol. 1495, No. 25699, p. 181.

[128] See footnote 83 *supra*.

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

litis" and that that statement was "a generally recognized principle of procedural law" intended to prevent the "nullifying [of] the essence of the immunity rule."[130] On that basis, the Court concluded by 14 votes to 1 "that the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*".[131]

54. The International Court of Justice also indirectly pronounced on the timing of the consideration of immunity when examining the question of what types of acts are affected by immunity, in the *Arrest Warrant of 11 April 2000 and Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* cases. In *Arrest Warrant of 11 April 2000*, the Court concluded as follows: "The functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."[132] The Court thus identified the nature of acts that could affect immunity and also linked the protection of functions to the exercise of immunity in such a way as to indicate that immunity should be taken into account only when the exercise of foreign criminal jurisdiction threatens to impede the performance of functions.[133] In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court highlighted the most obvious consequence of that approach by affirming 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."[134]

55. The Special Court for Sierra Leone took a similar position in the *Taylor* case. In its decision of 31 May 2004, the Appeals Chamber concluded that the question of immunity from jurisdiction should have been considered when an arrest warrant was issued; there was no need to wait for the oral proceedings to commence or for the accused to appear in court. The Court stated that "to insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity."[135]

56. National courts have likewise ruled on this matter. Although practice is not very abundant, courts have generally tended to consider immunity at the initial stage of judicial proceedings, before binding measures are taken in respect of a foreign official. For example, immunity was considered: in suits brought against an official

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[130] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, advisory opinion, *ICJ Reports 1999*, pp. 62 *et seq*., in particular p. 88, para. 63.

[131] *Ibid*., p. 90, para. 67.

[132] *Arrest Warrant of 11 April 2000* (see footnote 109 *supra*), p. 22, para. 54.

[133] The following reasoning of the Court is enlightening: "If a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office ... Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions." (*Ibid*., para. 55)

[134] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, judgment, *ICJ Reports 2008*, pp. 177 *et seq*., in particular p. 237, para. 170.

[135] *Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone, Appeals Chamber, case SCSL-2003-01-I, decision on immunity from jurisdiction, 31 May 2004, para. 30.

in the cases *King of Morocco*,[136] *Fidel Castro*,[137] *Mrs. Lydienne X* v. *Prosecutor*[138] and *Mr. Michel X* v. *Prosecutor*;[139] with regard to the prosecution of an official, for example in the cases *Rwanda*[140] and *Office of the Attorney General of the Confederation* v. *Nezzar*;[141] in connection with arrest warrants, for example *Application for Arrest Warrant against General Shaul Mofaz*,[142] or when an extradition application was filed as in the cases *Pinochet (No. 3)*,[143] *Peter Tatchell* v. *Robert Mugabe*[144] and *Khurts Bat*.[145] Immunity has sometimes been considered at the appeal stage, for example in the cases *Gaddafi*[146] and *Ariel Sharon et al*.[147] It may be inferred from these decisions that the consideration of a foreign official's immunity from jurisdiction is directly related to the time at which the court of the forum State must take a binding decision with regard to that person. Conversely, the only decision which seems to depart from this approach is that in the *Honecker* case, where it is stated that "any inquiry or investigation by the police or the public prosecutor […] would be incompatible with the effects of immunity under international law".[148]

57. In view of the foregoing, it must be concluded, first, that immunity must be considered by the courts of the forum State, at the earliest opportunity, when they

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[136] National High Court of Spain, decision of the Criminal Chamber, of 23 December 1998. The Court found that the suit brought against the King of Morocco was inadmissible.

[137] National High Court of Spain, decision of the Criminal Chamber sitting in full, of 13 November 2007. The Court declared inadmissible a suit brought against Fidel Castro, the President of Cuba, on the grounds that he enjoyed immunity. The Court had ruled earlier on two suits brought against Fidel Castro in 1998 and 2005.

[138] Court of Cassation of France, Criminal Chamber, Judgment No. 12-81676, of 19 March 2013. On examining the claim for indemnification, the investigating judge considered that immunity existed. However, the Constitutional Court set aside the investigating judge's decision.

[139] Court of Cassation of France, Criminal Chamber, Judgment No. 12-80158, of 17 June 2014. On examining the claim for indemnification, the investigating considered that immunity existed. However, the Constitutional Court set aside the investigating judge's decision.

[140] National High Court of Spain, Investigations Court No. 4, decision on committal for trial of 6 February 2008. The investigating judge excluded President Kagame from the decision on committal for trial in this case, on the grounds that he enjoyed immunity from criminal prosecution by virtue of his office.

[141] *A. v. Office of the Attorney General of the Confederation, B and C*. After the decision of the Office of the Attorney General of Switzerland to investigate the case, the person concerned filed an appeal with the Appeals Chamber which considered immunity and dismissed the appellant's claims by a decision of 12 December 2011. The Federal Criminal Court then upheld this decision by its judgment of 25 July 2012 (BB 2011 140). See also the written comments provided by Switzerland in 2017 in response to the Commission's questions.

[142] *Application for Arrest Warrant against General Shaul Mofaz*, Bow Street Magistrates' Court (United Kingdom), decision of 12 February 2004 (reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004) p. 771 *et seq*.).

[143] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, (Pinochet No. 3)* House of Lords (United Kingdom), Judgment of 24 March 1999 (reproduced in *International Legal Materials*, vol. 38 (1999) p. 581 *et seq*.). On that occasion, the ruling concerned an arrest warrant issued in response to an application for extradition.

[144] Judgment of the Senior District Judge of Bow Street of 14 January 2004 (reproduced in *International and Comparative La Quarterly*, vol. 53 (2004) p. 770).

[145] *Khurts Bat v. Investigating Judge of the German Federal Court and Secretary of State for Foreign and Commonwealth Affairs (intervening)* Appeal Decision [2011] EWHC 2029 (Admin) [2012] 3 WLR 180, [2011] All ER (D) 293, [2011] ACD 111, ILDC 1779 (UK 2011), 29th July 2011, United Kingdom; England and Wales; High Court [HC]; Queen's Bench Division [QBD]; Administrative Court. The Court ruled in the context of a European Arrest Warrant.

[146] *Gaddafi*, Court of Cassation of France, Criminal Chamber, Judgment of 13 March 2011 (No. 1414).

[147] *H.S.A. et al. v. S.A et al.*, Court of Cassation of Belgium, decision of 12 February 2003.

[148] In *re Honecker*, Federal Supreme Court (Federal Republic of Germany), Second Criminal Chamber, Decision of 14 December 1994 (case No. 2 ARs 252/84) *International Law Reports*, vol. 80, p. 366).

begin to exercise their jurisdiction and, at all events, before they deliver any judgment on the merits of the case. This general rule makes it possible to obviate acts of jurisdiction which may breach the principle of sovereign equality, might have an adverse effect on the foreign official's performance of State functions and which in reality might deprive immunity from jurisdiction of any effect in the case in question. It is therefore obvious that the application of the aforementioned criteria necessarily translates into the obligation to consider the question of immunity at least when charges are brought against the foreign official, or when he or she is committed for trial and, later, at the beginning of the oral hearing, since these acts always entail the exercise of jurisdiction by the forum courts. The need to consider a foreign official's immunity from jurisdiction at the initial phase of proceedings, before the adoption of a binding decision imposing a coercive measure on that person, has been mentioned in the written comments of all the States which in 2017 responded to the Commission's questions on the matter.[149]

58. Whether immunity applies at the inquiry or investigation stage and whether national courts must therefore consider the issue at that stage is more doubtful. Indeed there can be no standard answer bearing in mind the diversity of existing models of criminal inquiries and investigations in national legal systems and the diversity of the entities in each national system which are competent to perform these functions. What is certain is that, throughout this phase, many different kinds of non-binding acts are carried out which cannot always be termed acts of jurisdiction and which, moreover, do not necessarily have any bearing on the principle of the sovereign equality of States or prejudice the exercise of State functions by the foreign official. In this regard, it is possible to agree with Judges Higgins, Kooijmans and Buergenthal, who stated in their joint separate opinion in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that "commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate [the] principles [of the immunity and inviolability of the Minister of Foreign Relations]".[150]

59. The sole purpose of an inquiry or investigation is to identify the acts and persons who, where appropriate, may subsequently be subjected to the criminal jurisdiction of the forum State. This submission to criminal jurisdiction does not occur until charges are entered against one of the persons under investigation; as a rule, this will not take place until the end of the inquiry or investigation, or, at any event, until it has reached a very advanced stage.

60. On the other hand, it is also necessary to take account of the fact that an inquiry or investigation can encompass many acts and different persons, only one of whom may perhaps have the status of a State official within the meaning of these draft articles. Consequently, requiring the full, automatic application of immunity (a bar to jurisdiction) at the investigative stage might disproportionately and groundlessly curtail the exercise of the powers of the forum State, thereby producing a paradoxical situation where its authorities would be unable to conduct an investigation of a general situation (which might concern various persons) simply because the investigation involves a foreign official whose participation in the acts must furthermore be determined. Lastly, it is necessary to bear in mind the fact that the possibility of carrying out an investigation without prejudicing immunity is of special significance in the case of immunity *ratione materiae*, since in order to decide whether the latter applies, the authorities of the forum State will have to ascertain whether a person is a State official and whether the acts in question may be

[149] See the comments of Austria, Czechia, France, Germany, Mexico, Netherlands, and Switzerland.

[150] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (see footnote 109, *supra*,) p. 80, para. 59).

characterized as official acts, something which would be impossible without a minimum amount of investigation.

61. It therefore appears impossible to conclude that immunity from jurisdiction must be taken into consideration and applied automatically right from the start of an investigation, even when the latter may concern a foreign official. Former Special Rapporteur Kolodkin expressed a similar view in his third report, where he stated that "[i]n many cases, the preliminary actions of the criminal process are unrelated to measures precluded by immunity. In that situation, consideration of the issue of immunity by a State exercising criminal jurisdiction is not necessary and cannot be deemed its obligation".[151] This position was endorsed by some of the States which submitted written comments to the Commission.[152]

62. However, this is not a hard and fast conclusion. First of all, it is necessary to take into account the fact that immunity from jurisdiction must invariably be considered when seeking to bring charges against the foreign official or to commit him or her for trial, because it constitutes both a form of exercising criminal jurisdiction and a coercive act which must be covered by immunity, regardless of whether, under the municipal law of the forum State, the bringing of charges or committal for trial is the concluding act of the inquiry or investigative stage. It must also be borne in mind that, during the inquiry or investigative stage, the courts of the forum State may possibly order interim measures with regard to a foreign official, to wit summonses to appear or arrest warrants. In such situations, immunity from jurisdiction would have to be considered at the inquiry or investigative stage as well, since the aforementioned acts (although adopted before the bringing of charges in the strict sense, or before the beginning of the oral hearing) constitute forms of exercising jurisdiction, generate obligations for the foreign official, are manifestly coercive and may have an effect on the free exercise of his or her State functions.

63. In short, on the basis of the foregoing considerations, it may be concluded that courts of the forum State will have to consider immunity of State officials from foreign criminal jurisdiction at the following times: (a) before commencing the prosecution of a foreign official; (b) before bringing charges against the official or committing him or her for trial, and (c) before taking any measures expressly directed at that official which impose obligations on him or her which, in the event of non-compliance therewith, may lead to coercive measures and which may possibly impede the proper performance of his or her State functions, including in cases where the aforementioned measures are of an interim nature and may be ordered at the inquiry or investigative stage. At all events, there is nothing to prevent courts of the forum State from considering immunity at a later stage, especially during an appeal.

[151] A/CN.4/646, para. 11.

[152] For example, for Austria, "[t]he preliminary inquiries to clarify the circumstances of a case, to identify the specific suspect and to establish the facts the suspicion is based upon, do not yet constitute acts of prosecution and therefore immunity cannot be invoked against them". France held that "before immunity may be relied on, the court must sometimes determine whether the cause of action is well-founded. In effect, the forum court must ascertain whether the alleged facts, if they were to be proven, would give entitlement to immunity". On the other hand, the Netherlands considered that immunity could be invoked at any stage (investigation, indictment, prosecution) and Czechia explained that, in accordance with its Code of Criminal Procedure, if an investigation involves a person who may enjoy immunity, the investigation may not be conducted or must be discontinued.

C. The material element: what categories of acts are affected by immunity?

1. General considerations

64. The concept of jurisdiction also plays a role in identifying acts of the authorities of the forum State in respect of which immunity may be invoked and which might, in some cases, be affected by that institution. Identifying such acts and pinpointing the time at which immunity must be considered have some common elements and, perhaps for this reason, have sometimes been examined concurrently. Nevertheless it is equally certain that the specific aspects and particular problems of identifying which acts of the authorities of the forum State are affected by immunity deserve separate treatment, at least as far as some of those acts are concerned, namely those where the effect of immunity from foreign criminal jurisdiction may be more debatable.

65. The most obvious measures which a criminal court may take in the exercise of its jurisdiction and which may concern, or directly affect, a foreign official, are the bringing of a criminal charge, a summons to appear before the court as a person under investigation or to attend a confirmation of charges hearing, a decision on the confirmation of charges, committal for trial, a summons to appear as the accused in a criminal trial, a court detention order or an application to extradite or surrender a foreign official. The jurisdictional nature of all of these acts is plain, their purpose being none other than to make it possible for the forum court to exercise its jurisdiction over a given person (in this case the foreign official) in order to be able to decide whether he or she bears criminal responsibility. The exercise of jurisdiction is always inherent in these acts and, for this reason, the above-listed acts are necessarily affected by the immunity of State officials from foreign criminal jurisdiction.

66. Moreover this interpretation is supported by various international instruments which expressly provide that the State officials referred to therein may not be subject to measures of execution and that their inviolability must be respected. A good example of such an instrument is the Vienna Convention on Diplomatic Relations, which establishes that “the person of a diplomatic agent shall be inviolable [and] may not be liable to any form of arrest or detention”[153] and that “[n]o measure of execution may be taken in respect of a diplomatic agent.[154] In this connection, mention should also be made of the resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law.[155] At all events, it must be noted that the examples cited refer solely to cases of immunity *ratione personae*.

67. However, as already argued in the Special Rapporteur’s second report,[156] in practice it is possible to find various kinds of acts of an authority of the forum State which may have an impact on the foreign official and the immunity from foreign

[153] Vienna Convention on Diplomatic Relations, art. 29. Similar wording is contained in the Convention on Special Missions, art. 29; the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28 and 58; and in a more nuanced manner in the Vienna Convention on Consular Relations, art. 45, paras. 1 and 2.

[154] Vienna Convention on Diplomatic Relations, art. 31, para. 3. A similar idea is expressed in the Convention on Special Missions, art. 31, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 30 and art. 60, para. 2.

[155] See footnote 83, above, (see in particular, arts. 1 and 4 of the resolution).

[156] A/CN.4/661, paras. 37 and 38.

criminal jurisdiction that he or she possesses. These acts may be divided into three groups:

(*a*) Acts which are essentially executive in nature, but which are not always unconnected with the activity of the court. In this group, mention should be made, by way of example, of the detention of a foreign official as part of police operation in the territory of the forum State, or in pursuance of an international arrest warrant, or of the registration of a search or arrest warrant in international police cooperation systems.

(*b*) Acts which, despite being qualified as a judicial measure and being issued by a judicial body, normally have the purpose of exercising criminal jurisdiction over a third person rather than over a foreign official. In this case, special mention must be made of a summons to appear as a witness, or an order to provide the forum court with information in the official's possession.

(*c*) Acts which may be ordered by forum courts in the exercise of their jurisdiction over a person (possibly a foreign official), but which do not in themselves have the purpose of determining his or her responsibility. These are interim measures for various purposes: first to ensure that the person will remain at the disposal of the judicial body throughout the proceedings; secondly, to ensure that, if the person's criminal responsibility is established, the court can avail itself of assets to cover the civil liability deriving from a criminal conviction and, thirdly, to ensure that the court can avail itself of assets which constituted essential instruments or elements of the crime and over which the court therefore has a power of disposal.

68. The answer to the question whether these acts are affected by immunity from foreign criminal jurisdiction cannot be as simple and automatic as that relating to the acts discussed in the previous paragraphs. On the contrary, whether or not these acts are affected by immunity will depend on various issues which must be considered one by one, namely: (a) the distinction between immunity from jurisdiction and inviolability; (b) the separation between the person of the official and the assets the seizure of which is sought; and (c) the binding and coercive nature of the measure and its influence on the foreign official's exercise of his or her functions. All these factors must also be considered in the light of the distinction between immunity *ratione personae* and immunity *ratione materiae*.

2. Detention

69. In view of the aforementioned criteria, it is first necessary to examine acts which lead to the detention or arrest of a foreign official, especially when detention takes place in the context of criminal proceedings before the forum court and is the result of an executive act. The issue arising in this case is not strictly related to immunity from criminal jurisdiction but to the inviolability of some officials. This inviolability is embodied in various international treaties and essentially covers persons who, in accordance with international law, enjoy some kind of personal immunity. This is particularly true of diplomatic agents, members of special missions, representatives to international organizations, or persons who represent the State in an international body or at a conference.[157] This inviolability and protection from detention or arrest is also possessed by a State official who exercises the functions of "diplomatic courier",[158] the obvious purpose being to ensure the free exercise of his or her

[157] See the Vienna Convention on Diplomatic Relations, art. 29, the Convention on Special Missions, art. 29; Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28 and 58, and in a more nuanced manner the Vienna Convention on Consular Relations, art. 41, paras. 1 and 2.

[158] See the Vienna Convention on Diplomatic Relations, art. 27, para. 5; the Convention on Special Missions, art. 28, para. 2; and the Vienna Convention on the Representation of States in Their

function. However, in all the above-mentioned cases, protection from detention stems from the inviolability of the person and not from his or her immunity from criminal jurisdiction. It is therefore sufficient to call attention to the fact that the treaties which have so far regulated this matter refer separately to inviolability and immunity from jurisdiction.[159]

70. It may be concluded by extension that this inviolability also applies to Heads of State, Heads of Government and Ministers for Foreign Affairs. This may be inferred from the Convention on Special Missions, which establishes that, when they take part in a special mission, the Head of State, Head of Government and Minister for Foreign Affairs enjoy the facilities, privileges and immunities embodied in the Convention, which include inviolability and protection from arrest and detention.[160] Furthermore the inviolability of the Head of State, Head of Government and Minister for Foreign Affairs is in itself a rule of customary law. This appears to have been also recognized in the 2001 resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law.[161]

71. Above all, the inviolability of the Minister for Foreign Affairs has been explicitly recognized by the International Court of Justice in the case of the *Arrest Warrant of 11 April 2000*, where it found that "the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties".[162]

72. In this case, the Court made it clear that this inviolability is required for the special function which the Minister for Foreign Affairs performs in developing and maintaining international relations and which he or she could not carry out if he or she were detained, or if the threat of detention hung over him or her when travelling abroad. Thus it seems that the notion of freedom to perform this function forms the bedrock of the inviolability protecting the serving Head of State, Head of Government

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Relations with International Organizations of a Universal Character, art. 27, para. 5.

[159] This is the case in the Vienna Convention on Diplomatic Relations, which refers to the personal inviolability of a diplomatic agent in article 29 and to his or her immunity in article 31. The distinction between those two categories is made especially clear in article 3, paragraph 3, where it is stated that "[n]o measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person and his residence". See the similar wording in the Convention on Special Missions, arts. 29 and 31; the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28, 30, 58 and 60; and the Vienna Convention on Consular Relations, arts. 41 and 44. The distinction between inviolability and immunity is also reflected in the 2001 resolution of the Institute of International Law (see footnote 83, *supra*), which refers to the two categories separately in arts. 1, 2 and 3. Furthermore this distinction is well established in art. 15, para. 1, of the resolution where it is stated that "[t]he Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the Head of the State. This provision is without prejudice to any immunity from execution of a Head of Government."

[160] See the Convention on Special Missions, art. 21.

[161] See footnote 83 *supra*. Article 1 thereof reads "When in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form or arrest or detention". Article 15, paragraph 1, thereof reads "[t]he Head of Government of a foreign State enjoys the same inviolability and immunity from jurisdiction recognised, in this Resolution, to the Head of the State".

[162] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, (see footnote 109 supra, p. 27, para. 54.

and Minister for Foreign Affairs from any form of arrest or detention by foreign authorities, when he or she is travelling in either an official or a private capacity. This reference to the need to guarantee the free exercise of their function is of such importance that, under the Vienna Convention on Consular Relations, in cases where a consular officer and other members of the consular post do not generally enjoy inviolability and are not fully protected from arrest or detention,[163] any criminal proceedings against them must be conducted in a manner which will hamper the exercise of their functions as little as possible[164] and the authorities of the official's State must be notified of his or her detention immediately.[165]

73. However, it is impossible to find any rules in international treaty law or customary international law recognizing the inviolability of State officials who enjoy immunity *ratione materiae*. Nor does international case law directly apply any such rules, since the findings of the International Court of Justice, especially those in the case of the *Arrest Warrant of 11 April 2000*, refer to a matter pertaining to immunity *ratione personae*. For this reason, it must be concluded that immunity *ratione materiae* would protect a foreign official from detention only when the detention has been carried out in pursuance of a court order, which, as stated above, constitutes an act of the exercise of jurisdiction on which immunity from criminal jurisdiction has a bearing. In this case, the competent court would have to consider immunity and rule on it before issuing any order for detention.

74. Conversely, 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. Plainly, although an objection could be raised to the unfriendly nature of the measure, its impact on good relations between the forum State and the official's State could be impugned and the question would have to be raised whether the detention of the foreign official had breached other rules of international law (especially, but not only, the rules of international human rights law), the rules on the immunity of State officials from foreign criminal jurisdiction strictly speaking will be of no relevance to this kind of detention. At all events, this conclusion does not in any way adversely affect subsequent consideration of immunity in the context of the exercise of jurisdiction. Hence it is must be borne in mind that, after the detained foreign official has appeared before the court, possibly in response to an application for a writ of *habeas corpus*, the court will have no option but to consider whether immunity from jurisdiction applies, since the act in question is binding and imposes a coercive measure on the official.

75. The situation is more complicated with respect to detention without an arrest warrant issued by a court of the forum State, but in pursuance of an international judicial cooperation and assistance mechanism, or of an international arrest warrant registered in an international police cooperation system. In this case, the inviolability of persons enjoying any form of personal immunity is indubitable, regardless of whether the issue of immunity from foreign criminal jurisdiction arises. However, the answer is less simple when the foreign official enjoys only immunity *ratione materiae* and is detained under an arrest warrant issued by the competent judicial organ of a third State.

76. Although in this case it would be very difficult for detention to take place without any form of participation of the forum courts, the mere possibility that this situation might arise (think, for example, of detention at a border) makes it necessary

[163] The diverse rules related to inviolability and protection from arrest or detention of the aforementioned officials are clearly established in article 41, paragraphs 1 and 2, and articles 71 and 72 of the Convention on Consular Relations

[164] See arts. 41, para. 3, 44, para. 2, 63 and 71 of the Convention.

[165] See art. 42 of the Convention.

to reflect on the registration of information in international police cooperation databases and the extent to which immunity from jurisdiction might have a bearing on this registration. This is what prompted the International Criminal Police Organization (INTERPOL) to express an interest in this topic in a letter which the Director of the organization's Legal Service sent to the Codification Division.[166]

77. In order to fulfil its functions INTERPOL maintains a secure communication network between the Secretary General of the organization and the National Central Bureaus maintained by the member States. This network may include "Red Notices" (an arrest warrant issued against a person by decision of a court of the requesting State), "Blue Notices" (a request to collect information about a person's identity, place of residence and other data referring to a specific person) and "diffusions" (general information about current investigations not requiring specified action in respect of a person). According to the information supplied by INTERPOL, the latter has had occasion to consider the question of the immunity of foreign officials from foreign criminal jurisdiction, especially that of the Head of State, Head of Government and the Minister for Foreign Affairs. It did so in light of the international rules and case law and in accordance with article 3 of its Constitution,[167] which requires it to perform its functions apolitically. The practice followed seems to vary depending on the type of notice (red, blue or diffusion) recorded in its database and appears also to take account of the distinction between persons enjoying immunity *ratione personae* and those enjoying immunity *ratione materiae*, as well as of the type of proceedings of the national authorities requesting the recording of the notice.

78. As far as the matter under consideration here is concerned, INTERPOL would not register, or would remove from its database, arrest warrants against a serving Head of State, Head of Government or Minister for Foreign Affairs, because these warrants entail the adoption of coercive measures against a State official who enjoys immunity *ratione personae*. Although the information supplied by INTERPOL does not explicitly refer to the practice followed in respect of State officials enjoying immunity *ratione materiae*, mention must be made of the fact that, according to information supplied by the State in question, INTERPOL has deleted from its database international arrest warrants transmitted earlier through French courts against Mr. Teodoro Nguema Obiang Mangue, Vice-President of Equatorial Guinea.[168] Thus the organization's rule not to include in, or to delete from, Red Notices information regarding a person whose immunity is disputed by the States in question, seems to have been followed. However, INTERPOL appears to retain in its informative databases (diffusions) data relating to State officials which might be useful for the exchange of information between police forces for investigative purposes.

79. In any event, attention must be drawn to the importance of information recording procedures for international judicial cooperation between the forum State and the official's State, a question which will be examined in the seventh report.

3. Appearance as a witness

80. As with the arrest or detention of a foreign official, when he or she appears as a witness, international treaty law determines only the rules applying to officials who enjoy immunity *ratione personae*. It must be noted that article 31, paragraph 2, of the

[166] The letter, dated 7 May 2010, has been placed in the files of the Commission secretariat.

[167] Constitution of the International Criminal Police Organization-INTERPOL (Vienna 1956) I/CONS/GA/1956 (2017), available at https://www.interpol.int/About-INTERPOL/Legal-materials/The-Constitution.

[168] As notified in the *Memorial of Equatorial Guinea* presented in the case *Immunities and Criminal Proceedings* (*Equatorial Guinea v. France*), which is pending before the International Court of Justice (see the *Memorial of the Republic of Equatorial Guinea*, vol. I, p. 37, para. 3.44, and vol. II, Annex 17).

Vienna Convention on Diplomatic Relations provides that "[a] a diplomatic agent is not obliged to give evidence as a witness". An identical provision is found in the Convention on Special Missions[169] and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[170] Although the Vienna Convention on Consular Relations deals with the possibility of consular officials being called upon to attend as witnesses,[171] it defines a model which basically rests on three safeguards for consular functions: (*a*) members of a consular post "are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto";[172] (*b*) when they have to testify "the authority requiring the evidence of a consular official shall avoid interference with the performance of his functions";[173] and (*c*) if the consular officer declines to give evidence, "no coercive measure or penalty may be applied to him".[174]

81. However, it is impossible to find rules of international treaty law or customary international law which lay down general rules in respect of the appearance as a witness of a State official who is not covered by the aforementioned Conventions, not even in the case of a Head of State, Head of Government or Minister for Foreign Affairs. National laws of relevance to immunity do not contain any specific provisions of a general nature on the matter either.[175]

82. This situation has not, however, prevented the International Court of Justice from ruling on the issue in the cases *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)* and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

83. The first case concerns an application to the Court from the Republic of the Congo in connection with the prosecution in judicial proceedings in France of a Minister of the Interior who stood accused of various crimes allegedly committed during the exercise of his responsibilities for maintaining law and order. In this context, the French Court requested the appearance of President Sassou Nguesso as a witness. The Republic of the Congo objected on the grounds that he enjoyed immunity from jurisdiction. Although the Court did not ultimately rule on the merits, because the Republic of the Congo withdrew its application, it nonetheless adopted an order refusing the provisional measures requested by that country, since it considered that the application to appear as a witness did not irreversibly prejudice the immunity of the President of the Republic of the Congo from jurisdiction.[176] It must also be emphasized that in proceedings with regard to provisional measures both France and the Republic of the Congo accepted that a summons to appear as a witness was not necessarily contrary to the rules governing immunity. In particular, the Republic of the Congo stated that "the possibility cannot be excluded that the judge might take

[169] Art. 31, para. 3.

[170] Arts. 30, para. 3, and 60, para. 3.

[171] Art. 44, para. 1.

[172] Art. 44, para. 3. Nor are they under an obligation to give evidence as expert witnesses with regard to interpretation of the law of the sending State.

[173] Art. 44, para. 2.

[174] Art. 44, para. 1, The Convention also provides that the consular officer may give evidence at the consular post, at his residence, or in writing, when possible.

[175] However, the Spanish Act on the privileges and immunities of foreign States, international organizations with a seat or office in Spain and international conferences and meetings held in Spain (Organic Law 15/2015, of 27 October 2015) provides that the incumbent Head of State, Head of Government and Minister for Foreign Affairs will be under no obligation to appear as witnesses before Spanish courts (art. 22, para. 2).

[176] *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*), Provisional Measures, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102 *et seq*., in particular pp. 109 and 110, paras. 30–35.

the initiative to include President Sassou Nguesso in his investigation particularly as President Sassou Nguesso is mentioned in the documentation upon which the *réquisitoire* [made by the *Procureur de la République*] was based".[177]

84. The conclusion reached by the Court in the case *Certain Questions of Mutual Assistance in Criminal Matters* is even clearer in that, when ruling on a summons addressed to the President of Djibouti to appear as a witness, it found 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 […] measures of constraint […]; 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".[178] In order to arrive at that conclusion, the Court based itself on its earlier judgment in the above-cited case of the *Arrest Warrant of 11 April 2000*, where emphasis was placed on the binding nature of the measure adopted by the judicial authorities of the forum State in order to determine whether it was affected by immunity from jurisdiction.

85. As may be seen, the findings of the International Court of Justice in this case did not rest on recognition of an abstract right of a Head of State not to be summoned to appear as a witness, but on recognition that he was under no obligation to testify. Consequently, a summons to appear as a witness addressed to a Head of State in order that he or she may give evidence will be affected by immunity from foreign criminal jurisdiction if the measure in question is binding and failure to comply with it may entail coercive measures against the Head of State. Once again in this case, the Court gave primary consideration to the special position of the Head of State as a person vested with special dignity and as an international representative of the State, hence there does not appear to be any reason not to extend the same rule to the Head of Government and Minister for Foreign Affairs. It must therefore be concluded that any measure of a binding nature summoning a Head of State, Head of Government or Minister for Foreign Relations to appear as a witness would be affected by immunity from foreign criminal jurisdiction.

86. Conversely, it does not seem possible automatically to reach the same conclusion with respect to summonses addressed to other foreign officials enjoying only immunity *ratione materiae*. In this case it will be necessary to consider the purpose of the statement as well. Given that this category of immunity is closely related to "acts performed in an official capacity", a summons to appear as a witness addressed to a foreign official will be affected by immunity only when it is binding and his or her testimony touches on this category of acts.

87. The nature of the act on which testimony is requested is highly relevant to any request to surrender to the court or place the latter's disposal information or documents in the possession of a State official. Once again in this case, the measure taken by the forum court and addressed to a person enjoying immunity *ratione personae* will be automatically affected by that immunity for the above-mentioned reasons. Conversely, in the event of immunity *ratione materiae*, it must be assumed that the surrender of documents in the possession of a foreign official will be protected by immunity from foreign jurisdiction only if they are documents of the official's State and he or she holds them in his or her capacity as a State official. In this case, it is obvious that this is State information or documentation which in some instances

[177] *Ibid*., para. 32.

[178] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, (see footnote 134, *supra*) p. 237, para. 171.

may be protected by international rules on inviolability[179] and which may be unquestionably termed official documents (and which, for this reason, may be treated *mutatis mutandis* as an "act performed in an official capacity"). However, even when these rules cannot be applied to a document, the request to surrender them, or to provide information about them, addressed to a State official may be affected by immunity from jurisdiction *ratione materiae*, if the request is binding and may entail coercive measures against the official, or if the request for information or the surrender of a document is related to acts performed by the official in an official capacity.[180]

88. Although it is related to the activity of an international tribunal, the conclusion drawn by the International Tribunal for the former Yugoslavia in the *Blaškić* case with regard to the request addressed to Croatia and its Minister of Defence to provide information and produce documentation concerning the case and the subsequent order to the Minister of Defence to appear before the Tribunal (*subpoena duces tecum*) may be of importance. In response to the appeal filed by Croatia the Appeals Chamber found that "both under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials" to produce such documents.[181] It adds, after referring to a State's power to determine its internal structure,[182] that "it is indubitable that States, being the addressees of such obligation [to cooperate with the Tribunal], have some choice or leeway in identifying the persons responsible for, and the method of, its fulfilment. It is for each such State to determine the internal organs competent to carry out the order".[183] However, this does not prevent it from concluding that the Tribunal may also notify a State official of an order sent to a State to produce a document, for information purposes.[184]

89. Lastly, it must be emphasized that issues related to the appearance of a State official as a witness and a court's request for the production of documents (or information about them) also give rise to questions related to cooperation between the forum State and the official's State and to questions related to guarantees of a fair trial, which will have to be examined in the seventh report.

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[179] Article 24 of the Vienna Convention on Diplomatic Relations reads "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be". See also the Convention on Special Missions (art. 26) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (arts. 25 and 55) and the Vienna Convention on Consular Relations (arts. 33 and 61).

[180] In connection with this matter, it may be useful to remember that some national acts on immunity provide that a foreign State may not form the subject of penalties for failure to surrender documents which have been requested from it or from one of its officials by a court of the forum State. See *State Immunity Act* (United Kingdom, 1978) sect. 13, subsection (1); *State Immunity Ordinance* (Pakistan, 1981) art.14, para. 1; *Foreign States Immunities Act* (Australia, 1985) sect. 39; *State Immunity Act* (Canada, 1985), sect.13; *State Immunity Act* (Singapore, 1979, 2014) sect.15, subsection (1); *Act on the Civil Jurisdiction of Japan with respect to a Foreign State* (Japan, 2009), sect. 15(1), and *Organic Law 16/2005* (Spain, 2009), art. 56, para. 1.

[181] *Prosecutor v. Tihomir Blaškić*, International Tribunal for the former Yugoslavia, Appeals Chamber, case No. IT-95-14, Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, of 29 October 1997, para.43.

[182] *Ibid*., para. 41.

[183] *Ibid*., para. 43. The Tribunal draws attention not only to the legal basis for its decision, but also to the practical reasons for it, in particular the difficulties stemming from the fact that the State might prohibit the official who has been summoned to appear before the court and the risks that the official who has been summoned might not appear despite the State's willingness to cooperate with the Tribunal (ibid., para. 44).

[184] *Ibid*., para. 45.

4. Precautionary measures

90. The final category of acts that should be considered is measures of a precautionary nature taken by a court in the context of a criminal trial, including prior to the indictment or prosecution of an individual. Normally, such measures can affect either the freedom of movement of the foreign official (impoundment of passport or other travel documents, order to appear regularly before the courts or authorities of the forum State) or seizure of the official's property that may be located in the territory of the forum State. Again, the question whether such acts affected by immunity will require a different answer depending on whether we are dealing with a presumed immunity *ratione personae* or immunity *ratione materiae*.

91. As regards precautionary measures affecting the person, to which reference has already been made, it is not possible to find either special rules or State practice applicable to such measures. However, it would be possible to apply to such measures *mutatis mutandis* the considerations set forth above concerning detention or arrest, since, although it is clear that such measures do not result in the deprivation of the official's liberty, they do have a similar effect, inasmuch as the official's freedom of movement is substantially reduced and the possibility of leaving the territory of the forum State is ruled out.

92. The analysis of precautionary measures involving the seizure of the foreign official's property is, however, more complex. Again, in this case, one must make a distinction between situations involving application of immunity *ratione personae* and those involving the application of immunity *ratione materiae*.

93. In the case of immunity *ratione personae*, it should first be recalled that the conventions that govern any type of personal immunity generally contain a prohibition on the adoption of measures of execution against persons enjoying such immunity, including the prohibition against seizing the property of the foreign official. Thus, for example, the Vienna Convention on Diplomatic Relations provides in article 31, paragraph 3, that "[n]o measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence."[185] In addition, these provisions are accompanied by the affirmation of the inviolability of the official's personal residence, mail and property.[186]

94. Although the provisions to which reference is made above relate to special regimes of immunity *ratione personae* that fall outside the scope of these draft articles, it would appear that there are no reasons that would prevent the application of the same rule to the property of the Head of State, Head of Government, and Minister for Foreign Affairs. In this connection, the Institute of International Law took a position on the matter in its 2001 resolution on the "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law", in which it recognized "immunity from execution",[187] while establishing a special regime applicable to the property of the Head of State or Head of Government in accordance with which " [p]roperty belonging personally to a Head of State and located in the territory of a foreign State may not be subject to any measure of execution except to give effect to a final judgement, rendered against such Head of

[185] Similar provisions are to be found in the Convention on Special Missions (art. 31) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 30 and art. 60, para. 2).

[186] See the Vienna Convention on Diplomatic Relations, art. 30; the Convention on Special Missions, art. 30; and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 29 and 59.

[187] See note 83 above (article 6 of the resolution).

State. In any event, no measure of execution may be taken against such property when the Head of State is present in the territory of the foreign State in the exercise of official functions".[188] Nevertheless, this precautionary regime does not prevent the forum State from "taking provisional measures with respect to [such property] as are necessary for the maintenance of control over [the property] while the legality of the appropriation remains insufficiently established".[189] On the other hand, it must also be pointed out that some laws on State immunity include similar provisions relating to the inviolability of the property or immunity from execution of Heads of State, Heads of Government and Ministers for Foreign Affairs.[190]

95. However, in the case of individuals who enjoy immunity *ratione materiae*, the response must be much more nuanced. Firstly, as regards measures affecting freedom of movement, there is no doubt in principle that such measures impose obligations on the foreign official and that they constitute coercive measures. Accordingly, such measures may be affected by the immunity from criminal jurisdiction if the enforcement of those measures prevents the foreign official from carrying out his or her State functions. However, this needs to be analysed on a case-by-case basis.

96. As regards the seizure of property as a precautionary measure, an answer would require a more detailed analysis, which must take into account whether the property in question belongs to the official or is State property under the official's custody, and whether in the latter case the property is covered by State immunity. Where the property is property of the State, there can be no doubt in principle that an order to seize such property (even as a precautionary measure) could infringe upon the immunity of the State, either in general terms or in special terms governing the inviolability and immunity of diplomatic premises and property appurtenant thereto. However, in the case of property belonging to the official, it is difficult to maintain that an order to seize or confiscate property is affected by immunity, since it is difficult to conclude that such a measure is a coercive measure against the person of the State official or that it hampers the official in the proper performance of his or her State functions. In this respect the Special Rapporteur wishes to draw attention to how the former Special Rapporteur Mr. Kolodkin answered, in his second report, the question "is the seizure of … personal property, in particular, bank accounts (used, for example, in illegal operations) or car (for example, in a case where the alleged crime was committed with the use of this car) legal?"; he wrote: "such measures are legal."[191]

D. Determination of immunity

97. The final question of a general nature relating to the concept of jurisdiction that we must analyse relates to the determination of immunity, in particular the identification of the State organ in the forum State that is competent to consider and decide on the applicability of immunity from criminal jurisdiction that the foreign official may enjoy.

98. As a starting point and, given that the application of immunity from jurisdiction will have the effect of immobilizing the competent jurisdiction, it seems obvious to conclude that this competence belongs to the specific organs of such jurisdiction.[192]

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[188] *Ibid*., art. 4, para. 1.

[189] *Ibid*., art. 4, para. 2.

[190] See *Foreign States Immunities Act* (South Africa, 1981), art. 14, para. 1; *Foreign States Immunities Act* (Australia, 1985), art. 30; *State Immunity Act* (Canada, 1985), art. 12; and Organic Law 16/2015 (Spain, 2015), art. 21, para. 2, and art. 22, para. 1.

[191] A/CN.4/631, para. 42, note 92.

[192] Thus, it may be deduced, for example, from the written comments submitted by Austria, Chechia,

As a result, the courts of the forum State would be competent to give a definitive view on this issue, although it would also be possible for organs other than the judicial bodies (such as public prosecutors) to decide, when they are tasked with the investigation or preliminary proceedings, if in the exercise of their functions a question arises as to immunity in relation to any of the acts affected by immunity discussed in the previous section.[193] In any event, it must be taken into account that the decision of these organs will, in the majority of cases, be subject to appeal before the courts, which must render a final decision in the matter.[194] In any event, referral to the courts of the forum State as competent organ should be understood in general terms, since competence to decide a specific case will depend exclusively on the judicial structure of the forum State (organization of the courts) and the system of appeals provided for in the laws governing procedure.

99. Asserting that the courts of the forum State are competent to make a determination regarding immunity does not necessarily imply that other State organs or authorities cannot express their views on the matter, acting together with the courts to settle the question of immunity. Such cooperation between State organs and the courts can take different forms, including appeals through the normal channels or resort to ad hoc instruments established specifically in the context of jurisdictional immunity.

100. Undoubtedly the best known instrument is the system of "suggestion of immunity, which has been applied in the United States as a common law institution relating to the determination of the immunity of officials of a foreign State.[195] In

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France, Germany, Mexico, Netherlands and Switzerland that this is the logical consequence that every judicial body must satisfy itself that it is competent in a specific case before exercising its jurisdiction. France expressed this view in the case *Certain Questions of Mutual Assistance in Criminal Matters (see note 134 supra)*, asserting that such a decision was for "the justice system of each country" to take which should be taken on a case-by-case basis (para. 189). Although the Court did not expressly rule on that assertion, in concluding against Djibouti's claims concerning the immunity of the Procureur général and Head of National Security, stated that "it had not been 'concretely verified' before it that the acts which were the subject of the summonses as témoins assistés issued by France were indeed acts within the scope of their duties as organs of State" (para. 191). What follows necessarily from this is the recognition of the power of the competent court (the Court itself) to determine whether the requirements for application of immunity from jurisdiction have been met.

[193] The possibility that the prosecutor may determine immunity seems to have led the Netherlands to assert in its written comments that "there is little relevant practice [relating to the invocation of immunity], since the Public Prosecutor would usually first assess whether any immunities will apply before bringing criminal charges". Germany and Mexico, for their part, also refer to the public prosecutor's taking immunity into account. In the case of Austria, if the Ministry of Public Prosecutions, after making a preliminary investigation, concludes that some form of immunity may apply, it must report to the Ministry of Justice on the facts of the case and the measures it intends to take.

[194] See, by way of example, *case A v. Office of the Attorney General of the Confederation, B and C* (note 141 *supra*), in which the Attorney General's decision to investigate Mr. Nezzar was appealed before the Swiss Federal Criminal Court (BB 2011 140). In the case of Czechia, in accordance with the provisions of the Code of Criminal Procedure, where there is doubt about the competence of a court, the Supreme Court will decide the matter on the motion of the person concerned, the public prosecutor, or the court (see comments).

[195] The application of the "suggestion of immunity" in proceedings involving foreign officials has been consolidated on the basis of the case *Samantar v. Yousuf*, United States, 130 S Ct. 2278 (2010). As regards the position taken previously by the United States courts, see the case *Chuidian v. Philippine National Bank*, United States, 912 F.2d 1095 (9th circuit, 1990), *International Law Reports*, vol. 92, p. 480. On the changes in the treatment of immunity of foreign officials by United States courts, see, inter alia, J. B. Bellinger III, "The dog that caught the car: observations of the past, present, and future approaches of the Office of the Legal Adviser to Official Acts Immunities", *Vanderbilt Journal of Transnational Law*, vol. 44, No. 4 (October 2011), pp. 819–835; H. Hongju Koh, "Foreign official immunity after *Samantar*: a

accordance with this system, the Department of State, through the Department of Justice, can refer to United States courts its opinion as to whether or not a given foreign official enjoys immunity.[196] The courts have generally accepted such a suggestion of immunity, considering that the determination of immunity of certain foreign officials — particularly the Head of State — involves elements connected with the conduct of the State's foreign policy that should be clarified by the Executive Branch. Only when the Department of State does not issue a "suggestion of immunity" do the courts become involved with the substantive issue as to whether or not immunity exists.

101. Nevertheless, in spite of the high degree of acceptance by the courts of a suggestion of immunity, one may well ask whether we are dealing here with an institution that completely deprives the courts of their competence to express their view on the immunity of foreign officials. Firstly, because, strictly speaking, there is no formal replacement of a court ruling, but rather an acceptance by the courts of the judgment of the Department of State. Secondly, although the courts generally accept the validity of the "suggestion of immunity", this has not prevented the courts on occasion from evaluating on their own whether the several substantive conditions required for recognition of a foreign official's immunity are present.[197]

102. Alongside the system of "suggestion of immunity", mention should be made of other mechanisms that have been established, particularly in the common law countries; these mechanisms envisage additionally the possibility of the Ministry of Foreign Affairs issuing certain certificates that must be accepted as compelling by a court that must rule on immunity in a specific case. Among the facts to which such certificates relate is the determination that an individual possesses the status of Head of State or Head of Government.[198] It should be noted, however, that the courts are obliged to accept the validity of such a determination and are not able to deduce from the determination any other consequences for the purpose of determining jurisdictional immunity.

103. Lastly, mention should be made of other rules that allow the courts to seek the opinion of administrative bodies for the purpose of determining whether immunity applies. Among these, mention should be made of Austria's Regulation on Extradition and Mutual Legal Assistance in Criminal Matters, in accordance with which, when a

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United States Government perspective", *ibid*., vol. 44, No. 5 (November 2011), pp. 1141–1161; C. I. Keitner, "Annotated brief of professors of public international law and comparative law as *Amici Curiae* in support of respondents in *Samantar v. Yousuf*", *Lewis & Clark Law Review*, vol. 15, No. 3 (fourth quarter of 2011), pp. 609–632; C. D. Totten, "Head-of-State and foreign official immunity in the United States after *Samantar*: a suggested approach", *Fordham International Law Journal*, vol. 34, No. 2 (January 2011), pp. 332–383; and C. de Castro Sánchez y T. Marcos Martín, "A vueltas con la inmunidad de los funcionarios extranjeros en los casos de violación de derechos humanos: ¿un nuevo horizonte tras la decisión en el *asunto Yousef v. Samantar*?", *Ordine internazionale e diritti umani*, 2017, pp. 507–524.

[196] On the practice of the Department of State with regard to the suggestion of immunity, see E. E. Smith, "Immunity games: how the State Department has provided courts with a post-*Samantar* framework for determining foreign official immunity", *Vanderbilt Law Review*, vol. 67, No. 2 (March 2014), pp. 569–608.

[197] See in this connection *Yousuf v. Samantar*, 699 F 3rd 763 (4th circuit). Although in this case the Department of State took a position against immunity, the court declared that the suggestion was not binding and undertook to assess the substance of the matter, concluding that there was a growing trend in contemporary international law to refuse recognition of immunity of an official in respect of acts contrary to the *jus cogens* norms, irrespective of whether the act can also be ascribed to the State.

[198] See *State Immunity Act* (United Kingdom, 1978), sect. 21 (*a*); *State Immunity Act* (Singapore, 1979, 2014), art. 18; *Foreign States Immunities Act* (South Africa, 1981), art. 17; *State Immunity Ordinance* (Pakistan, 1981), art. 18; *Foreign States Immunities Act* (Australia, 1985), art. 40; and *State Immunity Act* (Canada, 1985), art. 14.

court has doubts as to whether an individual enjoys immunity from criminal jurisdiction in the country's courts, it must obtain the views of the Ministry of Justice, which will clarify the individual's status in consultation with the Ministry of Foreign Affairs.[199] Similarly, in Spain, the Ministry of Foreign Affairs and Cooperation can issue reports on issues relating to the immunity from legal process of a Head of State, Head of Government or Minister for Foreign Affairs upon the request of the competent courts, the latter being required to communicate to the Ministry any proceeding commenced against a foreign State.[200]

104. In the light of the foregoing, attention should be drawn to the fact that in some States administrative organs do not have the capacity to transmit their views to the courts, or they may do so only when they have been asked to provide their views, as the transmittal of any other information or opinion could be viewed as a form of improper political influence.[201]

105. It is certain, however, that in specific instances determining immunity can come up against practical difficulties. In particular, in the case of immunity *ratione materiae*, the application of which requires the judge to confirm that the constituent normative elements are present, namely that the individual concerned is a foreign official, that the acts in question were performed in an official capacity and that the acts were performed during the official's tenure in office. In some instances, such elements cannot be assessed by the court of the forum State acting autonomously, but rather the court will need supplementary information that can be provided either by the authorities of the forum State themselves or by the official's State. Although information provided by the official's State is definitely important, it does not follow that the content of such information is binding on the court responsible for determining immunity.

106. The question of the validity of the information provided by the forum State regarding the official's status and the official nature of acts performed by the official is not covered by any international norm, nor has it been the subject of a judgement by any international court. However, the International Court of Justice has had occasion to express its views in the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. In respect of that case, the Secretary-General of the United Nations claimed that, pursuant to the Convention on the Privileges and Immunities of the United Nations, he had "exclusive authority to determine if the Special Rapporteur in question was an expert on mission and whether the interview that led to his prosecution should be identified as an act performed in the exercise of his official functions".[202] Although the Court stated that it could not rule on the matter because it was not covered by the question submitted to it by the Economic and Social Council, the Court did conclude that "the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity".[203] Nevertheless, this assertion did not lead the Court to conclude that the powers of the Secretary-General were absolute and that his views should prevail absolutely over any action taken by the court of a State Member. On the contrary, the

[199] See section 57 of the Regulation.

[200] Such a communication will be effected for the sole purpose of eliciting this report. See Organic Law 16/2015, art. 52, in relation to Act 29/2015, on international legal cooperation in civil matters, art. 27, para. 2.

[201] See in this connection the written comments of Germany.

[202] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see note 130 *supra*), p. 80, para. 33.

[203] *Ibid*., p. 87, para. 60.

Court confined itself to describing that opinion as "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",[204] thereby striking a balance between the interests of the forum State and the interests of the Organization.

107. Such an approach can easily be transposed to the assumption with which we are concerned here. And, thus, one must conclude (as did former Special Rapporteur Mr. Kolodkin) that "a foreign court (or any other authority of the State exercising jurisdiction) is not obliged to 'blindly accept' such a claim by the State which the official serves. Yet the court cannot disregard such claims, unless the circumstances of the case clearly indicate otherwise."[205] Undoubtedly, the content of the information provided by the official's State will have considerable importance to the court's determination as regards immunity and hence it should also be the subject of analysis in the seventh report from the viewpoint of cooperation.

108. That being said, it is necessary, in conclusion, to analyse the determination of immunity from the substantive standpoint. To that end, attention should be drawn to the fact that the determination of immunity by the courts of the forum State must take into account various elements, depending on whether it is a matter of determining immunity *ratione personae* or immunity *ratione materiae*. As regards the former, it is enough for the court to judge whether the individual who is the subject of intended criminal proceedings possesses the status of Head of State, Head of Government or Minister for Foreign Affairs, and whether they are serving in the office at the time when the immunity is under consideration in the courts. Otherwise, in the case of immunity *ratione materiae*, the court must assess, firstly, whether the individual is a State official (including a former Head of State, Head of Government or Minister for Foreign Affairs), whether the acts in question were performed in an official capacity, and whether those acts were performed by the official during his or her term of office. In addition, it must also be determined whether the acts in question fall within any of the categories of crimes under international law to which immunity to foreign criminal process does not apply *ratione materiae*. Only after the assessment of these elements can the court of the forum State determine whether or not the foreign official enjoys immunity from criminal jurisdiction.

Chapter III
Future workplan

109. As indicated above, the Special Rapporteur intends to submit in 2019 a seventh report, which will wrap up the consideration of procedural issues. The report will be devoted, in particular, to issues more directly related with what may be considered procedural safeguard clauses relating both to the official's State and to the official himself or herself. Accordingly, the report will analyse the following issues: invocation of immunity; waiver of immunity; communication between the forum State and the official's State; transmission of information by the official's State; cooperation and international legal assistance between the official's State and the forum State; and procedural safeguards and rights that must be recognized *vis-à-vis* the foreign official. In addition, the report should analyse matters relating to cooperation between States and international criminal courts and the possible impact of such cooperation on immunity from foreign criminal jurisdiction. Lastly, the Special Rapporteur's seventh report will contain proposed draft articles based on the analysis in this sixth report and draft articles based on the analysis contained in the

[204] *Ibid*., para. 61.
[205] A/CN.4/646 (third report, 2011), para. 30.

seventh report, so that both sets of draft articles can be considered together by the Commission, given the close interrelationship between the two.

110. Accordingly, and barring unforeseen circumstances, the seventh report should bring to an end the consideration of questions included in the original programme of work on the immunity of State officials from foreign criminal jurisdiction; it is to be hoped that the Commission will be in a position to conclude its comprehensive review of the topic and approve the draft articles in first reading in 2019.

Annex

Draft articles on immunity from foreign criminal jurisdiction of State officials provisionally adopted by the Commission

Part one
Introduction

Draft article 1. Scope of the present draft articles

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

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

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(e) "State official" means any individual who represents the State or who exercises State functions.

(f) An 'act performed in an official capacity' means any act performed by a State official in the exercise of State authority

Part two*
Immunity *ratione personae*

Draft article 3. Persons enjoying immunity ratione personae

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

Draft article 4. Scope of immunity ratione personae

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

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

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

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

Part three*
Immunity *ratione materiae*

Draft article 5. Persons enjoying immunity ratione materiae

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

Draft article 6. Scope of immunity ratione materiae

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

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

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

Draft article 7. Crimes in respect of which immunity ratione materiae does not apply

1. Immunity ***ratione materiae*** from the exercise of foreign criminal jurisdiction shall not apply in relation to the following crimes:

(*a*) Genocide;

(*b*) Crimes against humanity;

(*c*) War crimes;

(*d*) The crime of apartheid;

(*e*) Torture;

(*f*) Enforced disappearances.

2. For the purposes of this article, the meaning of crimes under international law referred to above shall be construed in accordance with the definition of such crimes as set forth in the treaties listed in the annex to these draft articles.

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

Annex

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

Crime of genocide

- Rome Statute of the International Criminal Court of 17 July 1998, article 6
- Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, article II

Crimes against humanity

- Rome Statute of the International Criminal Court of 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court of 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid* of 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1948, article 1, paragraph 1.

Enforced Disappearances

- International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006, article 2.