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

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Introduction

A. Previous consideration of the topic by the International Law Commission

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 on the work of that session.¹ At its fifty-ninth session (2007), the Commission decided to include the topic in its current 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, 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.⁴ The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008⁵ and 2011,⁶ respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the Commission’s report, particularly 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 with 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 report helped to clarify the terms of the discussion up to that point, to identify the principal points of contention that remained, the topics to be considered and the methodology to be followed, and to establish an indicative workplan for consideration of the topic. The Commission examined the preliminary report at its sixty-fourth session⁹ and the Sixth Committee did the same at the sixty-seventh session of the General Assembly.¹⁰ In both cases, the Special Rapporteur’s proposals were approved.

¹ See *Yearbook ... 2006*, vol. II (Part Two), para. 257 and annex I.

² See *Yearbook ... 2007*, vol. II (Part Two), para. 376.

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

⁴ The reports of the former Special Rapporteur, Mr. Kolodkin, are contained in *Yearbook ... 2008*, vol. II (Part One), p. 163, document [A/CN.4/601](#) (preliminary report), document [A/CN.4/631](#) (second report, 2010) and document [A/CN.4/646](#) (third report, 2011).

⁵ See *Yearbook ... 2008*, vol. II (Part Two), paras. 66–311.

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](#) to [SR.3147](#), available on the Commission’s website.

¹⁰ The Sixth Committee considered the topic “Immunity of State officials from foreign criminal jurisdiction” at the 20th and 23rd meetings of its sixty-seventh session. Two States also referred to the topic at the 19th meeting. The statements delivered by States at those meetings are covered in the summary records contained in documents [A/C.6/67/SR.19](#) to [SR.23](#). See also the topical summary prepared by the Secretariat of the debate 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 five more reports, in 2013, 2014, 2015, 2016 and 2018.¹¹ Since considering those reports,¹² the Commission has provisionally adopted so far the following draft articles, together with the commentaries thereto: draft article 1 (scope of the draft articles);¹³ draft article 2 (e) and (f) (concepts of “State official” and “act performed in an official capacity”);¹⁴ draft articles 3 and 4 (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 annex of draft article 7 provisionally adopted so far by the Commission is included in the present report as annex I.

6. The Sixth Committee considered the reports of the Commission on this topic at its sessions from 2013 to 2018.¹⁸

7. At its seventieth session (2018), the Commission could not conclude the discussion on the Special Rapporteur’s sixth report, since the report had not been available in all languages sufficiently ahead of time. The Commission had therefore decided to start the discussion on the report at its seventieth session and to continue it in 2019.¹⁹

8. Although the members of the Commission who participated in the discussion noted that their comments were preliminary in nature, they raised some interesting points that are worth mentioning in the present report which, as mentioned earlier, should be read in conjunction with the previous report. First, they reiterated some of the points already raised in previous sessions. They recalled the need for the

¹¹ See [A/CN.4/661](#) (second report), [A/CN.4/673](#) (third report), [A/CN.4/686](#) (fourth report), [A/CN.4/701](#) (fifth report) and [A/CN.4/722](#) (sixth 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-ninth sessions: *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, paras. 43–49; *ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 126–132; *ibid.*, *Seventieth Session (A/70/10)*, paras. 174–243; *ibid.*, *Seventy-first Session, Supplement No. 10 (A/71/10)*, paras. 190–250; and *ibid.*, *Seventy-second Session, Supplement No. 10 (A/72/10)*, paras. 68–141. The Sixth Committee’s discussions are examined in the present introduction.

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. 10–30; [A/CN.4/678](#), paras. 37–51; [A/CN.4/689](#), paras. 68–76; [A/CN.4/703](#), paras. 51–61, and [A/CN.4/713](#), paras. 29–44, which contain the topical summaries prepared by the Secretariat of the debate held in the Sixth Committee of the General Assembly during its sixty-eighth to seventy-second 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, [A/C.6/70/SR.20](#) and SR.22 to SR.25, [A/C.6/71/SR.20](#), SR.24 and SR.26 to SR.30, and [A/C.6/72/SR.18](#), SR.19 and SR.21 to SR.26. The full texts of the statements made by the delegations that participated in the debate may be consulted at <http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda> <http://papersmart.unmeetings.org/es/ga/sixth/69th-session/agenda> <http://papersmart.unmeetings.org/es/ga/sixth/70th-session/agenda> <http://papersmart.unmeetings.org/es/ga/sixth/71th> and <http://papersmart.unmeetings.org/es/ga/sixth/72th-session/agenda>. The Sixth Committee’s discussions on the sixth report are examined in the present introduction.

¹⁹ For a detailed account of the consideration of the topic, see *Official Records of the General Assembly, Seventy-third session, Supplement No. 10 (A/73/10)*, paras. 267–330.

Commission to clarify in the draft articles whether exceptions to immunity reflected *lex lata* or whether, on the contrary, they constituted progressive development of international law and draft article 7 was, therefore, a proposal *de lege ferenda*.²⁰ Some members drew attention to the need to reach a consensus on the matter, in order to avoid division among the members,²¹ with one member even making a specific proposal for a redrafting of draft article 7.²² They also reiterated the need for the Commission to strike a balance, in its work, between the principle of the sovereign equality of States and the fight against impunity for the most serious international crimes.²³ One member of the Commission also said that it was essential for the relationship between immunity *ratione materiae* and *jus cogens* to be addressed in the seventh report of the Special Rapporteur.²⁴ That question was also raised in the context of the proposals formulated by the Special Rapporteur on peremptory norms of general international law (*jus cogens*), in his third report,²⁵ generating intense debate.²⁶

9. The members of the Commission agreed in general with the inclusion in the draft articles of provisions concerning the procedural aspects of immunity, requesting that the Special Rapporteur include in her seventh report a draft article that deals with procedural issues and reflects the comments and observations made by States in the Sixth Committee.²⁷ They also noted that it was essential that the procedural safeguards associated with exceptions to immunity prevent politically motivated or abusive exercise of jurisdiction against foreign officials.²⁸ Some members of the Commission also addressed specific aspects of the sixth report, pointing out that the concept of jurisdiction was important, because it determined the proceedings of the forum State to which immunity could apply. Some members concluded in particular that appearance as a witness did not violate immunity, except where the summons to

²⁰ See statements by Mr. Nolte (A/CN.4/SR.3439), Mr. Hassouna (A/CN.4/SR.3439) and Mr. Murphy (A/CN.4/SR.3440).

²¹ See statements by Mr. Huang (A/CN.4/SR.3439), Mr. Nolte (A/CN.4/SR.3439), Mr. Murphy (A/CN.4/SR.3440) and Mr. Zagaynov (A/CN.4/SR.3440) and, from a more nuanced perspective, Mr. Gómez Robledo (A/CN.4/SR.3440).

²² See statement by Mr. Nolte, who proposed that the draft article be couched as a non-binding recommendation for States (A/CN.4/SR.3439).

²³ See statements by Mr. Saboia (A/CN.4/SR.3439), Mr. Hassouna (A/CN.4/SR.3439), Mr. Hmoud (A/CN.4/SR.3440), Mr. Grossman Guiloff (A/CN.4/SR.3439), Mr. Ruda Santolaria (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

²⁴ See statement by Mr. Nguyen (A/CN.4/SR.3439).

²⁵ Third report on peremptory norms of general international law (*jus cogens*), by Dire Tladi, Special Rapporteur (A/CN.4/714). Draft conclusion 23 read as follows: "Irrelevance of official position and non-applicability of immunity *ratione materiae*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.

2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*)."

²⁶ See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), especially paras. 110, 141–148 and 161. See also the oral report of the Chair of the Drafting Committee presented to the Commission on 26 July 2018, available on the Commission's website.

²⁷ See statements by Mr. Murase (A/CN.4/SR.3438), Mr. Tladi (A/CN.4/SR.3438), Mr. Hmoud (A/CN.4/SR.3440), Mr. Nolte (A/CN.4/SR.3439), Mr. Nguyen (A/CN.4/SR.3439), Mr. Petrič (A/CN.4/SR.3440), Mr. Hassouna (A/CN.4/SR.3439), Mr. Saboia (A/CN.4/SR.3439) and Ms. Galvão Teles (A/CN.4/SR.3440).

²⁸ See statements by Mr. Nolte (A/CN.4/SR.3439), Mr. Grossman Guiloff (A/CN.4/SR.3439), (A/CN.4/SR.3439), Mr. Ruda Santolaria (A/CN.4/SR.3440), and Mr. Murphy (A/CN.4/SR.3440), Mr. Hmoud (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

appear was mandatory,²⁹ whereas the requirement to provide documents³⁰ and the adoption of precautionary measures³¹ did affect immunity. As for timing, it was generally agreed that immunity should be considered at an early stage of the proceedings, although some members noted that it should not apply at the investigation stage,³² to avoid impeding the investigation of other persons who did not enjoy immunity.³³ In any case, however, immunity should be considered when binding and coercive measures are adopted against an official³⁴ that may affect the performance of his or her functions.³⁵ Many members of the Commission said that the courts should be the competent organs to determine immunity, and that the determination should be made by a court of high rank³⁶. Some members drew attention to the need to limit prosecutorial discretion³⁷ and to the need to reserve some role for the executive branch³⁸ in this area. Some members were also in favour of some form of intervention by the State of the official in the consideration of immunity, referring in particular to mechanisms for consultation, information and cooperation between the forum State and the State of the official.³⁹ Various members of the Commission also referred to the usefulness of establishing a mechanism for the settlement of disputes before an international body.⁴⁰

10. Some members of the Commission were in favour of examining the relationship between the current topic and international criminal courts,⁴¹ while others were against.⁴²

11. The Sixth Committee also held a debate on the immunity of State officials from foreign criminal jurisdiction, in which some delegations referred to the sixth report of the Special Rapporteur.⁴³ The delegations reiterated that their comments were of a

²⁹ See statements by Mr. Nolte (A/CN.4/SR.3439), Mr. Grossman Guiloff (A/CN.4/SR.3439), (A/CN.4/SR.3439), Mr. Ruda Santolaria (A/CN.4/SR.3440), and Mr. Murphy (A/CN.4/SR.3440), Mr. Hmoud (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

³⁰ See statement by Mr. Grossman Guiloff (A/CN.4/SR.3439).

³¹ See statements by Mr. Saboia (A/CN.4/SR.3439), Mr. Hmoud (A/CN.4/SR.3440) and Ms. Galvão Teles (A/CN.4/SR.3440).

³² See statement by Mr. Saboia (A/CN.4/SR.3439).

³³ See statements by Mr. Šturma (A/CN.4/SR.3439) and Ms. Galvão Teles (A/CN.4/SR.3440).

³⁴ See statement by Ms. Galvão Teles (A/CN.4/SR.3440).

³⁵ See statements by Mr. Gómez Robledo (A/CN.4/SR.3440) and Mr. Hmoud (A/CN.4/SR.3440).

³⁶ See statements by Mr. Tladi (A/CN.4/SR.3438), Mr. Hassouna (A/CN.4/SR.3439), Mr. Grossmann Guiloff (A/CN.4/SR.3439), Mr. Saboia (A/CN.4/SR.3439), Mr. Hmoud (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

³⁷ See statements by Mr. Murase (A/CN.4/SR.3438), Mr. Grossmann Guiloff (A/CN.4/SR.3439), Mr. Saboia (A/CN.4/SR.3439) and Mr. Šturma (A/CN.4/SR.3439).

³⁸ See statements by Mr. Tladi (A/CN.4/SR.3438), Mr. Nguyen (A/CN.4/SR.3439), Mr. Ruda Santolaria (A/CN.4/SR.3440), Mr. Gómez Robledo (A/CN.4/SR.3440), Mr. Hmoud (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

³⁹ See statements by Mr. Šturma (A/CN.4/SR.3439), Mr. Ruda Santolaria (A/CN.4/SR.3440), Mr. Hmoud (A/CN.4/SR.3440), Ms. Galvão Teles (A/CN.4/SR.3440) and Ms. Oral (A/CN.4/SR.3440).

⁴⁰ See statements by Mr. Hassouna (A/CN.4/SR.3439) and Mr. Grossmann Guiloff (A/CN.4/SR.3439).

⁴¹ See statements by Ms. Galvão Teles (A/CN.4/SR.3440) and Mr. Ruda Santolaria (A/CN.4/SR.3440), who referred to the complementarity model established in the Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations *Treaty Series*, vol. 2187, No. 38544, p. 3), and Mr. Grossmann Guiloff (A/CN.4/SR.3439), Mr. Hassouna (A/CN.4/SR.3439) and especially Mr. Murase (A/CN.4/SR.3438), who reiterated his position that the draft articles should closely follow article 27 of the Rome Statute.

⁴² See statements by Mr. Murphy (A/CN.4/SR.3440) and Mr. Zagaynov (A/CN.4/SR.3440).

⁴³ See also the following summary records of the Sixth Committee of the General Assembly: A/C.6/73/SR.20 and A/C.6/73/SR.25 to SR.30. The full texts of the statements of the delegations that participated in the discussion are available at <http://papersmart.unmeetings.org/es/ga/sixth/73th-session/agenda>

preliminary nature, since the Commission had still not concluded its consideration of the report and, as was the case in the Commission, they reiterated some of their previous positions, especially on draft article 7 and exceptions, and on the balance between the values that should be derived from the consideration of the topic of immunity of State officials from foreign criminal jurisdiction, although this latter point was addressed from a variety of perspectives.⁴⁴

12. Concerning draft article 7 and exceptions to immunity, it should be noted that the inclusion of the draft article and its content received broad support from States,⁴⁵ regardless of whether they considered said precept a proposal of *lex lata* or of *lex ferenda*,⁴⁶ and notwithstanding the request from some States that the Commission clarify the true nature of the proposal,⁴⁷ or the suggestion by some States to have the draft article amended to include the crime of aggression,⁴⁸ or to establish a general exception clause without a specific reference to a list of crimes.⁴⁹ States that supported the draft article did so because of the need to continue combating impunity for the most serious crimes and of its balance.⁵⁰ Some States recalled the trend in practice to exclude international crimes from the application of immunity *ratione materiae*.⁵¹ On the other hand, some States said that draft article 7 did not reflect *lex lata*⁵² and that the Commission should include in the draft article only proposals of *lex lata* that reflected customary norms,⁵³ or, where applicable, consider the issue following the model of a treaty norm.⁵⁴ Some countries also made comments regarding the relationship between immunity from jurisdiction and peremptory norms of international law (*jus cogens*),⁵⁵ although only one said that it would be useful to examine that relationship, to enhance the understanding of the relationship between immunity from jurisdiction and the exercise of jurisdiction in the case of international crimes.⁵⁶ Some States reiterated their position that voting in the Commission was not desirable and pointed to the need to seek a consensus.⁵⁷

13. The States that participated in the debate noted that the purpose of these procedural safeguards should be to prevent abusive and politicized exercise of criminal jurisdiction by the forum State,⁵⁸ and to some States from being able to put pressure on others.⁵⁹ In that connection, a number of delegations considered that the safeguards should pertain to both the State of the official and the official concerned,⁶⁰

⁴⁴ On this topic, see statements by Bahamas (on behalf of the Caribbean Community (CARICOM)), Chile, Japan, the Holy See, Islamic Republic of Iran, Israel, South Africa, Romania, Switzerland, Thailand, Spain, Singapore, Viet Nam, Slovakia, Portugal, Poland and Sweden (on behalf of the Nordic countries).

⁴⁵ See statements by Italy, Brazil, Azerbaijan, Netherlands, Switzerland, Spain, Czechia, Portugal, Greece and Sweden (on behalf of the Nordic countries).

⁴⁶ See statements by Brazil, Switzerland and Spain.

⁴⁷ See for example the statement by Switzerland.

⁴⁸ Estonia, Portugal and Nicaragua took this position.

⁴⁹ The Netherlands took this position.

⁵⁰ See statements by Italy, Spain, Portugal and Sweden (on behalf of the Nordic countries).

⁵¹ See statements by Italy and Chile. The United States of America was against.

⁵² See statements by China, Islamic Republic of Iran, Germany, United Kingdom, Australia, Russian Federation, Israel, United States of America, Thailand and Viet Nam.

⁵³ See statements by Israel and Viet Nam.

⁵⁴ See statements by Germany and the United Kingdom of Great Britain and Northern Ireland.

⁵⁵ See statements by Austria, China and South Africa.

⁵⁶ See statement by South Africa.

⁵⁷ See statements by India, Japan, Algeria, United Kingdom of Great Britain and Northern Ireland, Viet Nam, Russian Federation and United States of America.

⁵⁸ See statements by China, Japan, Malaysia, Turkey, Islamic Republic of Iran, Israel, Russian Federation, Romania, Switzerland, Thailand, Ireland, Mexico, Nicaragua and Sweden (on behalf of the Nordic countries).

⁵⁹ See statement by Russian Federation.

⁶⁰ See statements by Israel, Switzerland, Ireland and Sweden (on behalf of the Nordic countries).

while others said that the main aim of procedural safeguards should be to protect the sovereignty of the State of the official,⁶¹ and that the safeguards and rights pertaining to the official relating to criminal cases were not relevant to the topic.⁶² One State pointed out that no procedural safeguards could compensate for the error committed by provisionally adopting draft article 7.⁶³

14. With regard to the procedural aspects of immunity examined in the sixth report of the Special Rapporteur, delegations that participated in the debate were generally in favour of immunity being considered at the earliest possible stage, *in limine litis* and without delay.⁶⁴ They also said that immunity should be considered whenever measures that imposed obligations and gave rise to coercive measures were taken in case of non-compliance with said obligations,⁶⁵ and when measures were taken that hindered the performance of the functions of the individual concerned.⁶⁶ Some States said that, in their judgment, immunity should be considered throughout the process and in any of its phases,⁶⁷ while others said that it should also apply to acts that did not impose any obligations, such as during an investigation or prior to the investigation.⁶⁸ One delegation stated that it was essential that the Commission not focus on the trial phase and to also study the investigation phase, advocating the establishment of prior authorization or cooperation mechanisms.⁶⁹ Another took the position that existing practice on the issue was unclear and that *opinio juris* was inconclusive.⁷⁰ Various States agreed that the courts were the competent organs to determine the application of immunity;⁷¹ one delegation said that a special organ might be established,⁷² while others said that such determination might also be made by the executive branch.⁷³ One delegation drew attention to the diversity of existing models in the laws of States,⁷⁴ and others affirmed that the Commission should not propose norms in that regard and that it should preferably focus on international standards that might apply and on the need to ensure internal consistency in the context of immunity.⁷⁵

15. With regard to the future work of the Commission, it should be noted that various delegations supported the establishment of communication and international cooperation mechanisms,⁷⁶ and took positions in favour⁷⁷ and against⁷⁸ the Commission's consideration of the question of the existing relationship between immunity from foreign criminal jurisdiction and international criminal courts.

⁶¹ See statement by the Islamic Republic of Iran.

⁶² See statement by China.

⁶³ See *ibid.*

⁶⁴ See statements by Bahamas (on behalf of CARICOM), Holy See, Malaysia, Turkey, Israel, South Africa, Ireland, Spain, Czechia and Poland.

⁶⁵ See statements by Holy See, Malaysia, Estonia, Austria and Netherlands.

⁶⁶ This question was addressed in particular in the statements by South Africa, Romania, Spain and Czechia.

⁶⁷ See statements by Poland and Austria.

⁶⁸ See statements by Israel, China and Turkey.

⁶⁹ See statement by Turkey.

⁷⁰ See statement by United States of America.

⁷¹ See statements by Bahamas, Malaysia and Spain.

⁷² See statement by Bahamas.

⁷³ See statements by Turkey, Israel and Romania. Bahamas also referred to this possibility.

⁷⁴ See statement by South Africa, which also warned about the risks that could arise from the recognition of wider prosecutorial discretionary powers.

⁷⁵ See statements by China and the United States of America.

⁷⁶ See statements by Estonia, Romania, Spain and Israel (which advocated the definition of a system based on the subsidiarity of the forum State).

⁷⁷ See statement by Mexico.

⁷⁸ See statements by Austria and Russian Federation.

16. In concluding this summary of previous work on the present topic, it should be recalled that since 2013 the Commission has been addressing questions to States on matters concerning the topic. 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.⁷⁹ In 2015, the following States submitted contributions: Austria, Czechia, Cuba, Finland, France, Germany, Netherlands, Peru, Poland, Spain, Switzerland and United Kingdom.⁸⁰ In 2016, written contributions were received from the following States: Australia, Austria, Netherlands, Paraguay, Spain, Switzerland and United Kingdom.⁸¹ In 2017, the following States sent written comments: Austria, Czechia, France, Germany, Mexico, Netherlands and Switzerland.⁸² In 2018 and 2019, the following States submitted comments: Austria, El Salvador, Morocco, Netherlands, Spain, and United Kingdom.⁸³ In addition, in their statements in the Sixth Committee, various States referred to the issues contained 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 Commission's work. She would also welcome any other comments that States might wish to submit at a later date. Those comments and observations made in the oral statements of States delivered in the Sixth Committee were duly taken into account in the preparation of the present report.

17. Since the seventieth session of the Commission (2018), the issue of the immunity of State officials from foreign criminal jurisdiction has been debated before the International Criminal Court, in the appeal lodged by Jordan against the decision

⁷⁹ See *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".

⁸⁰ *Ibid.*, *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 the practice of their institutions, and in particular, on judicial decisions, with reference to (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 (b) any exceptions to immunity of State officials from foreign criminal jurisdiction."

⁸¹ *Ibid.*, *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."

⁸² *Ibid.*, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*, para. 35. 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) 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 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." That request was reiterated in 2017 (*ibid.*, *Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 30).

⁸³ *Ibid.*, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 34. The Commission would welcome any information that States could provide "on their national legislation and practice (of a judicial, administrative or any other nature) concerning procedures for dealing with immunity, in particular the invocation and waiver of immunity, as well as on mechanisms for communication, consultation, cooperation and international judicial assistance that they may use in relation to situations in which the immunity of State officials from foreign criminal jurisdiction is being or may be examined by their national authorities". Similarly, it would be useful to have any information that international organizations could provide "on international cooperation mechanisms which, within their area of competence, may affect immunity of State officials from foreign criminal jurisdiction".

of Pre-Trial Chamber II to refer to the Assembly of States Parties the non-compliance by Jordan with its obligation to cooperate with the Court in the arrest and surrender of the President of the Sudan, Omar Hassan Ahmad Al-Bashir, accused of committing war crimes, crimes against humanity and genocide.⁸⁴ Although the case concerns the specific question of cooperation of States parties with the International Criminal Court, in various briefs submitted to the Court and in oral arguments presented in September 2018, a number of questions were raised concerning exceptions to immunity and the distinction between the concepts of international criminal jurisdiction and foreign criminal jurisdiction that are germane to the present topic. The Commission should be aware of that debate, in which some of its members participated and in which references were made to the Commission's work in relation to the present topic.⁸⁵ It should be noted, however, that the International Criminal Court had not issued a ruling on the appeal by the time the present report was completed.

18. It should also be noted that the agenda of the General Assembly includes an item entitled "Request for an advisory opinion from the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials".⁸⁶ That item had been included at the request of Kenya on behalf of the African States Members of the United Nations and is directly related to the internal debate that has developed concerning cooperation with the International Criminal Court on charges brought against various African leaders, in particular Presidents Al-Bashir of the Sudan and Kenyatta of Kenya.⁸⁷ Although the General Assembly has included the topic on its agenda, it has not assigned the consideration thereof to any Committee and, by the time the present report was completed, the sponsors of the request had not yet submitted the relevant text, nor had the Bureau of the Assembly scheduled the consideration of the agenda item in plenary.

B. Outline of the seventh report

19. As indicated *supra*, the Commission could not conclude the discussion on the Special Rapporteur's sixth report, which remained open for comments from Commission members during the present session. The members may submit their comments together with those concerning the seventh report which is now being submitted to the Commission for its consideration.⁸⁸

20. In fact, both reports are part of the comprehensive treatment of the procedural aspects of immunity, which is why the points raised in the present report should be understood in the light of the general considerations set forth in the sixth report, which, for reasons of economy, do not need to be reproduced here. However, to make the present report easier to read and understand, it seems necessary for it to include at least some reference to the criteria that guided the approach to the topic of the procedural aspects of immunity followed in both reports, as well as the topics that

⁸⁴ An overview of the *Al-Bashir* case is available at www.icc-cpi.int/iccdocs/PIDS/docs/AIBashirCisEng.pdf. See the decision under art. 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, of 11 December 2017 (ICC-02/05-01/09-309). The appeal was lodged by Jordan on 12 March 2018 (ICC-02/05-01/09-326).

⁸⁵ See transcript of public hearings held on 10–14 September 2018 in the Appeals Chamber of the International Criminal Court (ICC-02/05-01/09-386 and annexes 1–5).

⁸⁶ Agenda of the seventy-third session of the General Assembly, item 89 (A/73/251).

⁸⁷ See A/73/144.

⁸⁸ See *Ibid.*, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 26 and 293.

should be examined in this context. Both issues are developed further in the sixth report, to which the Special Rapporteur refers.⁸⁹

21. As regards the first issue, it suffices to recall that the examination of the procedural aspects of immunity of State officials from foreign criminal jurisdiction is justified for a variety of reasons. First, such immunity is intended to be exercised before a foreign criminal court which, in performing its functions, applies procedural rules, principles and processes that cannot be ignored. Second, any proceeding by the forum State concerning this type of immunity involves the presence of a foreign national (the State official), which courts must take into consideration in order to decide whether or not to exercise their jurisdiction (in particular, determining whether the individual qualifies as a “State official”, whether the acts were “performed in an official capacity”, and whether the official was performing his or her official functions at a point in time).

22. The mere mention of these two elements would suffice to explain why the procedural aspects of the immunity of State officials from foreign criminal jurisdiction should be examined, because otherwise, the work of the Commission on the topic would be incomplete and would not be fully effective. It is also important to draw attention to certain outcomes whose value cannot be ignored: (a) procedural arrangements help to provide certainty to both the forum State and the State of the official, and to reduce as much as possible the inclusion of political factors and the possibility of jurisdiction being exercised over a foreign State official abusively or for political purposes or motives; (b) procedural arrangements help to introduce an element of neutrality into the treatment of immunity from foreign criminal jurisdiction, to build trust between the forum State and the State of the official, and to mitigate the undesired effect of instability in international relations that a debate on immunity might produce.

23. The consideration of the procedural aspects of immunity is also highly valuable in that it helps to ensure the proper balance in safeguarding the following legal principles and values of the international community: (a) the balance in applying the principle of the sovereign equality of the two States concerned (that of the forum and that of the State of the official), whose legitimate right to exercise their respective jurisdictions is altered by the mechanism of immunity; (b) the balance between respecting and upholding the principle of the sovereign equality of States and respecting other legal principles and values of the international community, which are generally embodied in institutions responsible for ensuring accountability and combating impunity; and (c) the balance between the right of the forum State to exercise its criminal jurisdiction, where applicable, and the need to respect the procedural rights and safeguards pertaining to State officials that may be affected by such jurisdiction.

24. In the light of the foregoing, the Special Rapporteur proposed, in her sixth report, that the following groups of issues be considered in succession:

(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 and the acts of the authorities of the forum State that may be affected by immunity, as well as issues related to the determination of immunity;

(b) The procedural elements that have autonomous procedural significance owing to their instrumental nature and direct link with the application or non-application of immunity in a given case, and that also serve as a first-level

⁸⁹ See [A/CN.4/722](#), paras. 23–44.

safeguard for the State of the official, in particular invocation and waiver of immunity;

(c) The procedural elements that should preferably fall under the category of procedural safeguards for the State of the official, in particular mechanisms for facilitating 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 on 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.

25. The first set of issues was examined in the sixth report and the remaining three will be examined in the present report. To that end, the present report includes four chapters devoted to the following issues: continuation of the examination of the relationship between the concept of jurisdiction and the procedural aspects of immunity, including proposed articles (chap. I); invocation and waiver of immunity (chap. II); procedural safeguards that operate between the forum State and the State of the official (chap. III); and procedural rights and safeguards pertaining to the official (chap. IV). The consideration of these issues is accompanied by draft articles which the Commission will have to examine in connection with the sixth and seventh reports. The present report also includes a chapter devoted to the future workplan (chap. V), along with annexes containing the draft articles provisionally adopted by the Commission (annex I) and the draft articles proposed in the present report (annex II).

Chapter I

Concept of jurisdiction and procedural aspects of immunity (continued)

26. The sixth report contained an analysis of the concept of jurisdiction and the procedural aspects of immunity from foreign criminal jurisdiction that are closely related to the concept, in particular the timing of the consideration of immunity, the categories of acts affected by immunity and the determination of immunity.⁹⁰ It is not necessary to reproduce said analysis or even its core elements here, since the Commission will continue to consider the sixth report in parallel with the discussion on the present report. For the time being, it suffices, therefore, to summarize the main conclusions contained in the sixth report on these issues:

(a) The courts of the forum State will have to consider the immunity of State officials from foreign criminal jurisdiction at the following stages: (i) before the initiation of a prosecution which may affect a foreign official; (ii) before issuing a formal accusation or indictment against the official; and (iii) before taking any measures directed expressly at the official that impose on him or her obligations which, if not fulfilled, may give rise to coercive measures that could impede the performance of his or her State functions, including measures that are precautionary in nature and that may be taken at the investigation or inquiry stage. In any case, nothing prevents the courts of the forum State from considering immunity at a later stage, especially during a review or an appeal.

(b) Immunity may also be considered when the courts of the State have to take a decision concerning the detention of the foreign official, his or her appearance as a witness and the request for the provision of documents, or when they have to order precautionary measures, provided such decisions affect the official directly, impose

⁹⁰ *Ibid.*, chap. II.

coercive measures on the official, or impede the proper performance of his or her functions.

(c) Given that the application of immunity from jurisdiction will have the effect of paralyzing the competent jurisdiction, it seems obvious to conclude that it is the organs endowed with such jurisdiction that are competent to exercise it. Accordingly, it is the courts of the forum State that will be competent to make a final decision on the issue, although organs other than judges (in particular prosecutors) may also make such a decision when tasked with the investigation or inquiry, if in performing their functions the question of immunity arises in relation to any of the relevant acts discussed in the previous section.⁹¹ This does not mean, however, that other organs or powers of the State cannot express their opinions on the matter, thus cooperating with the courts in the determination of immunity. Such cooperation between other organs of the State and the courts may be effected through various means, including recourse to general mechanisms or *ad hoc* instruments established specifically to deal with immunity from jurisdiction.

27. On the basis of these conclusions and the study contained in the sixth report, the following draft articles are proposed:

Part Three. Procedural provisions and safeguards

Draft article 8

Consideration of immunity by the forum State

1. The competent authorities of the forum State shall consider immunity as soon as they are aware that a foreign official may be affected by a criminal proceeding.
2. Immunity shall be considered at an early stage of the proceeding, before the indictment of the official and the commencement of the prosecution phase.
3. Immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official that may affect the performance of his or her functions.

Draft article 9

Determination of immunity

1. It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them.
2. The immunity of the foreign State shall be determined in accordance with the provisions of the present draft articles and through the procedures established by national law.

⁹¹ The possibility that the prosecutor may determine immunity seems to have led the Netherlands to assert, in its written comments, that “there [was] little relevant practice [relating to the invocation of immunity], since the public prosecutor would usually first assess whether any immunities [applied] before bringing criminal charges”. Germany and Mexico also refer to the public prosecutor taking immunity into account. In the case of Austria, if the office of the public prosecutor, after completing the preliminary inquiries, concludes that some form of immunity may apply, it has to report the facts of the case and the intended measures to the Ministry of Justice.

3. The competent court shall consider whether the State of the official has invoked or waived immunity, as well as the information provided to it by other authorities of the forum State and by the authorities of the State of the official whenever possible.

28. In addition to the draft articles that are proposed, it is worth recalling that the Commission will have to consider the definitions of “jurisdiction”,⁹² “immunity from foreign criminal jurisdiction”⁹³ and “immunity *ratione personae* and immunity *ratione materiae*”,⁹⁴ which were included in the second report of the Special Rapporteur and referred at the time to the Drafting Committee. The Drafting Committee did not address them in detail and decided that it would examine them at a later stage in its work on the topic.⁹⁵

Chapter II

Invocation and waiver of immunity

A. General considerations

29. As indicated in the sixth report, invocation and waiver of immunity are among the issues that have been traditionally addressed in studies on immunity, in general, and on immunity of State officials from foreign criminal jurisdiction, in particular. With respect to our topic, it should be noted that invocation and waiver were examined in the reports of the former Special Rapporteur, Mr. Kolodkin,⁹⁶ and in the memorandum by the Secretariat.⁹⁷ It should also be borne in mind that both issues have been codified in treaties and other international instruments devoted to immunity or containing provisions on immunity, many of which were developed from draft articles adopted by the Commission, as well as in the few national laws dealing with the institution of immunity. Various national and international courts have also

⁹² “Draft article 3. Definitions

For the purposes of the present draft articles:

(a) 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 to exercise jurisdiction is irrelevant” (A/CN.4/661, para. 42). In the current version of the draft articles provisionally adopted by the Commission, this is draft article 2.

⁹³ Draft article 3. Definitions

For the purposes of the present draft articles:

[...]

(b) “Immunity from foreign criminal jurisdiction” means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials (A/CN.4/661, para. 46).

⁹⁴ Draft article 3. Definitions

For the purposes of the present draft articles:

[...]

(c) “Immunity *ratione personae*” means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(d) “Immunity *ratione materiae*” means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as “official acts” (A/CN.4/661, para. 53).

⁹⁵ See statement by the Chair of the Drafting Committee of the sixty-fifth session of the Commission, 7 February 2013, pp. 16–18, available on the Commission’s website.

⁹⁶ See in particular A/CN.4/646, paras. 14–57.

⁹⁷ See A/CN.4/596, paras. 213–269.

considered and ruled on both invocation and waiver of immunity, elements of practice referred to *infra*.

30. This is logical, considering the nature and significance of both procedural categories, which are basic elements of the decision-making process that the courts of the forum State go through when deciding whether or not they are dealing with a situation that is covered by immunity and, consequently, whether or not they can exercise their jurisdiction. In this connection, three prior considerations are worth mentioning briefly:

(a) Immunity from jurisdiction (in this case the immunity of State officials from foreign criminal jurisdiction) is recognized with a view to protecting the rights of the State and ensuring the proper performance of its functions. Therefore, the position taken by the State of the official in respect of the exercise of criminal jurisdiction by foreign courts is of special significance;

(b) If the State of the official invokes immunity from jurisdiction, it should be understood that the State in question considers that its rights and interests may be affected by the actions of the courts of the forum State; and

(c) If the State of the official waives the immunity of its officials from foreign criminal jurisdiction, it should be understood that the State in question does not consider that its rights and interests may be affected by the actions of those courts.

31. From this perspective, both institutions (invocation and waiver) have elements in common and, in some cases, may produce the same effects on the application of immunity or the exercise of jurisdiction. It is also true, however, that invocation and waiver of immunity are conceptually and procedurally different. It is perhaps for this reason that they have been treated quite differently in normative terms, not only in the work of the Commission and even in international instruments adopted on the basis of that work, but also in national laws on immunity and even in private codification instruments, in particular the resolutions of the *Institut de Droit International*. Suffice it to note at this time that all these instruments have focused on waiver of immunity and have referred to invocation of immunity only indirectly.

32. On the other hand, although both invocation and waiver of immunity affect the application of immunity and the exercise of jurisdiction, they are in reality mere procedural institutions, avenues through which the State of the official can claim a right which it believes it has (the immunity of its officials) or waive such right. However, neither of these categories affect or modify the normative elements of immunity of State officials from foreign criminal jurisdiction that have already been defined by the Commission and without which there could be no talk of the existence of immunity. Similarly, they do not alter the rules concerning limitations and exceptions to immunity, which are substantive in nature, and with which they cannot be confused.

33. In any case, it should be noted that invocation and waiver of immunity are first-level safeguards available to the State of the official to ensure that the rights and interests that are protected through the institution of immunity of its officials from foreign criminal jurisdiction are respected appropriately. It is therefore of vital importance, for the purposes of the present topic, to clearly identify how both procedural institutions operate. To that end, both issues are discussed separately below on the basis of the elements of practice referred to above, also taking into consideration the comments that States have made to date on the issues, either in their written replies to questions from the Commission or in their statements in the Sixth Committee.

B. Invocation of immunity

34. As already discussed in the sixth report, the immunity of State officials from criminal jurisdiction should be considered by the courts of the forum State as early as possible, since it is only under such circumstances that immunity can be truly effective.⁹⁸ For that to occur, however, the question of immunity should be raised before the competent organ, either on its own initiative or at the request of the party concerned. It is only in the second case that invocation, in the strict sense, comes into play. For the purposes of the present topic, the treatment of immunity must include the following questions: (a) is invocation of immunity necessary for immunity to apply? (b) who can invoke immunity and through what channel? (c) at what point should immunity be invoked? and (d) what are the effects of the invocation of immunity?

1. Invocation as a procedural requirement

35. As already noted, for immunity to be assessed by the organs of the forum State, it must be raised before them. This is a logical requirement which does not need further justification, not even the fact that it is referred to in legal instruments dealing with immunity. It is not possible, however, to reach a similar conclusion when it comes to the channels through which the question of immunity should be raised, since normative practice shows that there is no clear rule as to whether it is necessary or not necessary for the person concerned to invoke immunity. In this regard, it is instructive to examine the previous work of the Commission and international instruments and national laws concerning immunity.

36. Beginning with the previous work of the Commission, it should be noted that the question of invocation of immunity has not been given prominence in the draft articles that have dealt directly or indirectly with immunity. This is the case with the draft articles concerning the immunity of certain State officials, especially the draft articles on diplomatic relations, on consular relations, on special missions and on the representation of States in their relations with international organizations of a universal character. The Commission did not indicate in any of those draft articles whether or not the invocation of immunity is necessary.⁹⁹ It should therefore be concluded, *a contrario sensu*, that immunity may be invoked by the States concerned, although it is not possible to say that invocation is a prerequisite for immunity to be able to be considered and, as the case may be, applied by the courts of the forum State. The approach taken by the Commission in those draft articles was maintained virtually unchanged in multilateral conventions originating from the draft articles, especially the 1963 Vienna Convention on Diplomatic Relations,¹⁰⁰ the 1963 Vienna Convention on Consular Relations,¹⁰¹ the 1969 Convention on Special Missions¹⁰²

⁹⁸ See A/CN.4/722, paras. 49–63.

⁹⁹ See the draft articles on diplomatic intercourse and immunities (arts. 29 and 30 and the commentaries thereto), *Yearbook ... 1958*, vol. II, pp. 105–107; the draft articles on consular intercourse and immunities (arts. 43 and 45 and the commentaries thereto), *Yearbook ... 1961*, vol. II, pp. 130–132; the draft articles on special missions (arts. 31 and 41 and the commentaries thereto), *Yearbook ... 1967*, vol. II, pp. 376 et seq.; and the draft articles on the representation of States in their relations with international organizations (arts. 30 and 31 and the commentaries thereto), *Yearbook ... 1971*, vol. II, Part One, pp. 327–329.

¹⁰⁰ Vienna Convention on Diplomatic Relations, ((Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

¹⁰¹ Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid.*, vol. 596, No. 8638, p. 261.

¹⁰² Convention on Special Missions (New York, 8 December 1969), *ibid.*, vol. 1400, No. 23431, p. 231.

and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.^{103,104}

37. The Commission followed a fairly similar approach in the draft articles on the jurisdictional immunities of States and their property, in which it referred expressly to invocation of immunity in a negative sense, declaring that immunity may not be invoked by the State concerned when it has expressly or tacitly consented to the exercise of jurisdiction by the forum State,¹⁰⁵ or when jurisdiction is exercised in respect of certain types of proceedings identified in substantive terms.¹⁰⁶ However, article 6 (Modalities for giving effect to State immunity) provides as follows:

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.¹⁰⁷

38. As noted in the commentary to draft article 6, paragraph 1, the purpose of the stipulation that the State shall ensure that its courts determine on their own initiative that the immunity is respected “was to define and strengthen the obligation set forth in the first part of the provision”. This is because “respect for State immunity would be ensured all the more if the courts of the forum State, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceedings were really directed against that State, and whether the State was entitled to invoke immunity”.¹⁰⁸ What emerges is a model for the determination of immunity *proprio motu*, without the need for it being invoked by the foreign State, which in return “is not intended to discourage the court appearance of the contesting State [in the forum State], which would provide the best assurance for obtaining a satisfactory result”.¹⁰⁹

39. The abovementioned provisions of the draft articles on the jurisdictional immunities of States and their property were followed in the United Nations Convention on Jurisdictional Immunities of States and Their Property, both in its structure and in its content.¹¹⁰ Therefore, in this case as well, it should be taken that invocation of State immunity is contemplated as a recognized power of the State, but without necessarily concluding that invocation is a procedural requirement for the consideration of the applicability of such immunity by the courts of the forum State.

¹⁰³ Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, Judicial Yearbook 1975 (Sales No. E.77.V.3), p. 87.

¹⁰⁴ It should be noted that the aforementioned conventions, in dealing with the waiver of immunity as well, establish in generic terms that the State will not be able to invoke immunity if the exercise of jurisdiction originates from a request presented by the very official or in respect of a counterclaim, thus creating some confusion between waiver and invocation. See Vienna Convention on Diplomatic Relations (art. 32); Vienna Convention on Consular Relations (art. 45); Convention on Special Missions (art. 41); and Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 31).

¹⁰⁵ Such consent may be express (art. 7) or implied, either through direct participation in a proceeding before a court in the forum State (art. 8) or as a result of a counterclaim (art. 9) See *Yearbook ... 1991*, vol. II (Part Two), arts, p. 13, para. 28.

¹⁰⁶ *Ibid.*, pp. 36 et seq., arts. 10–17.

¹⁰⁷ *Ibid.*, p. 24.

¹⁰⁸ *Ibid.*, commentary to art. 6, para. (5), p. 24

¹⁰⁹ *Ibid.*

¹¹⁰ 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. See arts. 6–17.

40. Still with regard to State immunity, it should be noted that, in the European Convention on State Immunity, the Council of Europe also does not expressly codify the invocation of immunity, merely affirming that immunity cannot be invoked in respect of particular types of proceedings,¹¹¹ or in cases of voluntary submission to the jurisdiction of the forum State, or in cases of counterclaims.¹¹²

41. A similar approach is taken in national laws concerning the immunity of foreign States. Several laws stipulate that immunity should be considered *proprio motu* by a judge of the forum.¹¹³ Most of these laws also provide that immunity shall be considered *proprio motu* mainly in case of non-appearance of the foreign State,¹¹⁴ thus reinforcing the view that immunity is a right, the waiver of which cannot be presumed from the mere inaction of the State concerned.

42. On a separate issue, it should also be borne in mind that, in its resolution on immunities of Heads of State and Heads of Government from jurisdiction and execution in international law, the *Institut de Droit International* provides 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.”¹¹⁵

This has also been interpreted to mean that the immunity of Heads of State and Heads of Government must be assessed *proprio motu* by the courts of the forum State.

43. In the light of the normative practice examined, it seems possible to arrive at a first set of conclusions, namely: (a) that invocation of immunity is a power of the State of the official which may be exercised, save in expressly excluded cases; (b) that invocation is not a procedural requirement for the courts of the forum State to consider the immunity of the State or of one of its officials from jurisdiction; and (c) that, accordingly, the courts of the forum State should assess and decide *proprio motu* on the immunity of State officials.

44. It should be borne in mind, however, that there are some examples in practice where invocation of the immunity of the official by the State concerned appears to have been considered a requisite for the immunity to apply, notably in the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.¹¹⁶ It is therefore imperative to consider whether the first set of conclusions outlined above can apply to any type of immunity of State officials from foreign criminal jurisdiction, or whether it can only apply to one type of immunity. To that end, it is useful to consider a number of points concerning the nature of the immunity to which the

¹¹¹ European Convention on State Immunity (Basel, 16 May 1972), United Nations, *Treaty Series*, vol. 1495, No. 25699, p. 181. See in particular arts. 4–14.

¹¹² See arts. 1–3.

¹¹³ See: United Kingdom, State Immunity Act 1978, sect. 1 (2); Singapore, State Immunity Act 1979, sect. 3 (2); South Africa, Foreign States Immunities Act 1981, sect. 2 (2); Pakistan, State Immunity Ordinance 1981, sect. 3 (2); Canada, State Immunity Act 1985, sect. 3 (2); Israel, Foreign States Immunity Law 2008, sect. 14; Spain, Organic Act No. 16/2015, 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, art. 49.

¹¹⁴ See: United Kingdom, State Immunity Act 1978, sect. 1 (2); Singapore, State Immunity Act 1979, sect. 3 (2); South Africa, Foreign States Immunities Act 1981, sect. 2 (2); Pakistan, State Immunity Ordinance 1981, sect. 3 (2); Canada, State Immunity Act 1985, sect. 3 (2); Israel, Foreign States Immunity Law 2008, sect. 14.

¹¹⁵ Vancouver session, 2001, art. 6 (*Institut de Droit International, Yearbook*, vol. 69, 2000–2001).

¹¹⁶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, judgment, ICJ Reports 2008, p. 177. There is little judicial practice at State level. See the third report of the former Special Rapporteur, Mr. Kolodkin (A/CN.4/646), footnotes 33 and 43.

abovementioned normative practice refers, as well as a few practical dimensions arising solely in relation to the immunity of State officials from foreign criminal jurisdiction.

45. Regarding the first of these issues, it is useful to draw attention to the fact that the abovementioned normative instruments refer to State immunity or immunity *ratione personae* enjoyed by State officials, whether they are diplomatic agents, certain consular officials, members of special missions or representatives to international organizations. In the first of these cases (State immunity), action *proprio motu* by national courts is an immediate consequence of the principle of the sovereign equality of States and leaves no doubt as to the identity of the beneficiary of such immunity, since it is the State, in the abstract sense. Indeed, the United Nations Convention on Jurisdictional Immunities of States and Their Property itself includes a definition of the word “State”,¹¹⁷ with the immunity of the State from the immunity being differentiated from the immunity that may be enjoyed by some of its officials,¹¹⁸ whose identification does not create any problems either.

46. The same is true for State officials that participate in international missions, who are afforded immunity precisely for that reason and whose identity is always sufficiently known by the authorities of the forum State, since all of them would have received prior accreditation from those authorities,¹¹⁹ or from the relevant international organization, which in turn would have shared that accreditation with the authorities of the host State.¹²⁰ Accordingly, in both cases, the authorities of the forum State, including the courts, may determine on their own whether the proceeding before them is one directed against a foreign State which may enjoy immunity. They are also in a position to easily determine the identity of the diplomatic officials present in their national territory who enjoy some form of immunity, as well as the scope of such immunity.

47. From that standpoint, insisting that the foreign State invoke its immunity or that of its officials as a prerequisite for the application of immunity appears to be an unnecessary burden, which may also become an exorbitant requirement in the light of the purpose of immunity and the application of the principle of the sovereign equality of States.¹²¹ Without a doubt, these arguments may help to explain why it was not found necessary, in the instruments examined above, to establish a specific regime for the invocation of immunity, and why, on the contrary, it was felt that the

¹¹⁷ Art. 2, para. (1) (b).

¹¹⁸ Art. 3, para. 2. The distinction between the immunity of a State and the immunity of its officials was examined by the Special Rapporteur in her fourth report (A/CN.4/686), paras. 96–117.

¹¹⁹ According to art. 10, para. 1 (a), of the Vienna Convention on Diplomatic Relations, “[T]he Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of: (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission”. See also the Convention on Special Missions, art. 11, para. (1) (a) and (b), and the Vienna Convention on Consular Relations, arts. 11 and 14.

¹²⁰ The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character contains, in its article 15, para. 1, a notification obligation similar to that contained in the Vienna Convention on Diplomatic Relations. It should be noted that the organization must transmit the same data to the host State and that the sending State has the power to do so, which is why the forum State in whose courts the question of immunity from criminal jurisdiction of any of the members of the permanent mission may be invoked will have full knowledge of the identity of such members (see art. 15, paras. 3 and 4).

¹²¹ This seems to be what the Commission had understood in relation to State immunity, stating the following in the commentary to the draft articles on the jurisdictional immunities of States and their property: “appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined” (*Yearbook ... 1991*, vol. II (Part Two), para. 25, commentary to art. 6, para. 5).

courts of the forum State should consider and decide *proprio motu* on the abovementioned forms of immunity.

48. It is difficult, however, to transpose this same logic automatically to the immunity of State officials from foreign criminal jurisdiction, where there are clear distinguishing elements between immunity *ratione personae* and immunity *ratione materiae*, both in terms of the preservation of the rights and interests protected by immunity, and in practical terms.

49. It should be recalled that immunity *ratione personae* applies to a limited number of State officials (Head of State, Head of Government and Minister for Foreign Affairs) whose identity is known and whose status as the international representative of the State is also well known and can hardly create any doubts among the authorities of the forum State. On the other hand, acts that may be covered by such immunity are all those performed by said officials while discharging their mandates, such that this normative element too cannot be subject to an assessment that requires the invocation of immunity by the foreign State. In addition, one has to assume that, as a rule, the State of the official has a real and current interest in defending the immunity from jurisdiction of its Head of State, Head of Government and Minister for Foreign Affairs. Accordingly, in respect of this category, it should be clear to the authorities of the State intending to exercise jurisdiction that the question of immunity exists and that it should therefore be taken into account and considered *proprio motu* by the courts of the forum State without the need to require that it be invoked by the State of the official.

50. On the other hand, the situation is different in the case of immunity *ratione materiae*, where the fact that an individual possesses all the normative elements of such immunity cannot necessarily be known autonomously by the organs of the forum State, which are not equipped to know whether an individual is a foreign official or not, whether the individual had such status at the time that he or she committed the acts being considered by the court of the forum, or whether such acts were carried out in an official capacity or not. Furthermore, the interest of the State of the official to claim the immunity that one of its officials may enjoy cannot be presumed in the same manner as in the case of the Head of State, Head of Government and Minister for Foreign Affairs. Accordingly, it is difficult to conclude that the authorities of the forum State have an obligation to assess and decide, on their own, whether an alleged immunity from foreign criminal jurisdiction exists or not. Yet, insisting that the State of the official invoke immunity cannot be considered an excessive burden or a requirement that is incompatible with the purpose of immunity from foreign criminal jurisdiction, or with the principle of the sovereign equality of States. On the contrary, the idea is more to require the application of due diligence in the exercise of a right of the State.

51. The arguments that have just been raised are also endorsed by the case law of the International Court of Justice. It should be recalled, for example, that in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the Court dismissed the claims of Djibouti concerning the immunity of the Public Prosecutor and the Head of National Security, noting that Djibouti never informed France that “the acts complained of by France were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out”.¹²² By contrast, when reference was made in the same case to the immunity of the Head of State of Djibouti, there was no mention of Djibouti having an obligation to inform France about such matters or, so to speak, to invoke immunity. The same situation arose in the case concerning *Arrest Warrant*

¹²² *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 116 *supra*), para. 196.

of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*),¹²³ in which the Court also did not state at any point that the Democratic Republic of the Congo had an obligation to notify the Belgian authorities of the status of its Minister for Foreign Affairs.

52. In short, given the elements examined so far, one can conclude that separate rules should apply in this case to immunity *ratione personae* and immunity *ratione materiae*. Thus, while in the case of immunity *ratione personae* the immunity of State officials from foreign criminal jurisdiction should be appraised and assessed *proprio motu* by the competent authorities of the forum State, in the case of immunity *ratione materiae*, the authorities will only have to appraise and assess the applicability of immunity when it is invoked expressly by the State of the official. This is the same position that had been taken by the former Special Rapporteur, Mr. Kolodkin.¹²⁴

53. Based on this approach, which calls for differentiated treatment between immunity *ratione personae* and immunity *ratione materiae*, one should conclude that invocation takes on special significance in the case of immunity *ratione materiae*, although this does not rule out the possibility of the State of the official – for various reasons – also invoking the immunity of its Head of State, Head of Government or Minister for Foreign Affairs from criminal jurisdiction. In any event, it is worth noting that the differentiated treatment between immunity *ratione personae* and immunity *ratione materiae* requires that the State of the official be aware of the intention of the authorities of the forum State to exercise any form of jurisdiction over one of its officials, since absent such awareness, the requirement for the State of the official to invoke immunity *ratione materiae* would become impossible to meet. This also imposes the need to consider, in the present report, the issue of communication between the forum State and the State of the official, which is covered in chapter III, section A below.

2. Competence to invoke immunity

54. The assertion that immunity of State officials from jurisdiction is recognized for the benefit of the interests of the State and not of the individual has been a consistent feature in practice,¹²⁵ and has been clearly established by the Commission throughout its work on the present topic.¹²⁶ It therefore seems obvious to admit that it is the State itself, and not its officials, that has the right to make any decision concerning

¹²³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment, *ICJ Reports 2002*, p. 3.

¹²⁴ See [A/CN.4/646](#), paras. 14–28.

¹²⁵ An example from treaty practice alone is offered by the following affirmation in the fourth preambular paragraph of the Vienna Convention on Diplomatic Relations: “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”. Virtually identical wording can be found in the fifth preambular paragraph of the Vienna Convention on Consular Relations, the seventh preambular paragraph of the Convention on Special Missions, and the seventh preambular paragraph of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The *Institut de Droit International* used similar wording in the preamble to its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it declared that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and “not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole” (Vancouver session, 2001, *Yearbook*, vol. 69, p. 742).

¹²⁶ This was already affirmed by the former Special Rapporteur, Mr. Kolodkin, in his reports ([A/CN.4/631](#), para. 19 and [A/CN.4/646](#), para. 15) and has been reiterated by the current Special Rapporteur in her reports (see [A/CN.4/661](#), para. 49).

invocation of immunity, with regard to both the invocation itself and the terms associated with such invocation, including the determination of the acts of the official which, in its estimation, should be protected by immunity from criminal jurisdiction. On that basis, it should be concluded that immunity can only be invoked by the State and not by the official.

55. In any event, this conclusion should be understood in relation to the concept of invocation in the strict sense, namely the formal act by which the State of the official notifies the authorities of the forum State that, in its judgment, its official enjoys immunity, which necessarily has procedural consequences, in particular the obligation for the authorities of the forum State to formally consider the existence of circumstances that would justify the application of such immunity. Nevertheless, it should be borne in mind that, in practice, it is the official over whom the jurisdiction is intended to be exercised who will likely be the first to use his or her status as such to claim that his or her immunity from jurisdiction be recognized. This possibility does not, however, undermine the conclusion set out in the previous paragraph. On the contrary, given that the rights protected by immunity do not belong to the official, his or her claim of immunity cannot be viewed as a true invocation of immunity, but only as an allegation which the authorities of the forum may assess as a fact and which, in any event, they may request the State of the official to confirm or deny. However, such an allegation cannot have the procedural effects of invocation, which would only occur if the State of the official confirms the allegations of its official.¹²⁷

56. While it is admitted that it is for the State of the official to invoke immunity, it is not possible to identify norms that indicate, clearly and unequivocally, which organs of the State can exercise that power. For instance, the international instruments examined above do not contain any rule in that regard, nor is the matter given much attention in national laws governing immunity. It can therefore be deduced, if only from the provisions concerning waivers, understood *a contrario sensu*, that immunity may be invoked by the head of the diplomatic mission, or the person representing the foreign State.¹²⁸ At the same time, judicial practice is also not clear, nor does it provide sufficient elements to help reach a conclusion as to the organs of the State that may invoke the immunity of any of its officials from foreign criminal jurisdiction. Accordingly, it seems necessary to turn to the principle of recognition of the State's right to self-organization which, for the purposes of our study, leads inevitably to the conclusion that it is the domestic order of each State which, as the case may be, will determine the organ that is competent to take the decision to invoke immunity and to make it effective.

57. This conclusion could, however, create some level of uncertainty among the authorities of the forum State, who will have to take into consideration the validity of the invocation without having sufficient information to conclude whether or not the organ invoking the immunity is competent to do so, considering the norms of the applicable domestic law. In any event, given that the organ in question may vary from one legal order to the next, it does not seem advisable to establish a list of competent organs; rather, it is preferable to adopt a formula whereby the authorities of the forum State may assess the validity of invocation on a case-by-case basis, taking into consideration the specific circumstances of each situation. The technique of case-by-case assessment would, nonetheless, be limited by the automatic recognition of the validity of an invocation effectuated by the Head of State, the Head of Government

¹²⁷ See the third report of the former Special Rapporteur, Mr. Kolodkin (A/CN.4/646), para. 15.

¹²⁸ See United Kingdom, State Immunity Act 1978, sect. 2 (7); Singapore, State Immunity Act 1979, sect. 4 (7); Pakistan, State Immunity Ordinance 1981, sect. 4 (6); South Africa, Foreign States Immunities Act 1981, sect. 3 (6); Israel, Foreign States Immunity Law, sect. 9 (c).

or the Minister for Foreign Affairs, or by the head of the diplomatic mission accredited to the State whose authorities intend to exercise jurisdiction.

58. The validity of an invocation of immunity effectuated by one of the members of the *troika* is fully justified by the capacity of such member, under autonomous rules of international law, to represent the State internationally. That capacity cannot be called into question, not even owing to the fact that the member is invoking his or her own immunity, unless it can be demonstrated specifically that a different decision had been taken at the domestic level by any other organ of the State to which the Head of State, Head of Government or Minister for Foreign Affairs is answerable, in particular the parliament, when it has the capacity to decide on the immunity of any of these organs of the executive branch. Although this conclusion may create some confusion between the right of the State to invoke the immunity of its officials and the *prima facie* case for the Head of State, the Head of Government and the Minister for Foreign Affairs to invoke his or her own immunity, such confusion is more theoretical than real and is of little practical relevance, especially considering, as concluded before, that invocation is designed only as a procedural requirement in relation to immunity *ratione materiae*. The assertion that the members of the *troika* are the only ones who, by definition, would be recognized as having the autonomous competence to invoke the immunity of “another” official of the State from foreign criminal jurisdiction does not create any problems.

59. The recognition of the capacity of heads of diplomatic missions accredited to the forum State to invoke the immunity of one of the officials of the sending State serves a separate purpose, one linked to the performance of the mission’s own functions. As established expressly in the Vienna Convention on Diplomatic Relations, the functions of the diplomatic mission consist, *inter alia*, in “representing the sending State in the receiving State” and “protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law”.¹²⁹ Given the expansive definition of these functions, it does not seem possible to exclude therefrom the invocation of immunity of an official of the sending State from foreign criminal jurisdiction, which should undoubtedly be characterized as representing and protecting an interest of the State. It is true that this competence is intricately linked with the issue of the channels of communication between the forum State and the State of the official and that, in principle, it should be understood that the head of mission is not automatically competent to invoke immunity, and that he or she will exercise such power upon instruction from the competent authorities of the State itself. But in any case, there can be no denying that invocation of immunity effectuated by a head of mission in the performance of his or her functions benefits, to say the least, from a presumption of validity, which has to be taken into consideration by the authorities of the forum State that intend to exercise jurisdiction. Consequently, the authorities would have to consider the question of immunity after receiving an invocation of immunity formulated by the head of mission of the State of the official accredited to the forum State.

60. Lastly, the invocation of immunity may well be formulated by any other organ which has been accorded such competence under a special agreement between the forum State and the State of the official, or under cooperation and mutual judicial assistance agreements to which both States are parties. Although this formula will not be the most widespread, its usefulness cannot be overlooked, especially at the present time when the concept of cooperation and mutual judicial assistance is undergoing considerable change at both the bilateral and the multilateral levels. This issue will be addressed below, in chapter III, sections A and B.

¹²⁹ Article 3, paras. 1 (a) and (b).

3. Timing of invocation of immunity

61. The timing of invocation of immunity cannot be addressed as a stand-alone issue, since it is intertwined with the timing of consideration of immunity by the authorities of the forum State. As discussed in the sixth report, immunity should be considered at the beginning of the proceeding, or as soon as the authorities of the forum State express the intention to exercise jurisdiction, because otherwise, immunity would lose its *raison d'être* and would not be fully effective.¹³⁰ Similarly, immunity should be invoked at the initial stages of the proceeding, especially if the invocation of immunity concerns an official who only enjoys immunity *ratione materiae*, which, as concluded above, would only operate subject to its invocation by the State of the official.

62. However, as is the case with the determination of the point at which immunity should be considered, it is also impossible to find rules concerning the point in the proceeding at which immunity should be invoked in international treaties that recognize some form of immunity from jurisdiction for certain State officials, or of a general character in the United Nations Convention on Jurisdictional Immunities of States and Their Property, or in the European Convention on State Immunity. In the last two instruments, the question of the timing of invocation of immunity is codified implicitly, with the participation of the State in a proceeding before the courts of the forum State being treated as a waiver, based on the provision that if the State

satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it [intervened in the proceeding or performed any other act in relation to the merits], it can claim immunity based on those facts, provided it does so at the earliest possible moment.¹³¹

63. The resolution of the *Institut de Droit International* mentioned above also does not provide useful information to resolve this issue expressly, as it only pertains to Heads of State and Government and defines a rule for action *proprio motu* by national courts. However, the provision in its article 6 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” is of interest with regard to invocation of immunity in general. Hence, this provision may be generally applied *mutatis mutandis* from two complementary perspectives: the reference to the initial stages of the proceeding and the express inclusion of the requirement that the court “be aware” of the status of the State official subject to the jurisdiction. This would imply that the State of the official would have to invoke immunity as early as possible, since the court of the forum State would only be compelled to consider the immunity when it becomes aware that the person over whom it intends to exercise jurisdiction is a foreign official.

64. Based on the elements discussed *supra*, one could conclude that there is no rule that limits the point in the proceeding when the State of the official may invoke the immunity for one of its officials, but that for such invocation to be useful and to produce the desired effects, the State should formulate it as soon as it is aware that the authorities of the forum State wish to exercise criminal jurisdiction over one of its officials. Conversely, if it does so at a later stage, it should be concluded – as the

¹³⁰ See A/CN.4/722, paras. 49–63.

¹³¹ United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 8, para. 1 (b). Article 3, para. 1, of the European Convention on State Immunity provides that “[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the Court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.”

former Special Rapporteur, Mr. Kolodkin, had already done – that acts that would have been performed by the authorities of the forum State would be valid and may not be considered a violation of the immunity of the official affected by said acts from foreign criminal jurisdiction.¹³²

65. In any case, all the foregoing reinforces the necessity for the State of the official to be aware of the intention of the authorities of the forum State to exercise jurisdiction over one of its officials.

4. Effects of invocation of immunity

66. By invoking the immunity of one of its officials from foreign criminal jurisdiction, the State concerned is pursuing two goals. First, to draw the attention of the authorities of the forum State that intend to exercise jurisdiction to the presence of a foreign national (the official) who enjoys immunity from jurisdiction. Second, to formally express its interest in the matter, to demand that immunity be respected and, consequently, to request that the authorities of the forum State not exercise any jurisdiction over the foreign official. It should therefore be concluded that the goal pursued by the invocation of immunity is to paralyse the jurisdiction of the authorities of the forum State.

67. The effects of invocation of immunity should be determined in relation to that goal, although they cannot be confused or identified with said goal. However, as noted in the sixth report, the authorities of the forum State should give serious attention to any communication or information from the State of the official, but this cannot be taken to mean that those authorities (especially the courts that are competent to determine immunity) are obliged to blindly accept any claim by the State which the official serves.¹³³ Consequently, invocation of immunity is not, in and of itself, a sufficient element to paralyse foreign criminal jurisdiction, nor can it replace the decision of the courts of the forum concerning the application of immunity. On the other hand, those courts will also not be compelled to automatically accept the claim formulated by the State invoking the immunity of one of its officials.¹³⁴

68. The foregoing does not mean, however, that invocation of immunity is without effect. On the contrary, its effects – which are of special interest in the case of immunity *ratione materiae* – can be felt in three different situations in particular. First, if we consider that, as noted previously, the application of immunity *ratione materiae* is contingent upon the invocation of immunity by the State of the official, the result will be that, following the invocation of immunity, the authorities of the forum State will be obliged to consider the question of immunity and to decide on the application thereof. Consequently, any form of silence or omission by the courts of the forum State on the invocation may constitute a violation of the rules governing immunity. Second, invocation of immunity is expected to also have a substantive effect on the decision-making process of the courts of the forum State, which will be obliged to take into consideration any information and arguments provided by the State of the official upon the invocation of immunity, in order to decide whether or not there are normative elements that would justify the application of immunity. Third, invocation of immunity can serve as the starting point for the implementation of the mechanisms for consultation, cooperation and mutual judicial assistance between the forum State and the State of the official which will be examined in chapter III below. In any event, it should be noted that the effects of invocation of

¹³² See A/CN.4/646, para. 13.

¹³³ A/CN.4/722, para. 107. The former Special Rapporteur, Mr. Kolodkin, had maintained that position in his third report (see A/CN.4/646, para. 30).

¹³⁴ On the determination of immunity, see the sixth report of the current Special Rapporteur (A/CN.4/722), paras. 97–108.

immunity described above can operate differently in relation to immunity *ratione materiae* and immunity *ratione personae*, in particular in respect of the obligation to consider immunity. In the case of immunity *ratione materiae*, that obligation arises only after the invocation of immunity, while in the case of immunity *ratione personae*, the obligation should be fulfilled *proprio motu*, such that invocation will only reinforce the pre-existing obligation. The effects of invocation of immunity that would be produced in the second and third situations will operate in the same manner for any type of immunity from foreign criminal jurisdiction.

69. On the basis of the foregoing analysis, the following draft article is proposed:

Draft article 10

Invocation of immunity

1. A State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction.
2. Immunity shall be invoked as soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official.
3. Immunity shall be invoked in writing and clearly, indicating the identity of the official in respect of whom immunity is being invoked and the type of immunity being invoked.
4. Immunity shall be invoked preferably through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. Immunity may also be invoked through the diplomatic channel.
5. Where immunity is not invoked directly before the courts of the forum State, the authorities that have received the communication relating to the invocation of immunity shall use all means available to them to transmit it to the organs that are competent to determine the application of immunity, which shall decide thereon as soon as they are aware of the invocation of immunity.
6. In any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not.

C. Waiver of immunity

70. Since the immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official, it is obvious that the State may waive that immunity, thereby consenting to the exercise of foreign criminal jurisdiction over one of its officials. In that sense, waiver of immunity by the State of the official invalidates any debate as to the existence or application of immunity and as to the limitations and exceptions thereto. Simply put, this means that the ultimate owner and beneficiary of the immunity waives its right to claim it. Therefore, this is not a true exception to immunity; it is a procedural act that removes any obstacles that might prevent the courts of the forum State from exercising their jurisdiction.

71. By its very nature, waiver of immunity has some unique characteristics that distinguish it from an invocation of immunity, making it imperative that it be treated on its own, considering that what we are faced with is not the supposed exercise of a right (invocation), but the abandonment or non-exercise of such right (waiver), with the consequences outlined earlier. It is not surprising, therefore, that waiver of immunity – unlike invocation thereof – has been codified expressly in international

instruments dealing with immunity from jurisdiction, as well as in relevant national laws, and that the emphasis in those instruments has been on the restrictive character of the forms of waiver of immunity, with a view to maintaining legal certainty.

72. The Commission addressed the issue of waiver of immunity for certain State officials in its work on diplomatic relations,¹³⁵ on consular relations,¹³⁶ on special missions,¹³⁷ and on representation of States in their relations with international organizations of a universal character.¹³⁸ In all those cases, the Commission concluded that the State of the official may waive the official's immunity and that said waiver shall be express. In any event, it should be noted that waiver is designed in all the draft articles as a power of the State of the official, and there is no obligation for said immunity to be waived, regardless of the seriousness of the facts allegedly imputed to the official. The Commission contemplated the obligation for a State to waive the immunity of its officials only in relation to civil claims, thus following the model of article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations, which provides that

a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.¹³⁹

73. That model served as the inspiration for article 42 of the draft articles on special missions and article 31, paragraph 5, of the draft articles on the representation of States in their relations with international organizations, in which the obligation to waive was replaced by a recommendation. In the first case, the provision is that "when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims". In the second case, the stipulation is that if the sending State "does not waive the immunity [...] in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case".¹⁴⁰

74. The same provision was included in the conventions that were adopted on the basis of those draft articles, an example being article 32 of the Vienna Convention on Diplomatic Relations, which states that:

¹³⁵ Article 30 of the draft articles on diplomatic intercourse and immunities (*Yearbook ... 1958*, vol. II, p. 99) was worded as follows: "*Waiver of immunity*. 1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State. 2. In criminal proceedings, waiver must always be express."

¹³⁶ Art. 45 of the draft articles on consular intercourse and immunities *Yearbook ... 1961*, vol. II, p. 118) was worded as follows: "Waiver of immunities. 1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in arts. 41, 43 and 44. 2. The waiver shall in all cases be express."

¹³⁷ Art. 41 of the draft articles on special missions (*Yearbook ... 1967*, vol. II, p. 365) was worded as follows: "Waiver of immunity. 1. The sending State may waive the immunity from jurisdiction of its representatives in the special mission, of the members of its diplomatic staff, and of other persons enjoying immunity under arts. 36–40. 2. Waiver must always be express."

¹³⁸ Art. 31 of the draft articles on the representation of States in their relations with international organizations (*Yearbook ... 1971*, vol. II (Part I), pp. 304) was worded as follows: "*Waiver of immunity*. 1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under art. 36 may be waived by the sending State. 2. Waiver must always be express (...)"

¹³⁹ 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.

¹⁴⁰ Respectively, art. 42 (*Yearbook ... 1967*, vol. II, p. 379; and art. 31, para. 5, (*Yearbook ... 1971*, vol. II, Part One), p. 304. In the case of special missions, this provision is set out under the heading "Settlement of civil claims".

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
2. Waiver must always be express.

This provision was repeated virtually unchanged in the Vienna Convention on Consular Relations (art. 45),¹⁴¹ in the Convention on Special Missions (art. 41), and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 31). With regard to the latter, attention should be drawn to the special provision contained in its article 31, paragraph 5, which establishes, however, that “if a sending State does not waive the immunity [...] in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case”.

75. On a separate matter, the Commission also addressed waiver of immunity in its work concerning State immunity, although it did so in that case only indirectly by listing a series of scenarios in which a waiver should be taken to mean automatically that the foreign State has consented to the exercise of jurisdiction by the courts of the forum State.¹⁴² This approach was also followed in the conventions mentioned *supra*¹⁴³ and was reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property, articles 7 to 9 of which set out special scenarios of implied waiver of immunity.

76. In a matter closer to the present topic, the *Institut de Droit International* had addressed the issue of waiver (or lifting) of immunity in two resolutions adopted in 2001 and 2009. In the first resolution, devoted to immunities from jurisdiction and execution of Heads of State and of Government, it grants the State of such officials the right to waive immunity, stating that such waiver may be explicit or implied, provided it is certain,¹⁴⁴ and that immunity may be subject to derogation, provided

¹⁴¹ According to para. 2 of the art., “the waiver shall in all cases be express, except as provided in paragraph 3 of this art. [counter-claim], and shall be communicated to the receiving State in writing”.

¹⁴² Article 7 of the draft articles on the jurisdictional immunities of States and their property provides that “1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding” (*Yearbook ... 1991*, vol. II (Part Two), pp. 26 and 27). See also arts. 8 and 9 (*ibid.*, pp. 30–35).

¹⁴³ All these cases involve the impossibility of invoking immunity if the State official has filed a claim which has given rise to a counterclaim. This operates only in the case of immunity from civil or administrative jurisdiction.

¹⁴⁴ Article 7 of the resolution of the *Institut de Droit International* on immunities from jurisdiction and execution of Heads of State and of Government in international law (Vancouver session, 2001, *Yearbook*, vol. 69, p. 748) reads as follows: “1. The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver. 2. Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take”.

this is by agreement.¹⁴⁵ In any case, waiver is also designed as a right of the State of the official, which can only be constrained by its own individual or general will (special agreements). That approach did not change in any way following the adoption in 2009 of the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which, however, introduced a new element with the stipulation in its article II, paragraph 3, that “States should consider waiving immunity where international crimes are allegedly committed by their agents”.¹⁴⁶

77. The question of waiver of immunity has also been addressed in national laws concerning State immunity. A waiver may be contemplated or effectuated once proceedings have been initiated; it is not presumed, even when it is understood that it has been tacitly effectuated where the foreign State participates in the proceedings; it is not revocable, even though it may be subject to limitations or exclusions based on its content.¹⁴⁷

78. The question of waiver of immunity has also been raised before national and international courts.¹⁴⁸ In this connection, special reference should be made to the judgment of the International Court of Justice in the *Arrest Warrant* case, where the Court said unequivocally that officials “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”.¹⁴⁹

79. Although the power of the State of the official to waive immunity has not been called into question in the literature or in national practice, the delimitation of its contours is not always easy. In any case, it must be noted that the delimitation of the meaning and extent of a waiver of immunity is of particular importance for the present topic. For that reason, the following issues relating to waiver of immunity with a special practical dimension are examined below: (a) the organs competent to waive immunity, (b), the form that a waiver should take, and (c) the substantive and temporal effects of a waiver.

¹⁴⁵ Naples session, 2009, *Yearbook*, vol. 73, p. 229. Article 8 of the 2001 resolution states that “1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means” (Vancouver session, 2001, *Yearbook*, vol. 69, p. 748).

¹⁴⁶ This recommendation runs parallel to the provision in paragraph 2 of the same art., which states that “pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this resolution are entitled” (Naples session, 2009, *Yearbook*, vol. 71, p. 229).

¹⁴⁷ See: United States, Foreign Sovereign Immunities Act 1976, Sect. 1605A; United Kingdom, State Immunity Act 1978, sect. 1 (2); Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sects. 10, 3 and 6. Canada, State Immunity Act 1985, sect. 4 (2); Israel, Foreign States Immunity Law 2008, sects. 9 and 10. Japan, Civil Jurisdiction of Japan with respect to a Foreign State Act 2009, art. 6. Spain, Organic Act No. 16/2015, arts. 5, 6 and 8.

¹⁴⁸ The manner in which the waiver of immunity of State officials has been handled by national courts was examined in the memorandum by the Secretariat (A/CN.4/596, paras. 246 et seq.) and in the third report of the former Special Rapporteur, Mr. Kolodkin (A/CN.4/646, paras. 33 et seq.), and to which the current Special Rapporteur refers.

¹⁴⁹ *Arrest warrant of 11 April 2000* (see footnote 123 *supra*) para. 61.

1. Organs competent to waive immunity

80. As is the case with invocation and for the same reasons, a waiver of immunity may be effectuated only by the State of the official and not by the official himself or herself. Therefore, the question of which organs are competent to exercise this power arises here also, since there is no clear indication either in international instruments or in the laws analysed which organs of the State are competent to make decisions on waiving immunity,¹⁵⁰ with the exception of certain laws in which express reference is made to a waiver effectuated by a head of diplomatic mission accredited to the forum State.¹⁵¹ The resolutions of the *Institut de Droit International* are also silent on this question, and contain references only to the national laws of the State of the official.¹⁵²

81. Furthermore, the scant case law in this area also makes it impossible to infer a clear rule on identifying competent organs. Rather, in the few cases in which the question has been raised before them, national courts have accepted a waiver effectuated by different organs, including the Minister of Justice and a head of diplomatic mission.¹⁵³ In addition, the question has not been raised before the international courts that have dealt with this type of immunity.

82. Therefore, the general conclusions set out above in relation to invocation of immunity are fully applicable to waiver thereof, both with regard to the primacy of the principle of the organizational autonomy of States and the need to analyse the issue case by case, and with regard to the presumption of validity of a waiver effectuated by the Head of State, Head of Government, Minister for Foreign Affairs or head of a diplomatic mission.¹⁵⁴ However, the question of waiver effectuated by a Head of State, Head of Government or Minister for Foreign Affairs raises a particular

¹⁵⁰ The Commission itself, as early as its draft articles on diplomatic intercourse and immunities, preferred to leave open the question of which organs were competent to waive the immunity of diplomatic agents. When it adopted the text of article 30 on second reading, it decided to amend the wording of paragraph 2 adopted on first reading by deleting the last phrase of the paragraph, which read as follows: "by the Government of the sending State". The Commission explained the decision thus: "[t]he Commission decided to delete the phrase 'by the Government of the sending State', because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission" (*Yearbook ... 1958*, vol. II, p. 99, para. 2). Similarly, the Commission stated the following in relation to article 45 of the draft articles on consular relations: "[t]he text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned" (*Yearbook ... 1961*, vol. II, p. 118, para. (2) of the commentary to article 45).

¹⁵¹ See United Kingdom, State Immunity Act 1978, section 2 (7); Singapore, State Immunity Act 1979, section 4 (7); Pakistan, State Immunity Ordinance 1981, section 4 (6); South Africa, Foreign States Immunities Act 1981, section 3 (6); Israel, Foreign States Immunity Law, section 9 (c).

¹⁵² See 2001 resolution (Vancouver session, 2001, *Yearbook*, vol. 69, p. 748), art. 7, para. 1.

¹⁵³ In the United States, the waiver was effectuated by the Attorney General in the case of *Paul v. Avril* (United States District Court for the Southern District of Florida, 812 F. Supp. 207) and in Belgium by the Minister of Justice in the *Hissène Habré* case. In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police*, the courts did not consider the question of which ministries were competent, merely noting that it was enough that they were government organs, and thus accepted a communication sent by the diplomatic mission of the Philippines accredited in the United States of America.

¹⁵⁴ See, in this chapter, section A, subsection 2, *supra*.

problem in that waiver is subject to common rules, irrespective of whether it pertains to immunity *ratione personae* or immunity *ratione materiae*. In the case of immunity *ratione personae*, a waiver effectuated by a Head of State, Head of Government or Minister for Foreign Affairs could be confused with a waiver effectuated by the official who enjoys immunity. Although this is an extremely hypothetical possibility, there is no doubt that, if it arose, it would also inescapably be subject to the principle of case-by-case assessment of the competence of the organ effectuating the waiver, which would negate the presumption of validity of the waiver. In this case, as the former Special Rapporteur, Mr. Kolodkin, previously pointed out, it should perhaps be presumed that the State of the official has the same status as its Head of State, Head of Government and Minister for Foreign Affairs, unless otherwise communicated to the forum State.¹⁵⁵

2. Form that the waiver should take

83. The need to maintain legal certainty and the limiting effect of waiver of immunity on the rights of the State of the official have led to a majority view in practice that waiver of immunity must, as a rule, be express. This is reflected in the Commission's previous work, in international conventions and in national laws relating to immunity.¹⁵⁶ Only the *Institut de Droit International*, in its 2001 resolution, provides that waiver of the immunity of the Head of State or Head of Government from jurisdiction may be "explicit or implied, provided it is certain".¹⁵⁷ National case law provides no useful information, since the issue has been addressed mainly in the context of civil proceedings. Furthermore, no conclusive view of national criminal courts can be identified from criminal cases in which the issue has arisen, including the *Pinochet* (No. 3) case before the House of Lords, which in its judgment raised the issue of implied waiver of immunity; however, the argument was not supported by a majority of the judges, nor was it a decisive factor in the court's final ruling.¹⁵⁸

84. In any case, it should be borne in mind that, in cases of immunity from criminal jurisdiction, the principles of legality and legal certainty must play a prominent role. From that perspective, it seems reasonable to conclude that a waiver of immunity by the State of the official should be clear and unequivocal, so that there can be no doubt about the scope of the waiver or about the persons, acts or types of immunity to which it applies.¹⁵⁹ On the basis of these premises, and in accordance with the Commission's

¹⁵⁵ See A/CN.4/646, para. 38.

¹⁵⁶ Article 27 of Organic Act No. 16/2015 of Spain provides for such express waiver in relation to the immunity of the Head of State, Head of Government and Minister for Foreign Affairs.

¹⁵⁷ Article 7, para. 1, Vancouver session, 2001, *Yearbook*, vol. 69, p. 748.

¹⁵⁸ See the discussion of waiver of immunity in the *Pinochet* (No. 3) case in the memorandum by the Secretariat (A/CN.4/596, paras. 259–263).

¹⁵⁹ Three examples of clear waivers included in the memorandum by the Secretariat (A/CN.4/596, paras. 252 and 253). In the case of *Paul v. Avril*, the Minister of Justice of Haiti stated that "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before court before and after judgment" (United States District Court for the Southern District of Florida, 812 F. Supp. 207, p. 211). In the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police*, the waiver submitted by the Philippines read as follows: "The Government of the Philippines hereby waives all (1) State, (2) head of State or (3) diplomatic immunity that the former President of the Philippines, Ferdinand Marcos, and his wife, Imelda Marcos, might enjoy or might have enjoyed on the basis of American law or international law [...] This waiver extends to the prosecution of Ferdinand and Imelda Marcos in the above-mentioned case (the investigation conducted in the southern district of New York) and to any criminal acts or any other related matters in connection with which these persons might attempt to refer to their immunity" (Federal Supreme Court of

previous pronouncements, it must be concluded that waiver of immunity from foreign criminal jurisdiction must be express and must be effectuated in an irrefutable form, preferably in writing. It is not, however, possible to identify a specific form that must be used for every waiver, as this will depend on the particular circumstances in which it is effectuated. Thus, nothing would prevent the waiver from being effectuated through a note verbale, a letter or a non-diplomatic document addressed to the authorities of the forum State, or through a procedural act or document, or even through any other document in which the State's will to waive the immunity of its official from foreign criminal jurisdiction is stated expressly, clearly and irrefutably.¹⁶⁰

85. This conclusion makes it necessary to examine, albeit briefly, three cases in which there is a question as to whether or not an act meets the requirements to be considered a waiver, namely: appearance before the authorities exercising jurisdiction; inclusion in international agreements and treaties of obligations requiring the exercise of criminal jurisdiction over a foreign national; and non-invocation of immunity.

86. Appearance of the foreign State before the courts of the forum State is one of the acts that have traditionally been considered a form of waiver of immunity from jurisdiction, both in the context of certain types of immunity of State officials and in the context of immunity of the State itself.¹⁶¹ Since such appearance involves the performance of procedural acts under a particular State jurisdiction, it must be taken, in principle, as an act of recognition of that jurisdiction, except, logically, where its sole purpose is to contest the court's competence through an invocation of immunity. However, in the case of foreign criminal jurisdiction, it will be very difficult in practice for the scenario of "implied waiver", or "explicit acceptance" of the forum State's jurisdiction, to occur. Perhaps the only exception would be where proceedings have been instituted at the request of the State of the foreign official; in that case, although the normative elements of immunity of State officials from foreign criminal jurisdiction (*ratione personae* or *ratione materiae*) may be present, the State's interest in prosecuting its own official would run counter to the institution of immunity and would completely negate its very purpose, namely to protect the rights and interests of the foreign State. Although it would be debatable whether or not such a case involves immunity of State officials from foreign criminal jurisdiction, what is certain is that the denunciation by the State of the official would, in any case, have to be

Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police (recours de droit administratif)*, judgment of 2 November 1989, ATF 115 Ib 496, p. 501 and 502). In the case against Hissène Habré in Brussels, the Ministry of Justice of Chad expressly waived immunity in the following terms: "The National Sovereign Conference, held in N'Djamena from 15 January to 7 April 1993, officially waived any immunity from jurisdiction with respect to Mr. Hissène Habré. This position was confirmed by Act No. 010/PR/95 of 9 June 1995, which granted amnesty to political prisoners and exiles and to persons in armed opposition, with the exception of 'the former President of the Republic, Hissène Habré, his accomplices and/or accessories'. It is therefore clear that Mr. Hissène Habré cannot claim any immunity whatsoever from the Chadian authorities since the end of the National Sovereign Conference" (letter from the Minister of Justice of Chad addressed to the investigating of the district of Brussels, 7 October 2002).

¹⁶⁰ By way of example, waiver of immunity has been communicated to the courts by means of a note verbale (in the case of *Ferdinand et Imelda Marcos c. Office fédérale de la Police*) or by means of a letter or document of the Ministry of Justice (the *Paul v. Avril* and *Hissène Habré* cases).

¹⁶¹ See Vienna Convention on Diplomatic Relations, art. 32, para. 3; Vienna Convention on Consular Relations, art. 45, para. 3; Convention on Special Missions, art. 41, para. 3; Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 31, para. 3; and the United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 8.

taken as a waiver of any form of immunity for the official that could arise at any point in the proceedings.¹⁶²

87. Both in the Commission's previous work on this topic¹⁶³ and in the literature, it has been suggested that certain provisions contained in international treaties may be considered to be forms of waiver of immunity from jurisdiction. For that to be the case, the waiver of immunity must be clear and unequivocal in the treaty from which it is claimed to be deduced. This condition would be met if the text of the treaty contains an express provision on waiver of immunity or on the lifting or non-applicability of immunity from the jurisdiction of the other States parties. It would also be met if it could be clearly deduced from the treaty that the States parties have an obligation to cooperate in an unrestricted manner to prosecute any person who is subject to their jurisdiction or is a national of theirs (including a State official) and the State of the official does not exercise its own jurisdiction. However, it is more debatable whether waiver of immunity from foreign criminal jurisdiction can be derived from treaty provisions of general scope, such as the obligation of States parties to exercise jurisdiction in respect of certain crimes (in particular crimes under international law), the *aut dedere aut judicare* obligation, and the obligation to cooperate with an international criminal court.

88. The obligation of States parties to exercise jurisdiction in respect of certain crimes means that the States parties (in this case the forum State and the State of the official) must "criminalize" certain acts in their domestic law and establish procedural rules that allow them to exercise jurisdiction, but does not necessarily imply that the State of the official waives its right to assert that it, and no other State, is entitled to exercise jurisdiction over crimes where the perpetrator is one of its officials that enjoys immunity. In this case, in order to ensure an appropriate balance between the protection of the principle of sovereign equality and the protection of other legal values and principles, the State of the official will be obliged to exercise its jurisdiction in respect of its own officials; however, it is difficult to conclude that this general obligation can automatically be regarded as a waiver of the immunity of such officials from foreign criminal jurisdiction.¹⁶⁴

89. Furthermore, the International Court of Justice has ruled out that possibility, stating the following in its judgment in the *Arrest Warrant* case:

Although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.¹⁶⁵

90. This conclusion is also relevant for the purpose of determining whether the *aut dedere aut judicare* obligation, where included in a treaty, can be interpreted as a waiver of immunity. As the International Court of Justice indicated in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*,

¹⁶² See the analysis of this issue in the memorandum by the Secretariat (A/CN.4/596), para. 258, and in particular footnote 762 (in which reference is made to the report of Mr. Verhoeven, which provided the basis for the adoption of the 2001 resolution of the *Institut de Droit International*).

¹⁶³ See *ibid.*, paras. 250–264, and A/CN.4/646, para. 44.

¹⁶⁴ See also the discussion of this question in the fifth report of the Special Rapporteur from the perspective of limitations and exceptions to immunity (A/CN.4/701), paras. 215 and 216.

¹⁶⁵ See *Arrest Warrant of 11 April 2000* (see footnote 123 *supra*), para. 59.

if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention [against Torture], it can relieve itself of its obligation to prosecute by acceding to that request.¹⁶⁶

91. Although this ruling pertains to obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶⁷ it also gives an adequate description of the operation of the *aut dedere aut judicare* obligation, as a mechanism that plays a special role in the context of international cooperation and mutual assistance. Applying this model to the matter at hand, it can be concluded that, if the forum State requests the extradition of the foreign official, the State of the official will be under an obligation to choose between prosecuting that official and acceding to the request for extradition addressed to it by the forum State. In order to make a decision, the requested State may bring up the fact that the individual whose extradition is requested is or had been an official of a third State and thus offer that the requesting State transfer the case to it so that it may exercise criminal jurisdiction itself. In a sense, this is the situation that occurred in Portugal pursuant to the judgment of the Court of Appeal of Lisbon of 10 May 2018, which will be analysed below.¹⁶⁸ However, it is difficult to conclude that the mere inclusion in a treaty of the *aut dedere aut judicare* obligation must automatically be interpreted as a waiver of immunity.

92. Evaluating whether the obligation to cooperate with an international criminal court implies a waiver of immunity on the part of the State of the official requires a more nuanced analysis. The issue has been the subject of academic debate since the time of adoption of the Rome Statute and has become a real practical issue, reflected in the decisions adopted by the International Criminal Court in relation to the non-compliance by a number of States with the request to arrest and surrender to the Court the President of the Sudan, Omar Al-Bashir. The issue culminated in an appeal by Jordan against the decision of Pre-Trial Chamber II to refer to the Assembly of States Parties, under article 87, paragraph 7, of the Rome Statute, the alleged non-compliance by Jordan with its obligation to cooperate with the Court.¹⁶⁹

93. In the hearings in that case before the International Criminal Court held in September 2018, one of the questions that arose was whether articles 98 and 27 of the Rome Statute, taken together, had given rise to a waiver of immunity of State officials from foreign criminal jurisdiction. This question has already been considered in the fifth report from the perspective of limitations and exceptions to immunity,¹⁷⁰ but the Commission's discussions on the issue cannot be considered conclusive. However, both the Prosecutor of the Court and various participants in the hearings – including a number of members of the Commission – spoke on the issue, referring in some cases to the Commission's work, with different interpretations and conclusions. Since the case was still *sub judice* by the time the present report was completed, it was not considered appropriate to conduct a detailed analysis of the issue raised in the preceding paragraph before the Court issued its decision. However, the Commission

¹⁶⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment, ICJ Reports 2012, pp. 422 et seq., especially p. 456, para. 95.

¹⁶⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

¹⁶⁸ See chap. III, sect. C, *infra*.

¹⁶⁹ See para. 17 *supra*. Article 87, paragraph 7, provides: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

¹⁷⁰ See A/CN.4/701, paras. 156–169.

should be aware that the issue was hotly debated, and the Special Rapporteur reserves the right to return to it at a later stage of the work on the present topic.

94. It is important to note that in some cases, non-invocation of immunity has been taken as an implied waiver, on the basis that the State is entitled to immunity and that, if it does not invoke it, that is because it has decided to waive it. Although this argument may seem persuasive and could be considered to go some way towards resolving an issue that arises in the debate on the scope of immunity,¹⁷¹ it also raises serious difficulties, particularly because it does not take into account the distinction between immunity *ratione personae* and immunity *ratione materiae*, and also avoids the issue of the meaning and legal effect of a State's silence or inaction.

95. It is clear that the distinction between immunity *ratione personae* and immunity *ratione materiae* necessarily has implications for the relationship between invocation and waiver of immunity. In the case of immunity *ratione personae*, non-invocation of immunity cannot under any circumstances be taken as a waiver of immunity, since the courts of the forum State must assess the question *proprio motu*. Therefore, for this type of immunity, waiver bears no relation to invocation and must be express. In the case of immunity *ratione materiae*, on the other hand, since the courts of the forum State will have to consider and apply immunity only if the State of the official invokes it, it would be appropriate to determine whether there is a relationship between waiver and invocation. However, any such relationship does not necessarily mean that a failure to invoke may be regarded as an implied waiver.¹⁷² For this to be the case, the State of the official would, first, have to be aware that the authorities of the forum State intend to exercise criminal jurisdiction over one of its officials and, second, have to consider that its official enjoys immunity in that specific case. Only then could the inaction of the State of the official be interpreted as a waiver of the immunity of its official from foreign criminal jurisdiction, because the State would be aware of the intention to exercise that jurisdiction and of the fact that immunity will not be considered or applied if the State does not invoke it. In other cases, it would be difficult to conclude that non-invocation is equivalent to waiver of immunity and, therefore, the path to invoking it would remain open.

96. Bearing in mind the foregoing, it can be concluded that waiver of immunity must be express and certain, irrespective of the fact that it may be effectuated through different formulations.

3. Effects of waiver of immunity

97. As already indicated, the immediate effect of a waiver of immunity from foreign criminal jurisdiction is that the State consents to the exercise of foreign criminal jurisdiction over one of its officials, thereby nullifying any debate as to the existence or application of immunity and limitations or exceptions thereto. Since this involves the waiver of a right of the State, the scope of the effect will have to be analysed case by case in the light of the means used to effectuate the waiver, with a view to identifying the official and the jurisdictional acts concerned.¹⁷³

¹⁷¹ In particular supporting the thesis that immunity is absolute and that the only limitation thereto is waiver by the State of the official, whether in express form or in the implied form of not invoking it in a specific case.

¹⁷² In a similar vein, see the third report of the former Special Rapporteur, Mr. Kolodkin, in which he drew attention to the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which the Court refers to the non-invocation of the immunity of certain officials of Djibouti, but in no way identifies this as a waiver of that immunity (A/CN.4/646, para. 54).

¹⁷³ See memorandum by the Secretariat (A/CN.4/596), para. 269.

98. In any case, a waiver must be taken to refer to the criminal process and criminal proceedings as an indivisible whole. Therefore, from the moment that the waiver is effectuated, it will apply both to acts carried out as part of a judicial investigation and to the different stages of criminal proceedings, which include not only proceedings in a trial court but also proceedings that may result following an appeal against the trial court's decision. This conclusion has already been supported by the Commission¹⁷⁴ and no new information can be identified that would justify a change of position. Furthermore, this principle of continuity of the effects of a waiver takes on particular significance in the case of immunity from foreign criminal jurisdiction, in which the distinction between immunity from jurisdiction and immunity from execution cannot be understood in the same way as it is in the case of State immunity. It thus seems reasonable to conclude that, once immunity from foreign criminal jurisdiction has been waived, the waiver will apply both to the prosecution of the official in the strict sense and to other acts involving any type of measure of execution in respect of the person of the official and his or her property taken at the time and in the context of the exercise of criminal jurisdiction. This conclusion is clear in the case of measures arising from a conviction on the merits, but it will also be applicable in respect of certain measures that have already been analysed in the sixth report, in particular the detention of the official and precautionary measures that may be ordered in respect of the official and his or her property during court proceedings.¹⁷⁵

99. That said, in order to properly delineate the effects of waiver of immunity, the timing of the waiver should be analysed in this context. To that end, it should first be emphasized that different treaties and other international instruments in which reference is made to waiver of immunity from jurisdiction do not specify the timing of such waiver, and the same applies to national laws concerning immunity. There have also been no express rulings on this question in national or international case law, and the comments from States also provide no additional useful information on the issue. It must therefore be concluded that immunity may be waived at any time, although a waiver will be most effective only if it is effectuated at an early stage of criminal proceedings. Otherwise, the authorities of the forum State will have to consider the question of immunity and rule on its application. However, this does not prevent a waiver from being effectuated later, whether on the initiative of the State of the official or at the request of the forum State, or as a consequence of some kind of agreement reached between the two States.

100. In any case, a waiver of immunity will produce effects only from the moment that it is effectuated. Therefore, until that moment, the authorities of the State will have to take into consideration the question of the immunity of the foreign official in relation to any form of exercise of its criminal jurisdiction. Conversely, once the waiver has been effectuated, its effect will be projected into the future and the question of immunity will cease to act as a bar to the exercise of criminal jurisdiction by the authorities of the forum State. In this context, the question has been raised in the Commission's previous work as to whether or not such waiver may be revoked. Although there is no practice in this regard, given the nature of waiver of immunity, its effects on the right of the forum State to exercise its jurisdiction and the need to ensure respect for the principle of legal certainty, it must be concluded that waiver of immunity is irrevocable. This conclusion will be applicable only to the specific case to which the waiver of immunity pertains; therefore, in the event of an intention to

¹⁷⁴ In the commentary to the draft articles on diplomatic intercourse and immunities, the Commission stated that "it goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance" (*Yearbook ... 1958*, vol. II, p. 99, para. (5) of the commentary to article 30).

¹⁷⁵ A/CN.4/722, paras. 60–79 and 90–96.

exercise criminal jurisdiction in respect of new acts distinct from those to which the waiver pertains, the question of the immunity of the State official from foreign criminal jurisdiction will have to be considered again by the authorities of the forum State.

101. To conclude the consideration of waiver of immunity, it should be reiterated that only a waiver can produce effects; no autonomous legal effect (distinct from the obligation to consider the application of immunity on the part of the forum State) may be deduced from the decision of the State of the official not to waive immunity despite the request of the forum State that it do so. In relation to this question, the Commission should, however, recall the proposal presented by one of its members in 2017 during the discussion on limitations and exceptions to immunity. The proposal was put forward orally by Mr. Nolte as follows:

The State of the official shall either waive immunity or submit the case for prosecution before its own courts in relation to the following alleged crimes:

- (a) Genocide, crimes against humanity, war crimes, and torture;
- (b) [Possible other crimes].¹⁷⁶

102. This proposal was actually an alternative to draft article 7 as proposed by the Special Rapporteur in her fifth report. From that perspective, it could have afforded some importance to the decision not to waive immunity, which, however, became meaningless once the Commission provisionally adopted draft article 7. For that reason, the proposal has not been considered in the present report.

103. On the basis of the foregoing, the following draft article is proposed:

Draft article 11
Waiver of immunity

1. A State may waive the immunity of its officials from foreign criminal jurisdiction.
2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.
3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.
4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.
5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.
6. Waiver of immunity is irrevocable.

¹⁷⁶ [A/CN.4/SR.3365](#).

Chapter III

Procedural safeguards operating between the forum State and the State of the official

104. In the debates on immunity of State officials from foreign criminal jurisdiction, both the members of the Commission and States have mentioned the need to include procedural safeguards in the work on the topic, both in general terms and, in particular, in relation to the possible application of the limitations and exceptions listed in draft article 7. However, the term “procedural safeguards” has not always been used with the same meaning, making it difficult to identify which instruments should be covered by this generic term and should thus be reflected in the draft articles.

105. In the Special Rapporteur’s view, the procedural safeguards to be included in the draft articles should be identified in the light of the purpose for which they are established. From a general perspective, this purpose is none other than to ensure the necessary balance between respect for the principle of sovereign equality as it pertains to the State of the official (in the form of the claim of immunity of its official) and respect for the same principle as it pertains to the forum State (in the form of the right to exercise its jurisdiction). There is also a need to ensure that the forum State does not exercise its jurisdiction in an abusive or politically motivated manner and that the State of the official does not use the institution of immunity fraudulently, for the sole purpose of releasing its official, whatever the circumstances, from any form of criminal responsibility.

106. Procedural safeguards should be understood, therefore, as instruments of a procedural nature that make it possible to achieve the objectives set out above, which, for the purposes of the present topic, consist of a set of specific purposes and objectives that can be summarized as follows:

- (a) Ensuring that the State of the official is fully aware that the forum State intends to exercise some form of foreign criminal jurisdiction over the official, so that it can determine its position in that regard;
- (b) Ensuring that the forum State is able to obtain from the authorities of the State of the official the information necessary in order to rule on the applicability of immunity;
- (c) Facilitating the use of procedural instruments that enable, where applicable, the exercise of criminal jurisdiction, whether by the forum State or by the State of the official; and
- (d) Facilitating consultations between the forum State and the State of the official with regard to any question or difference that may arise during the process of determining and applying immunity.

107. In order to achieve these objectives, it is necessary to examine four types of activities that can be considered “procedural safeguards”, namely:

- (a) Notification of the State of the official that the authorities of the forum State intend to exercise criminal jurisdiction;
- (b) Requests for and exchange of information;
- (c) Transfer of criminal proceedings to the State of the official; and
- (d) Consultations between the forum State and the State of the official.

108. These “procedural safeguards” must be considered chiefly in the context of the international systems of legal cooperation and mutual assistance. This will make it

possible to define the safeguards on the basis of categories and institutions that States are aware of and familiar with, thus facilitating their potential application. For that reason, this chapter was prepared on the basis of a comparative study of the main international instruments on cooperation and mutual assistance in criminal matters, both global and regional. The following instruments were considered:

- The European Convention on Mutual Assistance in Criminal Matters of 20 April 1959¹⁷⁷ and its two additional protocols;¹⁷⁸
- The European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972;¹⁷⁹
- The European Convention on Extradition of 13 December 1957¹⁸⁰ and its four additional protocols;¹⁸¹
- The Inter-American Convention on Mutual Assistance in Criminal Matters of 23 May 1992;¹⁸²
- The Inter-American Convention on Extradition of 25 February 1981;¹⁸³
- The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000;¹⁸⁴
- Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;¹⁸⁵
- The Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries of 23 November 2005;¹⁸⁶
- The Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries of 23 November 2005;¹⁸⁷
- The Model Treaty on Mutual Assistance in Criminal Matters of 14 December 1990;¹⁸⁸
- The Model Treaty on the Transfer of Proceedings in Criminal Matters of 14 December 1990;¹⁸⁹
- The Model Treaty on Extradition of 14 December 1990.¹⁹⁰

109. In addition, account has been taken of various international treaties on the prevention and punishment of international crimes which, although they do not relate

¹⁷⁷ United Nations *Treaty Series*, vol. 472, No. 6841, p. 185.

¹⁷⁸ Council of Europe, *European Treaty Series*, Nos. 99 and 182.

¹⁷⁹ United Nations *Treaty Series*, vol. 1137, No. 17825, p. 29.

¹⁸⁰ *Ibid.*, vol. 359, No. 5146, p. 273.

¹⁸¹ Additional Protocol, *ibid.*, vol. 1161, No. 5146, p. 450; Second Additional Protocol, *ibid.*, vol. 1496, No. 5146, p. 328; Third Additional Protocol, *ibid.*, vol. 2838, No. 5146, p. 183; Fourth Additional Protocol, *ibid.*, No. 5146.

¹⁸² Organization of American States, *Treaty Series*, No. 75.

¹⁸³ United Nations *Treaty Series*, vol. 1752, No. 30597, p. 177.

¹⁸⁴ *Official Journal of the European Communities* C 197/1, 12 July 2000.

¹⁸⁵ *Official Journal of the European Union* L 328/42, 15 December 2009.

¹⁸⁶ Available in Portuguese at www.cplp.org.

¹⁸⁷ *Ibid.*

¹⁸⁸ General Assembly resolution 45/117, of 14 December 1990, amended by General Assembly resolution 53/112, of 9 December 1998.

¹⁸⁹ General Assembly resolution 45/118, of 14 December 1990.

¹⁹⁰ General Assembly resolution 45/116, of 14 December 1990, amended by General Assembly resolution 52/88, of 4 February 1998.

exclusively to cooperation and international legal assistance, contain provisions that are of interest for the consideration of the procedural safeguards that are analysed in this chapter. They include the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁹¹ the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁹² the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁹³ Similarly, consideration was given to the Commission's work on specific issues that may have some relevance to this issue, in particular its work on the draft Code of Crimes against the Peace and Security of Mankind, on the establishment of an international criminal court and on crimes against humanity, to which appropriate reference is made when one of their provisions or the Commission's commentaries are deemed relevant. Account was also taken of the Rome Statute, which, although it relates to cooperation between the International Criminal Court and the courts of States parties, contains a well-developed model for cooperation that may be useful for the purposes of the present report.

110. On that basis, the following issues are examined below: (a) notification of the State of the official of the intention to exercise criminal jurisdiction; (b) exchange of information between the forum State and the State of the official; (c) transfer of criminal proceedings to the State of the official; and (d) consultations. Recourse to any of these instruments is based on the assumption that channels of communication exist between the forum State and the State of the official. It has therefore not been deemed necessary to analyse this question independently; rather, the question has been considered specifically, where necessary, in relation to each of the issues referred to above.

A. Notification of the State of the official of the intention to exercise criminal jurisdiction

111. It is generally accepted that State officials are afforded immunity from foreign criminal jurisdiction for the benefit of the State. Therefore, as already argued above, it will be for the State and not the official to decide on the invocation and waiver of immunity; it will also be for the State to decide on the form and means to be used to demand that the immunity of one of its officials be respected. However, in order to exercise these powers, it will have to be aware that the authorities of a third State intend to exercise that State's own criminal jurisdiction over one of its officials. It is therefore necessary to examine, in the context of procedural safeguards, the question of notification of the State of the official that the forum State intends to exercise criminal jurisdiction over that official.

112. As the starting point for this analysis, attention must be drawn to the fact that treaty instruments that provide for some form of immunity from foreign criminal jurisdiction contain no rules imposing on the forum State an obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official. The only exception to this assertion is to be found in the Vienna Convention on Consular Relations, article 42 of which provides that:

¹⁹¹ Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations *Treaty Series*, vol. 78, No. 1021, p. 277.

¹⁹² International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973) *ibid.*, vol. 1015, No. 14861, p. 243.

¹⁹³ International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid.*, vol. 2716, No. 48088, p. 3.

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

113. The fact that the notification obligation is included only in the Vienna Convention on Consular Relations is doubtless due to the clear difference between that Convention and the other three relevant conventions, since the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the Convention on Special Missions provide for immunity from foreign criminal jurisdiction in terms of immunity *ratione personae*. It will not, therefore, be possible to exercise foreign criminal jurisdiction in any form over the officials referred to in those conventions. Conversely, the predominantly *ratione materiae* character of the immunity afforded to consular officials and other members of the consular post does not completely prevent the exercise of foreign criminal jurisdiction over them; the notification obligation may therefore operate as a safeguard for the State of the official.

114. This purpose of ensuring that the State is aware of the institution of proceedings that may affect immunity (in this case that of the State itself) is reflected in article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides for the means through which “service of process by writ or other document instituting a proceeding against a State” must be effected (para. 1); thus, it is assumed that such notification must be provided. Although it is clear that this provision relates to a model different from that of immunity from foreign criminal jurisdiction, it is also true that notification is becoming an essential requirement to allow the State to invoke immunity; thus, the article concerned may be taken into consideration *mutatis mutandis* for the purposes of this topic.

115. To support this interpretation of notification as a safeguard for the State of the official – meaning the State that has primary competence to exercise jurisdiction over its officials – the provisions of article 6 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁹⁴ article 10 of the International Convention for the Protection of All Persons from Enforced Disappearance,¹⁹⁵ and article 18 of the Rome Statute of the International Criminal

¹⁹⁴ Article 6 in its relevant part reads as follows: “When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

¹⁹⁵ Article 10 stipulates in its relevant part that: “A State Party which has taken the measures referred to in paragraph 1 of this article [detention of the suspect] shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.”

Court¹⁹⁶ may be cited. A similar provision was included in article 9 of the draft articles on crimes against humanity, which were adopted by the Commission on first reading in 2017.¹⁹⁷ Although no reference is made to immunity in the aforementioned provisions, their purpose is similar to that which would form the basis of the possible obligation to notify the State of the official examined herein, namely to inform States that may be competent to exercise jurisdiction over such crimes that the authorities of the notifying State (in this case, the forum State) have already carried out investigatory acts and that they intend to adopt jurisdictional measures that may affect the exercise of jurisdiction by the notified States (in this case, the State of the official).

116. It must therefore be concluded that the first procedural safeguard that should be included in the draft articles is the obligation of the forum State to notify the State of the official that it has exercised or intends to exercise criminal jurisdiction in respect of the foreign official. The content of such notification may vary from one case to another, but it is clear that it must include sufficient information to make the State of the official aware of the identity of the official, the acts carried out by him or her in respect of which jurisdiction is intended to be exercised, and the measures that the competent authorities of the forum State intend to take. Only in this way will the State of the official have full knowledge of the situation and thus be able to decide on the invocation or waiver of immunity. Such notification may also include a request to waive the official's immunity.¹⁹⁸

117. The means through which the notification is to be provided and the authority competent to do so must be acceptable to both States. In that regard, it should be borne in mind that this question is not addressed in the treaties governing any type of immunity of State officials, not even article 42 of the Vienna Convention on Consular Relations, mentioned above. The United Nations Convention on Jurisdictional Immunities of States and Their Property, on the other hand, does codify the means of notification that may be used by States. Article 22 thereof provides:

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) In accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) In accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or

(c) In the absence of such a convention or special arrangement:

¹⁹⁶ Article 18 provides in its relevant part that: "When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States."

¹⁹⁷ Article 9 establishes in its relevant part that: "When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction." (*Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 45).

¹⁹⁸ See chap. II, sect. C, *supra*.

- (i) By transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
- (ii) By any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

118. Bearing in mind the nature of the provision, nothing would prevent its being applied *mutatis mutandis* in relation to the immunity of a State official from foreign criminal jurisdiction. It may thus be concluded that in this case the notification could be made through one of the following means:

- (a) The communication mechanisms expressly provided for in agreements on international legal cooperation and mutual assistance in force between the two States;
- (b) In accordance with the provisions of any special agreement that may have been concluded between them, if not prohibited by the law of the forum State;
- (c) By any other means admissible under the law of the forum State; and
- (d) By default, through the diplomatic channel.

119. It seems clear that agreements and conventions on international judicial cooperation and mutual assistance have a central role to play in identifying the means that could be used in each case. All instruments on cooperation and international judicial assistance contain provisions to this effect.¹⁹⁹ In that context, mention should also be made of the emerging trend of providing in such agreements for forms of direct cooperation between the competent authorities of the requesting State and the authorities of the requested State, even going so far as to establish systems of direct communication between judges.²⁰⁰ Nonetheless, it is still true that in practice there continue to be agreements under which communication is effected through administrative channels (usually between the respective Ministries of Justice), including through the diplomatic channel.

120. In particular, communication through the diplomatic channel continues to be the means preferred by a number of States for international cooperation and mutual legal assistance, and – as some States have emphasized – it is the means frequently used in cases in which the question of immunity of State officials from foreign criminal jurisdiction arises.²⁰¹ Furthermore, the use of the diplomatic channel has a prominent place in relation to this topic, since determining whether or not immunity from foreign criminal jurisdiction applies to a particular official is undeniably an example of “official business”; therefore, if no other means of communication is accepted by the forum State and the State of the official, it seems obvious to conclude that article 41,

¹⁹⁹ For example, the European Convention on Mutual Assistance in Criminal Matters, art. 15; the Inter-American Convention on Mutual Assistance in Criminal Matters, art. 13; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 6; the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 8; and the Model Treaty on Mutual Assistance in Criminal Matters, art. 3.

²⁰⁰ See chap. II, section B, *supra*.

²⁰¹ This has been confirmed expressly in the written comments of Switzerland and the Netherlands. In the case of Spain, article 53 of Organic Act No. 16/2015 establishes the following: “*Communications of foreign States and of international organizations.* Communications of foreign States in which they expressly consent to the exercise of jurisdiction by the Spanish courts or waive immunity in all the cases covered by this Organic Act, and those of international organizations that have the same purpose, shall be effected through the diplomatic channel, through the Ministry of Foreign Affairs and Cooperation.”

paragraph 2, of the Vienna Convention on Diplomatic Relations would apply. It states that:

All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

121. In any case, to fulfil the obligation to notify the State of the official, the relevant authorities are required unequivocally to be conversant with the activities of the organs competent to exercise jurisdiction, but this does not necessarily have to be the case in practice. It is clear that this problem does not arise if the notification is issued directly by the judicial authorities or even through the investigative organs. However, this kind of case is not the most common in practice and, in all other cases (for example, administrative communication through ministries of justice or communication through the diplomatic channel), it cannot be taken for granted that the judicial organs responsible for deciding on the immunity of the foreign official have the obligation to inform the organs of the executive branch of this circumstance or that the organs of the executive branch may seek to obtain information from the courts in that regard. Thus, an equally significant problem arises, namely whether or not there are means under the legal system of the forum State for communication and information exchange between the organs of the executive branch and the organs responsible for exercising jurisdiction, in particular courts and prosecutors. Furthermore, this is a problem that may arise in relation to the other procedural safeguards; it therefore seems necessary to analyse it at some length.

122. The responses of States to the Commission's questions on this issue make clear the variety of approaches taken in national legal systems. In some cases, the organs of the executive branch may not under any circumstances communicate their opinions on immunity to the courts or request information in that regard or transmit to them information received from a third State, unless the law expressly authorizes them to do so. In other cases, mechanisms have been introduced to allow the organs of the judicial branch to request the Government's opinion with regard to immunity or to allow the organs of the executive branch to submit legal opinions to the courts. A third group includes those States that have laws under which the organs of the judicial branch have an obligation to inform the Government of the institution of, or intention to institute, criminal proceedings that might affect a third State or one of its officials, and which specify the channels of communication to be used for that purpose.

123. In the first group, particular attention should be drawn to the case of Germany, which in its written submission of 6 April 2017 expressly stated that "German law contains limits for the transmission of information to national courts by the Foreign Office", adding that, according to a statement of the Federal Constitutional Court, "any 'avoidable influence' is prohibited", and concluded that "therefore, any kind of advising on legal issues by the Government is illegitimate, unless it is expressly permitted by law".²⁰² The Netherlands stated that there were no mechanisms in its national legal system allowing the organs of the executive branch to submit documents or information to the courts in relation to cases of immunity.

124. The second group includes, first of all, the United States law relating to "suggestion of immunity", already examined in the sixth report,²⁰³ which allows the organs of the executive branch to transmit *proprio motu* to the courts their opinion on immunity. A similar practice is followed in the United Kingdom, where the courts may request from the Foreign and Commonwealth Office information on the status of

²⁰² The full text of the information provided by Germany can be consulted on the Commission's website.

²⁰³ See A/CN.4/722, paras. 100 and 101.

a person who might enjoy immunity,²⁰⁴ and where the Foreign and Commonwealth Office may be a party to court proceedings or may even nominate a person to act as *amicus curiae* if a court is considering issues relating to the immunity of a foreign official from criminal jurisdiction.²⁰⁵ According to the information provided by Switzerland, one of the functions of the Directorate of International Law of the Federal Department of Foreign Affairs is to “ensure that the Swiss authorities interpret and apply the rules of public international law correctly”²⁰⁶ and on that basis it “may be invited to rule on legal questions relating to the immunity of State officials, particularly in the context of court proceedings”, which it does “usually in the form of opinions”.²⁰⁷ Similar information was provided by Czechia²⁰⁸ and Mexico,²⁰⁹ which indicated that their courts – in applying general criminal and procedural rules – may request any kind of information that may be of interest to them from government organs, which are obliged to provide it. In the case of Spain, the courts are obliged to request from the Ministry of Foreign Affairs a report on the questions of immunity that they are dealing with (although such reports are not binding) and are also obliged to receive communications from the foreign State transmitted to them by the Ministry of Foreign Affairs.²¹⁰ Lastly, in the case of Austria, “[i]f a court has doubts whether a person enjoys immunity from national criminal jurisdiction, it has to obtain the opinion of the Ministry of Justice, which will clarify the status of the person in consultation with the Ministry of Foreign Affairs.”²¹¹

125. In the third group of States, particular mention should be made of Spain and Austria. According to the information provided by Austria, “if a person enjoying immunity is suspected to have committed a criminal act, the public prosecution department, after completing the permitted preliminary inquiries, has to report the facts of the case and the intended measures to the Ministry of Justice”.²¹² In the case of Spain, article 54 of Organic Act No. 16/2015 provides for a procedure for

²⁰⁴ According to the information provided by the United Kingdom, the response of the Foreign and Commonwealth Office, in the form of a certificate of status, pertains only to questions of fact; it is for the courts to rule on any legal question relating to the determination of immunity. See the written submission of January 2019 provided by the United Kingdom in response to the Commission’s questions, in particular the section entitled “Executive certificates relevant to establishing the status of a defendant”. The full text of the information provided by the United Kingdom can be consulted on the Commission’s website.

²⁰⁵ *Ibid.* See, in particular, the sections entitled “Executive as party in proceedings relevant to the determination of immunity” and “Amicus and interested party participation in proceedings”.

²⁰⁶ Ordinance on the Organization of the Federal Department of Foreign Affairs, article 8 (2) (a) (RS 172 211 1). The text is reproduced in the written submission of 31 January 2017 provided by Switzerland in response to the Commission’s questions.

²⁰⁷ In any case, these opinions have no legal effect on the proceedings, are not binding on the courts and do not confer on the Directorate of International Law the status of party to the proceedings. The general information provided by Switzerland in relation to the procedural aspects of immunity can be consulted on the Commission’s website.

²⁰⁸ The provisions of the Code of Criminal Procedure of Czechia are analysed in detail in that country’s response to the questions formulated in 2016, which can be consulted on the Commission’s website.

²⁰⁹ A request for information may come from the organs carrying out the investigation of the facts as well as from the competent courts. The general information provided by Mexico in relation to the procedural aspects of immunity can be consulted on the Commission’s website.

²¹⁰ Both obligations were established pursuant to Organic Act No. 16/2015 and, although they relate to civil jurisdiction, by analogy they are also applicable to cases in which the criminal courts have to rule on questions of immunity. See, in particular, articles 52 and 54. Of particular relevance are paragraphs 2 and 3 of article 54. The general information provided by Spain in relation to the procedural aspects of immunity can be consulted on the Commission’s website.

²¹¹ Regulation on Extradition and Mutual Assistance in Criminal Matters, section 57. The general information provided by Austria in relation to the procedural aspects of immunity can be consulted on the Commission’s website.

²¹² See *ibid.*, section 56, referred to in the written response from Austria.

communication between the Ministry of Foreign Affairs and Cooperation and the Spanish courts and reads as follows:

1. The Ministry of Foreign Affairs and Cooperation shall transmit the subpoena or notification from the court to the relevant diplomatic mission or permanent mission of Spain for onward transmission to the Ministry of Foreign Affairs of the foreign State or to the competent organ of the international organization.
2. The Ministry of Foreign Affairs and Cooperation shall transmit to the competent court the non-binding report provided for in article 27 of Act No. 29/2015 of 30 July on international legal cooperation in civil matters and any communication relating to immunity that a foreign State or international organization transmits to it through the diplomatic channel in connection with proceedings instituted in Spain.
3. The competent court shall, as soon as possible, transmit to the Ministry of Foreign Affairs and Cooperation requests for the report provided for in article 27 of Act 29/2015 of 30 July on international legal cooperation in civil matters and communications that it addresses to the foreign State.

126. From the foregoing, it can be deduced that there is a practical difficulty that the forum State may encounter at the time of providing the notification that is analysed in this section. It therefore seems necessary for the Commission to consider, in its work on procedural safeguards, including in the relevant draft articles, proposals that may help to overcome that difficulty.

127. In any case, in the light of the analysis in the foregoing paragraphs, it must be concluded by way of summary that notification of the State of the official of the intention of the competent organs of the forum State to exercise criminal jurisdiction over such an individual is a basic requirement to ensure proper determination and application of the immunity of State officials from foreign jurisdiction. The Commission could therefore consider including a draft article on that issue; to that end the following provision is proposed:

Draft article 12

Notification of the State of the official

1. Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such notification.
2. The notification shall include the identity of the official, the acts of the official that may be subject to the exercise of criminal jurisdiction and the authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction.
3. The notification shall be provided through any means of communication accepted by both States or through means provided for in international cooperation and mutual legal assistance treaties to which both States are parties. Where no such means exist or are accepted, the notification shall be provided through the diplomatic channel.

B. Exchange of information

128. In order to determine whether immunity from foreign criminal jurisdiction applies to a State official, particularly in the case of immunity *ratione materiae*, the

courts and other competent organs of the forum State must assess a number of elements that were analysed in the sixth report.²¹³ They will therefore need information that the forum State does not always possess and that its organs cannot directly obtain, particularly as regards the status of “official” of the individual over whom they intend to exercise jurisdiction, and the nature of the acts performed by that individual which are the subject of an investigation or prosecution by the forum State. That information may be provided *proprio motu* by the State of the official once it receives the notification referred to in the previous section. However, the State of the official might not provide the information, or the information provided might not be sufficient for the courts of the forum State to be able to make an informed decision as to whether or not immunity applies. Moreover, the State of the official might wish to provide information that it considers relevant in order to ensure respect for immunity, even though such information was not requested by the forum State. The State of the official might also deem it necessary to obtain supplementary information with a view to deciding whether to invoke or waive immunity. In either case, the possible exchange of information between the forum State and the State of the official constitutes another procedural safeguard that should be examined in the present report.

129. It is useful to begin by analysing the international instruments on cooperation and mutual legal assistance, since all those instruments contain detailed procedures by which two States that intend to exercise criminal jurisdiction can request and exchange information relevant to “investigations, prosecutions, and proceedings that pertain to crimes”.²¹⁴ Although each has its own specificities that set it apart from the others, the instruments also have shared elements that are of use for present purposes. These can be summarized as follows:

(a) Requests for mutual assistance may be to obtain information held by the requested State that could be of use to the requesting State;²¹⁵

(b) Requests should include a list of a variety of elements, including, in general terms, the authority making the request, the object of and reason for the request, a summary description of the facts on which the request is based and, if possible, the identity and nationality of the person concerned;²¹⁶

²¹³ See A/CN.4/722, para. 108.

²¹⁴ Inter-American Convention on Mutual Assistance in Criminal Matters, art. 2. See also art. 1 of the Model Treaty on Mutual Assistance in Criminal Matters (“the Parties shall [...] afford to each other the widest possible measure of mutual assistance in investigations or court proceedings”). The system established by those instruments is based on the general commitment that States undertake to “afford each other [...] the widest measure of mutual assistance in proceedings in respect of offences the punishment of which [...] falls within the jurisdiction of the judicial authorities of the requesting Party” (European Convention on Mutual Assistance in Criminal Matters, art. 1). See also art. 1 of the Inter-American Convention on Mutual Assistance in Criminal Matters (“The states parties undertake to render to one another mutual assistance in criminal matters”).

²¹⁵ European Convention on Mutual Assistance in Criminal Matters, art. 3; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 1, paras. 1 and 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 1, para. 2.

²¹⁶ European Convention on Mutual Assistance in Criminal Matters, art. 14; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 26; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 9; Model Treaty on Mutual Assistance in Criminal Matters, art. 5, para. 1.

(c) Information can be requested or exchanged by one of the following means: direct communication between the judicial authorities of the States concerned,²¹⁷ communication between the central authorities designated by those States,²¹⁸ direct communication between the relevant Ministers of Justice,²¹⁹ and any other means of communication expressly agreed by the parties or identified by the requested State;²²⁰

(d) Requests should in any event be executed “in accordance with the domestic law of the requested state”;²²¹

(e) The requested State may refuse the information request under certain circumstances. Examples given in all the instruments include requests involving political or related offences; cases in which the requested party considers that execution of the request might prejudice the sovereignty, security, public order (*ordre public*) or other essential interests of its country;²²² and cases in which it considers that the investigation has been initiated for the purpose of prosecuting, punishing, or discriminating in any way against an individual or group of persons for reason of sex, race, social status, nationality, religion or ideology. Reasons must be given for any refusal of assistance.²²³ In any case, before refusing an information request, the State may consider whether assistance may be granted subject to certain conditions;²²⁴

(f) The requesting State may make its request subject to conditions of confidentiality. The requested State may also make the information and evidence that

²¹⁷ European Convention on Mutual Assistance in Criminal Matters, art. 15 (see also art. 15 as amended by art. 4 of the Second Additional Protocol to that Convention); Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 6, para. 1; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 7.

²¹⁸ Inter-American Convention on Mutual Assistance in Criminal Matters, art. 3; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 6; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 7; Model Treaty on Mutual Assistance in Criminal Matters, art. 3 (the possibility of direct contact between the competent authorities as a supplementary means is suggested in the footnote under article 3).

²¹⁹ European Convention on Mutual Assistance in Criminal Matters, art. 15.

²²⁰ *Ibid.*; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 6; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 7.

²²¹ European Convention on Mutual Assistance in Criminal Matters, art. 3, para. 1; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 10; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 4; Model Treaty on Mutual Assistance in Criminal Matters, art. 6. In art. 4, para. 1 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, it is provided that the requested State “shall comply with the formalities and procedures expressly indicated by the requesting Member State, [...] provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State”.

²²² European Convention on Mutual Assistance in Criminal Matters, art. 2; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 9; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 3, para. 1; Model Treaty on Mutual Assistance in Criminal Matters, art. 4.

²²³ European Convention on Mutual Assistance in Criminal Matters, art. 19; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 3, para. 3; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 5.

²²⁴ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 4, para. 3; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 32; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 4.

it provides subject to such conditions.²²⁵ In either case, the requesting and requested State should consult one another if either of them is unable to fulfil a condition of confidentiality.²²⁶

130. These rules apply broadly to information requests submitted by a State that is already exercising its jurisdiction and do not take into consideration the question of immunity. Nevertheless, they can be used as a frame of reference to define, *mutatis mutandis*, a procedure that can be used to exchange the necessary information in order for the forum State to determine whether immunity applies and for the State of the official to decide whether to invoke or waive immunity. The application of those elements can, however, raise two difficulties that are worth mentioning: the reasons for refusing an information request, and the means of communication used to request and transmit information.

131. As regards the first issue, the power to refuse an information request is recognized in all instruments concerning cooperation and mutual assistance; there is no legal reason why it should be ruled out in relation to exchange of information regarding the immunity of State officials from foreign criminal jurisdiction. At the same time, it should be borne in mind that, under the instruments examined, assistance requests may be declined only for certain expressly listed reasons. Of particular interest for present purposes are the possibility that the acts affected by immunity could be defined as political or related offences, and the possibility that transmitting the requested information could prejudice the sovereignty, security, public order (*ordre public*) or other essential interests of State of the official. The first reason can apply only to a limited range of situations, especially given the trend in contemporary international law,²²⁷ including in instruments on cooperation and judicial assistance, not to view crimes under international law and other offences of international concern or scope as political or related offences.²²⁸ Conversely, the second reason could have

²²⁵ Inter-American Convention on Mutual Assistance in Criminal Matters, art. 25; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 5; Model Treaty on Mutual Assistance in Criminal Matters, art. 9.

²²⁶ Inter-American Convention on Mutual Assistance in Criminal Matters, art. 25; Model Treaty on Mutual Assistance in Criminal Matters, art. 9.

²²⁷ See the following instruments: Convention on the Prevention and Punishment of the Crime of Genocide, art. VII; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. XI; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 1. A similar provision was included in draft article 13, para. 2, of the draft articles on crimes against humanity adopted by the Commission on first reading.

²²⁸ In conventions on extradition, international crimes are generally excluded from the definition of political offences. For instance, it is stated as follows in article 1 of the First Additional Protocol to the European Convention on Extradition:

“political offences shall not be considered to include the following:

(a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

(b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

(c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions”.

a more far-reaching effect, especially since, where the present topic is concerned, the State of the official might consider the requested information to be “sensitive information” that could affect one of the aforementioned elements. In any case, there would be nothing to prevent the State of the official from providing such information subject to a condition of confidentiality.

132. Considering the foregoing, when an assistance request is refused or goes unanswered, the ability of the courts of the forum State to rule on the immunity of the official is obviously affected. However, owing to the very nature of immunity, one cannot conclude that the mere failure to provide assistance can result in a ruling that immunity does not apply. On the contrary, such a ruling will be based solely on the fact that the normative elements set out in draft articles 3, 4, 5 and 6 of the draft articles in their current form are present, and that, in the case of immunity *ratione materiae*, the forum State’s intention to exercise criminal jurisdiction pertains to one of the crimes under international law listed in draft article 7. In any event, the possibility of such silence or refusal of mutual assistance would make it advisable for the forum State and the State of the official to engage in consultations.

133. With regard to the second issue, it should be recalled once again that the information provided by the State of the official is intended to enable the competent authorities of the forum State to decide on immunity. The information will therefore need to be made available to the competent judicial organs (or, where applicable, the prosecutor), either because the information is required to be transmitted directly to such authorities, or because if it is transmitted to the forum State by other means, the receiving organ would have the authority to transmit it to the courts. This brings us back to the problem considered above concerning notification. It is clear, however, that in the case of exchange of information, mechanisms for cooperation and judicial assistance in criminal matters help to solve the problem by designating the organs competent to formulate a request for information, which in turn have to transmit the request to the competent organs, where applicable. Of particular note is article 18 of the European Convention on Mutual Assistance in Criminal Matters, which provides as follows:

“Where the authority which receives a request for mutual assistance has no jurisdiction to comply therewith, it shall, *ex officio*, transmit the request to the competent authority of its country and shall so inform the requesting Party through the direct channels, if the request has been addressed through such channels”.

A fuller list is provided in article 3, para. 2 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, which provides that the following shall not be considered political offences: “(a) crimes against the life of heads of sovereign organs or holders of senior public office or persons deserving special protection under international law; (b) acts of air and maritime piracy; (c) acts that have been excluded from the category of political offences under international conventions to which the requested State is a party; (d) genocide, crimes against humanity, war crimes and grave violations under the 1949 Geneva Conventions; (e) the acts referred to in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984”. In addition, it is stated in paragraph 1 (b) of the same article that “the mere allegation of a political purpose or motive does not entail that the crime will necessarily be designated as such”.

In the Model Treaty on Extradition, a much broader definition of the exception for political offences is provided; according to article 3 (a), “reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral treaty, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition”.

In any event, this difficulty should be taken into consideration in examining the draft article set forth below.

134. To conclude the examination of this issue, it should be emphasized that, in the context of the present report, the participation of the State of the official in the exchange of information process cannot in any way be construed as recognition of the competence of the courts of the forum State or as an implied waiver of the immunity of its official from criminal jurisdiction.

135. On the basis of the foregoing, the following draft article is proposed:

Draft article 13
Exchange of information

1. The forum State may request from the State of the official information that it considers relevant in order to decide on the application of immunity.
2. That information may be requested through the procedures set out in international cooperation and mutual legal assistance treaties to which both States are parties, or through any other procedure that they accept by common agreement. Where no applicable procedure exists, the information may be requested through the diplomatic channel.
3. Where the information is not transmitted directly to the competent judicial organs so that they can rule on immunity, the authorities of the forum State that receive it shall, in accordance with domestic law, transmit it directly to the competent courts. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such communication.
4. The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (*ordre public*), security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions.
5. The information received shall, where applicable, be subject to conditions of confidentiality stipulated by the State of the official, which shall be fulfilled in accordance with the mutual assistance treaties that provide the basis for the request for and provision of the information or, failing that, to conditions set by the State of the official when it provides the information.
6. Refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply.

C. Transfer of criminal proceedings

136. Following the reasoning of the International Court of Justice in the *Arrest Warrant* case, immunity from foreign criminal jurisdiction prevents the courts of the forum State from exercising jurisdiction over foreign officials who benefit from such immunity, but does not prevent their being brought before the courts of their own State with a view to determining what criminal responsibility they may have incurred.²²⁹ From that perspective, the transfer of proceedings to the State of the official represents a procedural instrument that can help to ensure the balance between respecting the sovereign equality of the State of the official and the right of the forum State to exercise criminal jurisdiction, and ensuring that the official will be held

²²⁹ *Arrest Warrant* case (see footnote 123 above), para. 61.

accountable for the alleged offences of which he or she may stand accused. The latter consideration is particularly important in the case of international crimes.

137. The mechanism of transfer of criminal proceedings operates in cases where the criminal courts of the States are competent, in abstract terms, to prosecute the same acts allegedly committed by the same individual. It allows a State that is considering whether to initiate the process of exercising jurisdiction, or that has already started such a process, to request that another competent State assume that responsibility owing to special circumstances and in the interests of the sound administration of justice. Although both the decision to request or offer the transfer of the proceedings and the decision to accept the transfer depend on the free will of each State, the institution serves as a mechanism for the division of competing jurisdictional competences, which is designed to ensure that jurisdiction is exercised by the State best placed to do so.

138. Transfer of proceedings is therefore simply an instrument that can be used in the context of international judicial cooperation and mutual assistance. For that reason, it is included indirectly in some relevant instruments.²³⁰ The unique nature of the mechanism has been reflected in the adoption of *ad hoc* measures. Examples are the European Convention on the Transfer of Proceedings in Criminal Matters adopted by the Council of Europe in 1972²³¹ and the Model Treaty on the Transfer of Proceedings in Criminal Matters adopted by the United Nations General Assembly in 1990. An initiative for a framework decision of the Council of the European Union on transfer of proceedings in criminal matters was introduced in 2009 but was not ultimately approved.²³² The initiative was intended to complement Council of the European Union Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings by establishing, at the level of the European Union, a common framework for the transfer of proceedings based on the Convention of the Council of Europe.

139. These two international instruments codify in detail the specific elements of the transfer of criminal proceedings, defining *inter alia* the cases in which such transfer can take place; the criteria that need to be taken into consideration when requesting, offering, accepting or refusing a transfer; the form that communication between interested States should take; the effects of a request for or acceptance of a transfer; the applicable law; and the participation in the process of the individual affected by the transfer. Those elements are codified differently in the two instruments, and not all the elements set out therein are relevant to the present report. Nevertheless, the two instruments do contain some shared elements that can be taken as criteria for identifying how the transfer of criminal proceedings can act as a procedural safeguard in the context of immunity of State officials from foreign criminal jurisdiction.

²³⁰ For instance, article 21 of the European Convention on Mutual Assistance in Criminal Matters, concerning the transmission of notifications in connection with proceedings, has been interpreted in such a manner.

²³¹ The Convention was adopted on 15 May 1972 and entered into force on 30 March 1978. It is open both to States members and to States not members of the Council of Europe. To date, it has been ratified by 25 States, all of which are members of the Council of Europe.

²³² See Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Kingdom of the Netherlands, Romania, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden for a Council Framework Decision 2009/.../JHA of ... on transfer of proceedings in criminal matters, *Official Journal of the European Union* C 219, 12 September 2009.

140. The common elements that are relevant to the present report are as follows:

(a) A request for transfer of criminal proceedings can be made by a State that has competence to exercise jurisdiction, and should be addressed to a State that also has competence;²³³

(b) The requesting State shall assess whether it is possible and appropriate to transfer the proceedings in the case in question.²³⁴ Reasons that could be taken into consideration when requesting a transfer include the following: (i) that the suspected person is a national of or ordinarily resident in the requested State; (ii) that the transfer is warranted in the interests of arriving at the truth and, in particular, that the most important items of evidence are located in the requested State; (iii) that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured; and (iv) that the requesting State could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;²³⁵

(c) The requested State should examine the request²³⁶ and may refuse it for certain reasons, including, in particular, the following: (i) if the offence can be regarded as being of a political nature; (ii) if the requested State has serious grounds for believing that the proceeding is motivated by considerations of race, religion, nationality or political opinion; (iii) if the proceeding is contrary to the international undertakings of the requested State; (iv) if the proceeding is contrary to the fundamental principles of the legal system of the requested State;²³⁷

(d) The transfer of criminal proceedings should always take place with the consent of the concerned States, respecting the principle of dual criminality, and with a view to the sound administration of justice;²³⁸

(e) A request for transfer should have as an immediate effect for the requesting State the obligation to discontinue any proceeding before its own courts and national authorities, until the requested State has informed it of its decision whether or not to accept the proceeding;²³⁹

(f) Judicial proceedings in the requested State should always be governed by its national law.²⁴⁰

(g) If the requested State is unable to accept the request or subsequently needs to desist from exercising its jurisdiction, the requesting State will once again be able to exercise its own jurisdiction.²⁴¹

²³³ European Convention on the Transfer of Proceedings in Criminal Matters, art. 3; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 1.

²³⁴ European Convention on the Transfer of Proceedings in Criminal Matters, art. 6.

²³⁵ *Ibid.*, art. 8, para. 1 (e), (g) and (h).

²³⁶ *Ibid.*, art. 9; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 5.

²³⁷ European Convention on the Transfer of Proceedings in Criminal Matters, art. 11; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 7.

²³⁸ European Convention on the Transfer of Proceedings in Criminal Matters, art. 7; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 6.

²³⁹ European Convention on the Transfer of Proceedings in Criminal Matters, art. 21, para. 1; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 10.

²⁴⁰ European Convention on the Transfer of Proceedings in Criminal Matters, art. 25; Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 11, para. 1.

²⁴¹ European Convention on the Transfer of Proceedings in Criminal Matters, art. 21, para. 2.

(h) The request should be transmitted through the diplomatic channel, between Ministers of Justice, or any other authorities designated by the concerned States.²⁴²

141. As can be deduced from the general rules that have just been summarized, the transfer of criminal proceedings is based on the concept of subsidiary jurisdiction, which is used in other areas of international judicial cooperation in criminal matters and which, under the principle of complementarity, is also used to define the system for the division of competences between the International Criminal Court and national courts. The model of subsidiary jurisdiction may be fully transposed to the regime of immunity of State officials from foreign criminal jurisdiction, which is based on the idea that a competent criminal jurisdiction (that of the forum State) is “blocked” because of the presence of a foreign national who is granted special protection (the official) in order to ensure the proper performance of his or her functions and to protect the right to sovereign equality of another State (the State of the official); for present purposes, that blockage is reflected in the fact that it is the national courts of the latter State that have the right to determine the possible criminal responsibility of that State official. From that standpoint, it can be concluded that the official’s immunity from foreign criminal jurisdiction would not be affected if, at the time of its consideration or at some later stage, the courts of the forum State, having concluded that it is not possible or appropriate for them to exercise their own jurisdiction over the official, put into motion the process to transfer the criminal proceedings to the State of the official.

142. Admittedly, the mechanism was originally designed to be applied in the ordinary context of the exercise of competing criminal jurisdictions, rather than in the extraordinary situation arising from the immunity of the suspect from foreign criminal jurisdiction. Indeed, it should be borne in mind that, in the case of the European Convention on the Transfer of Proceedings in Criminal Matters, one of the reasons to refuse a transfer request is respect for the “international undertakings” of the requested State, which include diplomatic immunity, as set forth in the explanatory report to the Convention.²⁴³ There are, however, two reasons to believe that that limitation does not rule out the possibility of the transfer of criminal proceedings being used as a procedural safeguard in relation to the immunity of State officials from foreign criminal jurisdiction. Firstly, the limitation should be understood logically as pertaining to a request to transfer proceedings against an official of a third State who is located on the territory of the requested State and has diplomatic immunity. Secondly, in the case of immunity from foreign criminal jurisdiction, a transfer of proceedings would, in any event, amount to a recognition of the primacy of the jurisdiction of the State of the official. It would thus work in favour of the State in question, in that it would ensure that it is the courts of that State that would, where applicable, be able to rule on the possible criminal responsibility of its official.

143. It would be very difficult to transfer criminal proceedings involving immunity *ratione personae*, since the courts of the forum State have virtually no margin of discretion when determining the immunity from criminal jurisdiction of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs. A transfer would, however, be feasible in any case involving immunity *ratione materiae*. In such cases, national courts have to consider the three normative elements that define that form of immunity. It is in precisely such a situation that they could assess whether, in the light of the available information and the circumstances at hand, it might be

²⁴² Model Treaty on the Transfer of Proceedings in Criminal Matters, art. 11, para. 1.

²⁴³ See Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters (ETS-073), commentary to art. 11 (i), p. 22.

possible and appropriate to transfer the criminal proceedings to the State of the official.

144. Without a doubt, the transfer of criminal proceedings can be most effective as a procedural safeguard in cases where the courts of the forum State find that immunity *ratione materiae* does not apply, either because the criminalized acts cannot be regarded as having been performed in an official capacity or because they may constitute one of the crimes under international law in respect of which such immunity does not apply, pursuant to draft article 7 provisionally adopted by the Commission. In such circumstances, defining a model for cooperation between the forum State and the State of the official through the transfer of criminal proceedings mechanism could help to counteract criticisms regarding the possible abuse of jurisdiction or the forum State's use of criminal jurisdiction for political purposes or motives. This would no doubt help in the fight against impunity for the most serious international crimes and to reinforce the principle of the sovereign equality of States. In that connection, it should be recalled that the instruments considered above allow the requested State to refuse the request for a transfer of criminal proceedings if it considers that the relevant offences could be described as political or related offences. Such a claim could be made if the acts constituting the offence were performed by the official under such condition and in an official capacity, or, at least, in what appeared to be an official capacity. The possibility of resorting to the transfer of criminal proceedings in such cases would not, however, be ruled out: as was mentioned above, there is a clear trend in contemporary international law to not view the offences listed in draft article 7 in any case as political or related offences.²⁴⁴

145. With regard to the transfer of criminal proceedings, it is worth analysing the judgment handed down on 10 May 2018 by the Lisbon Court of Appeal²⁴⁵ in a criminal case brought against a former Vice-President of Angola for corruption. In the judgment, the Court ruled first on the claim of immunity from foreign criminal jurisdiction invoked by the subject of the investigation, making a clear distinction between immunity *ratione personae* and immunity *ratione materiae*. On that basis, it found that, although the official would have enjoyed immunity *ratione personae* at one point, in that his functions as Vice-President made him comparable to a Head of State or Head of Government, his term of office as Vice-President had elapsed by the time the Lisbon Court of Appeal considered the question of his immunity. He could thus benefit only from immunity *ratione materiae* in relation to acts performed in an official capacity during his term as Vice-President. However, given that acts of corruption cannot be regarded as "acts performed in an official capacity", the Court found that he could not benefit from immunity *ratione materiae* either. It therefore asserted its competence to exercise criminal jurisdiction over him.²⁴⁶

²⁴⁴ See above, in section B of the present chapter.

²⁴⁵ Case 333/14.9TELSB-U.L1-9, which can be accessed at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/88e2a666e33779ce802582b8003567f3?OpenDocument>.

²⁴⁶ As regards acts that could be regarded as acts of corruption, the Lisbon Court of Appeal stated as follows: "The acts imputed in case 333/14.9TELSB, in respect of which the appellant wishes to be recognized as having immunity from Portuguese jurisdiction, are private in nature. They were not performed in the name, in the interests or on the orders of the Angolan State, or in exercise of the functions of an agent or official of the Angolan State, or during his term as Vice President of the Republic. The appellant would appear to have performed those acts in his personal capacity before assuming office as Vice-President of the Republic of Angola."

146. Having asserted its competence, the Court was able to rule on the second claim made by the subject of the investigation, namely that his case be separated from the rest of the proceeding before the Portuguese courts and transferred to the Angolan courts, on the basis of the mechanism of transfer of proceedings set forth in the Portuguese Code of Criminal Procedure. The Court took into consideration various circumstances, including difficulties in setting in motion the mechanisms for cooperation and mutual assistance between Portugal and Angola (in particular, the fact that it would be impossible to secure the extradition of the former Vice-President, who continued to enjoy residual immunity in his country), the lack of certainty as to whether the trial in Portugal could be brought to a conclusion, and the fact that it was in the subject's interests for the proceedings to continue in Angola, to facilitate his subsequent rehabilitation. On that basis, the Court found that the exigencies of the sound administration of justice and the interests of the subject of the investigation justified transferring the criminal proceedings to the Angolan courts. The Court was thus able to apply the model of subsidiary jurisdiction mentioned above.

147. The Court thus adopted a solution that was consistent with its domestic law and made it possible to strike a balance between, on the one hand, the prosecution of acts that were not covered by immunity and for which the foreign official should be held accountable, and, on the other hand, the recognition that the courts of the State of the official had a primacy of sorts, in that they were best placed to prosecute the acts. Nevertheless, it should be highlighted that the Portuguese court did not rule on the potential consequences of the Angolan courts being unable or unwilling to exercise their jurisdiction over the former Vice-President. That situation could arise, firstly, because the former Vice-President benefitted from residual immunity before the Angolan courts for five years after leaving office, and secondly, because the Amnesty Act of Angola could apply to him. The Court of First Instance had taken those elements into consideration when denying the request for a transfer of proceedings. However, while the Lisbon Court of Appeal did analyse them in its judgment, it considered that they were not sufficient to prevent the transfer, since they involved norms that had been adopted by Angola in exercise of its sovereignty and, moreover, it could not be established in abstract terms that the Amnesty Act would necessarily apply to the former Angolan official, or that those circumstances would in themselves be an affront to the sound administration of justice.

148. Although the latter aspect of the judgment could raise questions, it provides an interesting example of the form that the transfer of proceedings could take in relation to immunity from foreign criminal jurisdiction. As stated above, such immunity could operate both in cases where the courts of the forum State consider that immunity should apply, and – indeed especially – in cases where they dismiss that claim and expressly assert their competence. While the Portuguese court applied the mechanism to the official in accordance with its own domestic law, there is no reason why – in general terms and under more specific domestic provisions – the transfer of criminal

The appellant therefore cannot enjoy immunity *ratione materiae* from Portuguese jurisdiction in respect of those acts, as the acts imputed to him would appear to have been performed in his personal interest. Nor can he benefit from immunity *ratione personae* from Portuguese criminal jurisdiction, as immunity *ratione personae* applies only during the period when he held the position of Vice-President of the Republic of Angola, from 26 September 2012 to 26 September 2017”.

Furthermore, immunity *ratione personae* could not have been violated, because the procedural acts performed in Portugal “did not and could not have interfered with the independent and efficient performance of the functions” of Vice-President. It should also be emphasized that the judgment clearly distinguishes between immunity under international law and the immunity recognized under the domestic law of the State.

proceedings could not be effectuated on the initiative of the forum State or at the requested of the State of the official.

149. The international instruments analysed above provide elements that could be of use in defining a model for the transfer of criminal proceedings that could generally be used when the question of the immunity of State officials from foreign criminal jurisdiction arises. The principle of complementarity enshrined in the Rome Statute also provides elements that could be taken into account when defining that model, particularly as regards the reasons that need to be assessed in order for the International Criminal Court to decline to exercise its jurisdiction in favour of a competent national court, and the possibility that such a decision could be reviewed.

150. In that context, it should be recalled that, under the Rome Statute, a State that considers that it is competent to exercise jurisdiction can do so in three distinct cases that apply successively: (a) if a national court has already ruled on the matter; (b) if the same acts are already under an investigation that could lead to criminal proceedings; and (c) if the State is prepared to launch an investigation that could result in criminal proceedings. In any event, if the Court decides to decline to exercise its jurisdiction, it will retain the power to review that decision and reassert its jurisdiction if the courts of the State do not ultimately exercise their jurisdiction, or if they do so in a manner that is incompatible with the principles of justice enshrined in the Rome Statute.²⁴⁷ In this model, particular weight is accorded to the conduct of the State that asserts its competence and to its willingness to prosecute the acts.

151. On the basis of the foregoing, the Commission might deem it useful to define a model for the transfer of criminal proceedings to the State of the official in connection with immunity from foreign criminal jurisdiction. The following draft article is therefore proposed:

Draft article 14

Transfer of proceedings to the State of the official

1. The authorities of the forum State may consider declining to exercise their jurisdiction in favour of the State of the official, transferring to that State criminal proceedings that have been initiated or that are intended to be initiated against the official.
2. Once a transfer has been requested, the forum State shall suspend the criminal proceedings until the State of the official has made a decision concerning that request.
3. The proceedings shall be transferred to the State of the official in accordance with the national laws of the forum State and the international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties.

D. Consultations

152. Virtually all international instruments on cooperation and mutual judicial assistance provide for consultations between the States concerned. Such consultations may take place in accordance with any of the mutual assistance instruments provided for under a treaty, or may be designed as a mechanism to address problems and difficulties that may arise when applying the cooperation and mutual assistance system taken as a whole. The first category should include the consultations referred to above in connection with the exchange of information. As regards the second, reference should be made to article 18 of the Convention on Mutual Assistance in

²⁴⁷ Arts. 17–20.

Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, which states that “the Contracting States shall consult with each other in order to resolve issues arising from the application of the present Convention”. Similar terms appear in the Model Treaty on Mutual Assistance in Criminal Matters, article 21 of which states as follows:

The Parties shall consult promptly, at the request of either, concerning the interpretation, the application or the carrying out of the present Treaty either generally or in relation to a particular case.

153. With regard to the immunity of State officials from foreign criminal jurisdiction, consultations between the forum State and the State of the official may also have a role to play in the context of procedural safeguards, particularly for three distinct purposes, namely (a) to better define the position of each State as regards the immunity of the official; (b) to exchange information unofficially and informally; and (c) to seek a consensual solution to problems arising from the application of the procedural safeguards analysed above and, more generally, regarding the determination and application of the immunity of an official in a specific case.

154. The instrument of consultation has the advantage of being flexible and relatively informal. It could therefore be used alongside or instead of any of the procedural safeguards analysed above. Moreover, as the consultations need not necessarily be limited to those between organs competent to determine or apply immunity, they can also be conducted through the diplomatic channel, which, as several States have noted, is the means commonly used in cases in which the immunity of State officials from foreign criminal jurisdiction arises.

155. Accordingly, it is suggested that a general provision regarding consultations, drafted in broad terms, be included in the draft articles. The following draft article is therefore proposed:

Draft article 15
Consultations

The forum State and the State of the official shall consult, at the request of either, on matters concerning the determination of the immunity of the foreign official in accordance with the present draft articles.

Chapter IV

Procedural rights and safeguards pertaining to the official

156. As noted in the sixth report,²⁴⁸ an analysis of the procedural aspects of immunity of State officials from foreign criminal jurisdiction should include the issue of the procedural rights and safeguards pertaining to the official since, ultimately, any attempt to exercise foreign criminal jurisdiction over a State official may affect the official’s rights and, clearly, any official who is faced with the exercise of criminal jurisdiction in a State other than the State which has granted him or her the status of “official”, must, like anyone else, enjoy the procedural rights and safeguards recognized under international law, which include the concept of a “fair and impartial trial”. Furthermore, it should be borne in mind that serious concerns have been expressed throughout the debates in both the International Law Commission and the Sixth Committee, especially those concerning exceptions to immunity, regarding the way in which the exercise of jurisdiction over a foreign official might affect respect for the rules of due process, whether from the specific standpoint of respect for the

²⁴⁸ [A/CN.4/722](#), para. 41.

procedural rights and safeguards pertaining to the foreign official in a given case, or from the more general standpoint of the existence of a system of respect for the procedural rights and safeguards pertaining to the accused in the legal system of the State that is seeking to exercise jurisdiction.

157. The Commission, during its informal consultations in 2017 on the procedural aspects of immunity, briefly discussed the inclusion of the question of the procedural rights and safeguards pertaining to the foreign official in its work on the current topic. The discussion was inconclusive, although some members have consistently supported the consideration of that issue in the context of the procedural aspects of immunity of State officials from foreign criminal jurisdiction. Meanwhile, in the debate that took place in the Sixth Committee in 2018, some States supported the Commission's consideration of the procedural rights and safeguards pertaining to the official²⁴⁹, and only one State expressed its opposition²⁵⁰. The Special Rapporteur believes it is still appropriate for the Commission to analyse the procedural rights and safeguards pertaining to the official in the context of procedural aspects of immunity of State officials from foreign criminal jurisdiction, thereby completing its consideration of the procedural aspects and safeguards that should apply in relation to that type of immunity.

158. Consideration of this issue must include the delimitation of the procedural rights and safeguards that must be provided to the foreign official, but also other matters relating more to cooperation between the forum State and the State of the official. These matters include the capacity of the forum State to ensure respect for the right to a fair trial and the right to a defence; the possibility that the State of the official, if it waives immunity, might be able to impose conditions regarding the sentence that could be handed down; and the possibility of derogations from the principle that criminal proceedings must be public, in particular through the application of special rules of confidentiality for certain proceedings in order to safeguard the fundamental interests of the State of the official, in relation to its sovereignty or national security, and the application of special rules with regard to the information and evidence submitted by that State on condition of confidentiality. Some of these aspects related to cooperation have already been analysed above²⁵¹. The main focus of the present chapter will therefore be the scope of procedural rights and safeguards *stricto sensu*. The Special Rapporteur will also analyse the way in which such aspects have been dealt with previously in the Commission's work and whether such an approach could be used for the current topic.

A. Scope and content of procedural rights and safeguards

159. It is generally agreed that the right to a fair trial and the right to a defence are part of a set of rules and principles that are well established in contemporary international law and that have primarily been defined in the context of international human rights law, but also in international criminal law and international humanitarian law. Those rules include a "right of due process", which is at the heart of the procedural rights and safeguards pertaining to the foreign official in the context of the current topic. It is also important to take into account those provisions concerning the right to personal liberty that are relevant to the current topic, especially in relation to acts leading to the detention or arrest of a foreign official, which were analysed in the sixth report.²⁵²

²⁴⁹ Ireland, Israel, Switzerland and Sweden (on behalf of the Nordic countries).

²⁵⁰ China.

²⁵¹ See chapter III above.

²⁵² See A/CN.4/722, paras. 69–79.

160. From that standpoint, the universal scope of procedural rights and safeguards is most clearly expressed, at the universal level, in the 1966 International Covenant on Civil and Political Rights,²⁵³ especially articles 9 (right to liberty and security of person), 14 (right to a fair trial) and 15 (*nullum crimen, nulla poena sine lege*). Similar safeguards can be found in articles 5 (right to liberty and security), 6 (right to a fair trial), 7 (no punishment without law), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights);²⁵⁴ in articles 3, 7, 8, 9, 10, 24 and 25 of the 1969 American Convention on Human Rights (“Pact of San Jose, Costa Rica”);²⁵⁵ in articles 3, 6, 7 and 26 of the 1981 African Charter on Human and Peoples’ Rights;²⁵⁶ and in articles 12 to 16, 19 and 22 of the Arab Charter on Human Rights.²⁵⁷ Such content is therefore broadly accepted by the international community, at both the global and the regional levels.

161. Similarly, in accordance with the rules of international humanitarian law, members of a State’s armed forces who are made prisoners of war during an international armed conflict may not be tried merely for their participation in the hostilities.²⁵⁸ Although they do not enjoy jurisdictional immunity that protects them from being prosecuted and facing judicial proceedings, they do, however, benefit from some minimum protection deriving from the safeguards contained in articles 99 to 108 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention).²⁵⁹ Non-combatants who face judicial proceedings and are considered protected persons under article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)²⁶⁰ benefit from the safeguards provided therein, in particular in the *chapeau* of articles 37 and 38 and in articles 64 to 77, which apply, respectively, in the State’s own territory and in occupied territories. Moreover, article 75 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)²⁶¹ establishes relevant safeguards, which are now also applicable to persons not protected by article 4 of the Fourth Geneva Convention. In the context of non-international armed conflicts, individuals facing judicial proceedings are protected by the safeguards contained in common article 3 of the four Geneva Conventions, and in article 6 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of

²⁵³ International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

²⁵⁴ European Convention on Human Rights (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221.

²⁵⁵ American Convention on Human Rights: “Pact of San Jose, Costa Rica” (San José, 22 November 1969), *ibid.*, vol. 1144, No. 17955, p. 143.

²⁵⁶ African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217.

²⁵⁷ [ST/HR/CHR/NONE/2004/40/Rev.1. See also *Boston University International Law Journal*, vol. 24, issue 2, fall 2006, p. 147.

²⁵⁸ J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge, Cambridge University Press/International Committee of the Red Cross, 2005, p. 384.

²⁵⁹ Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 972, p. 135.

²⁶⁰ Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287.

²⁶¹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3.

non-international armed conflicts (Protocol II).²⁶² Provisions of international humanitarian law are non-derogable in all circumstances.²⁶³ It should be noted that, at least according to some authors, human rights law should be considered *lex specialis* in relation to procedural issues and judicial guarantees, even in situations of armed conflict.²⁶⁴

162. The obligation to respect the right to a fair trial and acknowledge the right to a defence of any person subject to criminal proceedings is also recognized under international criminal law. The provisions of articles 55 (rights of persons during an investigation), 66 (presumption of innocence) and 67 (rights of the accused) of the Rome Statute, for example, all reflect standards broadly accepted in contemporary international law. Moreover, those standards are also included in the Rome Statute among the criteria which the International Criminal Court uses to determine that a case is admissible, based on the principle of complementarity (art. 17, para. 2) and to exercise its jurisdiction even in the event that a national criminal court has already heard the same case (art. 20, para. 3 (b)).

163. The various international human rights bodies, including the European Court of Human Rights²⁶⁵ and the Inter-American Court of Human Rights,²⁶⁶ have constantly reiterated the importance of procedural rights and safeguards. The European Court of Human Rights has repeatedly stressed the prominent place held in a democratic society by the right to a fair trial.²⁶⁷ In the words of the Court, this right is “one of the fundamental principles of any democratic society”,²⁶⁸ even though it may be subject to restrictions in very exceptional circumstances.²⁶⁹ The Inter-American Court of Human Rights, meanwhile, stated, in relation to article 8 of the American Convention on Human Rights (“Right to a fair trial”), that it does not apply only to judicial remedies, strictly speaking, but to all the “procedural requirements that should be

²⁶² Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17513, p. 609.

²⁶³ See Human Rights Committee, general comment No. 29 (2001) on states of emergency (CCPR/C/21/Rev.1/Add.11), para. 15; and general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 11.

²⁶⁴ See, for example, M. Sassòli, A. A. Bouvier and A. Quintin, *How Does Law Protect in War?*, vol. I, *Outline of International Humanitarian Law*, 3rd ed., Geneva, International Committee of the Red Cross, 2011, part I, chapters 12 and 14.

²⁶⁵ See, *inter alia*, the judgments in the cases of *Yakuba v. Ukraine*, No. 1452/09, 12 February 2019; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], No. 5809/08, 21 June 2016; *Beuze v. Belgium* [GC], No. 71409/10, 9 November 2018; and *Ramos Nunes de Carvalho e Sá v. Portugal*, Nos. 55391/13, 57728/13 and 74041/13, 6 November 2018. The *Guide on Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe/European Court of Human Rights, 2014, provides an overview of the Court’s case law in relation to article 6 of the Convention. For an updated version, see *Guide on Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe/European Court of Human Rights, 2018. See also D. Vitkauskas and G. Dikov: *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe human rights handbooks, Strasbourg, Council of Europe, 2012.

²⁶⁶ See *Case of the Constitutional Court v. Peru*, Merits, Reparations and Costs, Judgment of 31 January 2001, Series C No. 71; *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, Series A No. 9, para. 27; *Case of Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Judgment of 6 February 2001, Series C No. 74, para. 102; *Case of Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 June 2005, Series C No. 127.

²⁶⁷ See *Case of Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 24; *Case of Stanev v. Bulgaria*, 17 January 2012, No. 36760/06, [GC], para. 231.

²⁶⁸ *Case of Pretto and others v. Italy*, 8 December 1983, No. 7984/77, para. 21.

²⁶⁹ See *Adorisio and others v. the Netherlands*, No. 47315/13, of 17 March 2015, para. 44.

observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention”.²⁷⁰ The Court adds that article 8 “recognizes the concept of ‘due process of law’, which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination”²⁷¹. The concept of due process of law expressed in article 8 of the Convention “should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention”.²⁷²

164. At the global level, the Human Rights Committee has addressed the procedural rights and safeguards referred to above in several of its general comments, especially No. 32, on the right to equality before courts and tribunals and to fair trial, and No. 35 (2014) on liberty and security of person.²⁷³ In general comment No. 32, the Committee has stated that “the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law”²⁷⁴ and that “article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law”.²⁷⁵

165. Although the intention in this chapter is not to analyse in detail the content of procedural rights and safeguards, it is considered useful for the Commission to have an indicative list of the rights included under that category. Consequently, following the general outline of the International Covenant on Civil and Political Rights,²⁷⁶ the rights that a foreign official should enjoy in relation to the competent authorities of the forum State seeking to exercise jurisdiction over him or her may be listed as follows:

(a) The right not to be subjected to arbitrary arrest and not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law;²⁷⁷

(b) The right to be informed, at the time of arrest, of the reasons for the arrest and the right to be informed promptly and in detail, in a language which he or she understands, of the nature and cause of the charge;²⁷⁸

(c) In the event of arrest or detention, the right to be brought before a judge or other officer authorized by law to exercise judicial power, and the right to trial within a reasonable time or, otherwise, to release;²⁷⁹

²⁷⁰ Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, para. 27; *Case of Ivcher Bronstein v. Peru*, para. 102, and *Case of Yatama v. Nicaragua*.

²⁷¹ *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, para. 28.

²⁷² *Ibid.*, para. 29.

²⁷³ CCPR/C/GC/35.

²⁷⁴ CCPR/C/GC/32, para. 2.

²⁷⁵ Para. 4. In the same paragraph, the Committee reaffirmed its statement by asserting that “while they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.”

²⁷⁶ The Commission followed this same model in article 11 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part II), para. 50, commentary to article 11, para. (6).

²⁷⁷ Article 9, para. 1.

²⁷⁸ Articles 9, para. 2, and 14, para. 3 (a)

²⁷⁹ Article 9, para. 3.

(d) When arrested or detained, the right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order the official's release if the detention is not lawful;²⁸⁰

(e) When deprived of liberty, the right to be treated with humanity and with respect for the inherent dignity of every human person;²⁸¹

(f) The right to have access to the courts, and to appear before them on terms of equality, including the right to be treated without discrimination;²⁸²

(g) The right to a fair and public hearing by competent, independent and impartial judges established by law;²⁸³

(h) The right to be presumed innocent until proved guilty according to law;²⁸⁴

(i) The right to adequate time and facilities for the preparation of the defence and to communicate with counsel of his or her own choosing;²⁸⁵

(j) the right to be tried without undue delay;²⁸⁶

(k) The right to be tried in his or her presence, and to conduct a defence in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the official in any such case if he or she does not have sufficient means to pay for it;²⁸⁷

(l) the right to examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;²⁸⁸

(m) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;²⁸⁹

(n) the right not to be compelled to testify against him or herself or to confess guilt;²⁹⁰

(o) The right to have a conviction and sentence reviewed by a higher tribunal according to law;²⁹¹

(p) The right to be compensated when a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person;²⁹²

²⁸⁰ *Ibid.*, para. 4.

²⁸¹ Article 10, para. 1.

²⁸² Article 14, para. 1.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*, para. 2.

²⁸⁵ *Ibid.*, para. 3 (b).

²⁸⁶ *Ibid.*, para. 3 (c).

²⁸⁷ *Ibid.*, para. 3 (d).

²⁸⁸ *Ibid.*, para. 3 (e).

²⁸⁹ *Ibid.*, para. 3 (f).

²⁹⁰ *Ibid.*, para. 3 (g).

²⁹¹ *Ibid.*, para. 5.

²⁹² *Ibid.*, para. 6.

(q) The right not to be tried or punished again for an offence for which the official has already been finally convicted or acquitted in accordance with the law and penal procedure of each country;²⁹³

(r) The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed; however, the official may benefit from the imposition of any lighter penalty for which provision is made by law subsequent to the commission of the offence.²⁹⁴

166. The importance of the rights and safeguards listed above is confirmed, moreover, by the fact that some of them are non-derogable under any circumstances,²⁹⁵ and, although derogation from those listed in article 14 is permitted, such derogation may not be made if it results in a *de facto* abrogation of the rights recognized. Thus, the Human Rights Committee has declared that it is inherent in the protection of rights explicitly recognized as non-derogable that they must be secured by procedural and judicial guarantees and, therefore, the provisions of the Covenant relating to guarantees of fair trial and procedural safeguards may never be subject to measures that would circumvent or reduce the protection of these non-derogable rights.²⁹⁶ In short, derogation from the principles of legality and the rule of law can never be justified and, consequently, the following fundamental requirements related to the right to a fair trial are non-derogable:

(a) A person may be tried for and convicted of an offence only by a court;

(b) The presumption of innocence must be respected;

(c) The right to bring proceedings before a court in order that the court may decide without delay on the lawfulness of a person's detention may not be undermined.

167. The procedural rights and safeguards just mentioned are, in principle, intended to operate in cases in which a State exercises its criminal jurisdiction over a person, regardless of his or her status; for that reason, one might ask whether such procedural rights and safeguards are relevant to a topic devoted to the issue of immunity from jurisdiction. However, such a question requires an affirmative answer. First, some of these procedural rights and safeguards are already in operation before jurisdiction begins to be fully exercised. Second, procedural rights and safeguards must be respected both in the context of the proceedings in which the court of the forum State is required to rule on the application of immunity and, if the court rules that immunity does not apply, in the proceedings that can subsequently be initiated against the foreign official. Express inclusion of this issue in the draft articles thus provides an additional safeguard for both the official and the State of the official.

168. In any event, it is important to bear in mind that procedural rights and safeguards must be addressed in the light of how closely they relate to the topic of immunity from foreign criminal jurisdiction, which will determine their greater or lesser relevance in each case. In that respect, particular attention should be drawn to the importance of procedural rights and safeguards relating to detention, the right of access to the courts, legal representation and consular assistance, the particular

²⁹³ *Ibid.*, para. 7.

²⁹⁴ Article 15, para. 1.

²⁹⁵ See article 4, para. 2, of the Covenant.

²⁹⁶ See general comment No. 29 on states of emergency, para. 15; and general comment No. 32 on the right to equality before courts and tribunals and to a fair trial, para. 6. See also the analysis in general comment No. 32 of the relationship of article 14 with other provisions of the Covenant (paras. 58–65).

problem of trials *in absentia* and matters relating to the public nature of criminal proceedings. However, it is for the authorities of the forum State to determine and respect the applicable procedural rights and safeguards, and to take them into consideration on a case-by-case basis.

B. Previous work of the Commission

169. The Commission has already considered the procedural rights and safeguards being examined in this chapter, most recently in the articles on the expulsion of aliens (art. 26: Procedural rights of aliens subject to expulsion)²⁹⁷ and the draft articles on crimes against humanity (art. 11 [10]: Fair treatment of the alleged offender),²⁹⁸ for example. Previously, the Commission had included articles referring to the issue in the context of its work on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, which had resulted in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (art. 8)²⁹⁹ and the draft Code of Crimes against the Peace and Security of Mankind (art. 11).³⁰⁰

170. In the two most recent texts, the Commission took very distinct approaches. While in the articles on the expulsion of aliens, it opted to list the procedural rights that are to be extended to an alien subject to expulsion,³⁰¹ in the draft articles on crimes against humanity adopted on first reading, the Commission chose the model

²⁹⁷ *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10 (A/69/10)*, para. 44.

²⁹⁸ *Ibid.*, *Seventy-second session, Supplement No. 10 (A/72/10)*, para. 45.

²⁹⁹ *Yearbook ... 1972*, vol. II, p. 320.

³⁰⁰ See note 278 above.

³⁰¹ "Article 26. *Procedural rights of aliens subject to expulsion*

1. An alien subject to expulsion enjoys the following procedural rights:
 - (a) the right to receive notice of the expulsion decision;
 - (b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;
 - (c) the right to be heard by a competent authority;
 - (d) the right of access to effective remedies to challenge the expulsion decision;
 - (e) the right to be represented before the competent authority; and
 - (f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.
2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.
3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.
4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration."

of a generic statement regarding the right to fair treatment of the alleged offender.³⁰² The draft articles on crimes against humanity thus derive inspiration from the approach taken by the Commission in 1972 in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, where it merely provided, in article 8, that:

any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings.³⁰³

Similar wording was used in the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.³⁰⁴

171. The reason for this choice of wording is clearly explained in the Commission's commentary to article 8 of the aforementioned draft articles, which is reproduced below:

"article 8 [...] is intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case. The expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense. The expression 'fair treatment' is intended to incorporate all the guarantees generally recognized to a detained or accused person. An example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights."³⁰⁵

172. Some specific aspects of the issue currently before us must be taken into account. First, it should not be forgotten that the protection of procedural rights and safeguards is being considered in the context of criminal proceedings and in a situation where the question of immunity is being raised. At the same time, equal consideration should be given to the fact that, as already indicated, these procedural rights and safeguards should operate at every stage of the proceedings, both in the determination of whether immunity is applicable and, subsequently, if immunity is found not to apply, in the exercise of criminal jurisdiction by the courts of the forum

³⁰² "Article 11 [10]. Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended."

³⁰³ See footnote 301 above.

³⁰⁴ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167. Under article 9 of the Convention, "any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings".

³⁰⁵ See footnote 301 above.

State. With that in mind, it seems preferable to take a general and comprehensive approach that covers all the procedural rights and safeguards mentioned above, the specific application of which must be on a case-by-case basis.

173. In light of all the above, the following draft article is proposed:

Draft article 16

Fair and impartial treatment of the official

1. A State official whose immunity from foreign criminal jurisdiction is being examined by the authorities of the forum State shall benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial.
2. These safeguards shall be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction does not apply.
3. The fair and impartial treatment safeguards shall in all cases include the obligation to inform the nearest representative of the State of the official, without delay, of such person's detention or any other measure that might affect his or her personal liberty, so that the official can receive the assistance to which he or she is entitled under international law.
4. The official shall be treated in a fair and impartial manner consistent with applicable international rules and the laws and regulations of the forum State.

Chapter V

Future workplan

174. The consideration of the procedural aspects of immunity in the present report concludes the analysis of the various issues that the Special Rapporteur included in the programme of work submitted for the Commission's consideration in 2012. Consequently, following its debate on this report, the Commission should be in a position to adopt on first reading the draft articles on the immunity of State officials from foreign criminal jurisdiction, before submitting them to States for their comments.

175. However, although the Special Rapporteur stated in her sixth report that an analysis of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal courts should be undertaken before consideration of the topic was concluded, it has not been possible to include such an analysis in this report. As already indicated,³⁰⁶ this is due to the fact that, at the time when the present report was finalized, the International Criminal Court had not delivered its judgment in the case concerning the obligation of Jordan to cooperate with the Court. Nonetheless, the Commission should note that various issues arising in that case could be of relevance to the topic and should therefore be considered in due course. The Special Rapporteur thus proposes to return to the issue of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal courts once the Court has delivered its judgment.

176. In addition, the Special Rapporteur would be interested to know the opinion of the members of the Commission regarding the possible inclusion in the draft articles of two new issues, namely: (a) the definition of a mechanism for the settlement of disputes between the forum State and the State of the official, as was suggested by one State during the debate in the Sixth Committee; and (b) the inclusion in the draft

³⁰⁶ See paras. 17, 92 and 93 above.

articles of recommended good practices that could help to solve the problems that in practice arise in the process of determining immunity, such as the preparation of guides or manuals intended for the various State organs that might have contact with foreign officials. The Special Rapporteur would welcome the comments of members of the Commission on those points.

177. On the basis of the comments received during the Commission's current session, and after the International Criminal Court has delivered its judgment in the proceedings currently before it, the Special Rapporteur proposes to prepare a final report in 2020. That will enable the Commission, following its consideration of the Special Rapporteur's seventh report (including the proposed new draft articles) during the current session, to adopt the draft articles on immunity of State officials from foreign criminal jurisdiction on first reading at its next session.

Annex I

Draft articles on immunity of State officials from foreign criminal jurisdiction 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*.

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

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
 - (a) crime of genocide;
 - (b) crimes against humanity;
 - (c) war crimes;
 - (d) crime of *apartheid*;
 - (e) torture;
 - (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex

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

Crime of genocide

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

Crimes against humanity

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

War crimes

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

Crime of *apartheid*

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

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

Enforced disappearance

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

Annex II

Draft articles on immunity of State officials from foreign criminal jurisdiction proposed for the consideration of the Commission at its seventy-first session

Part Four Procedural provisions and safeguards

Draft article 8 Consideration of immunity by the forum State

1. The competent authorities of the forum State shall consider immunity as soon as they are aware that a foreign official may be affected by a criminal proceeding.
2. Immunity shall be considered at an early stage of the proceeding, before the indictment of the official and the commencement of the prosecution phase.
3. Immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official that may affect the performance of his or her functions.

Draft article 9 Determination of immunity

1. It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them.
2. The immunity of the foreign State shall be determined in accordance with the provisions of the present draft articles and through the procedures established by national law.
3. The competent court shall consider whether the State of the official has invoked or waived immunity, as well as the information provided to it by other authorities of the forum State and by the authorities of the State of the official whenever possible.

Draft article 10 Invocation of immunity

1. A State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction.
2. Immunity shall be invoked as soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official.
3. Immunity shall be invoked in writing and clearly, indicating the identity of the official in respect of whom immunity is being invoked and the type of immunity being invoked.
4. Immunity shall be invoked preferably through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. Immunity may also be invoked through the diplomatic channel.
5. Where immunity is not invoked directly before the courts of the forum State, the authorities that have received the communication relating to the invocation of immunity shall use all means available to them to transmit it to the organs that are

competent to determine the application of immunity, which shall decide thereon as soon as they are aware of the invocation of immunity.

6. In any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not.

Draft article 11

Waiver of immunity

1. A State may waive the immunity of its officials from foreign criminal jurisdiction.

2. Waiver shall be express and clear and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains.

3. Waiver shall be effectuated preferably through the procedures set out in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States. A waiver of immunity may be communicated through the diplomatic channel.

4. A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver.

5. Where a waiver of immunity is not effectuated directly before the courts of the forum State, the authorities that have received the communication relating to the waiver shall use all means available to them to transmit it to the organs competent to determine the application of immunity.

6. Waiver of immunity is irrevocable.

Draft article 12

Notification of the State of the official

1. Where the competent authorities of the forum State have sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction, the forum State shall notify the State of the official of that circumstance. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such notification.

2. The notification shall include the identity of the official, the acts of the official that may be subject to the exercise of criminal jurisdiction and the authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction.

3. The notification shall be provided through any means of communication accepted by both States or through means provided for in international cooperation and mutual legal assistance treaties to which both States are parties. Where no such means exist or are accepted, the notification shall be provided through the diplomatic channel.

Draft article 13

Exchange of information

1. The forum State may request from the State of the official information that it considers relevant in order to decide on the application of immunity.

2. That information may be requested through the procedures set out in international cooperation and mutual legal assistance treaties to which both States are parties, or through any other procedure that they accept by common agreement.

Where no applicable procedure exists, the information may be requested through the diplomatic channel.

3. Where the information is not transmitted directly to the competent judicial organs so that they can rule on immunity, the authorities of the forum State that receive it shall, in accordance with domestic law, transmit it directly to the competent courts. For that purpose, States shall consider establishing in their domestic law appropriate procedures to facilitate such communication.

4. The State of the official may refuse a request for information if it considers that the request affects its sovereignty, public order (*ordre public*), security or essential public interests. Before refusing the request for information, the State of the official shall consider the possibility of making the transmission of the information subject to conditions.

5. The information received shall, where applicable, be subject to conditions of confidentiality stipulated by the State of the official, which shall be fulfilled in accordance with the mutual assistance treaties that provide the basis for the request for and provision of the information or, failing that, to conditions set by the State of the official when it provides the information.

6. Refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply.

Draft article 14

Transfer of proceedings to the State of the official

1. The authorities of the forum State may consider declining to exercise their jurisdiction in favour of the State of the official, transferring to that State criminal proceedings that have been initiated or that are intended to be initiated against the official.

2. Once a transfer has been requested, the forum State shall suspend the criminal proceedings until the State of the official has made a decision concerning that request.

3. The proceedings shall be transferred to the State of the official in accordance with the national laws of the forum State and international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official are parties.

Draft article 15

Consultations

The forum State and the State of the official shall consult, at the request of either, on matters concerning the determination of the immunity of the foreign official in accordance with the present draft articles.

Draft article 16

Fair and impartial treatment of the official

1. A State official whose immunity from foreign criminal jurisdiction is being examined by the authorities of the forum State shall benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial.

2. These safeguards shall be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction does not apply.

3. The fair and impartial treatment safeguards shall in all cases include the obligation to inform the nearest representative of the State of the official, without delay, of such person's detention or any other measure that might affect his or her personal liberty, so that the official can receive the assistance to which he or she is entitled under international law.

4. The official shall be treated in a fair and impartial manner consistent with applicable international rules and the laws and regulations of the forum State.
