United Nations A/CN.4/L.946

General Assembly

Distr.: Limited
17 June 2021

Original: English

International Law Commission
Seventy-second Session
Geneva, 26 April–4 June and 5 July–6 August 2021

Draft report of the International Law Commission on the work of its seventy-second session

Rapporteur: Mr. Juan José Ruda **Santolaria**

Chapter VI
Immunity of State officials from foreign criminal jurisdiction

Contents

Page

Chapter VI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

1. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[1] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[2]

2. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[3] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[4]

3. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and the seventy-first (2019) sessions, and the seventh report during the seventy-first session (2019).[6] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has thus far provisionally adopted seven draft articles and commentaries thereto. Draft article 2 on definitions is still being developed.[7]

---

[1] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[3] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[4] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[5] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[6] A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, A/CN.4/722, and A/CN.4/729, respectively.

[7] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 130–132).

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194–195 and 250).

B. Consideration of the topic at the present session

4. The Commission had before it the eighth report (A/CN.4/739) of the Special Rapporteur. The report examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; considered a mechanism for the settlement of disputes between the forum State and the State of the official; and considered good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity. In the light of the treatment of the issues in the report, proposals for draft articles 17 and 18 were also presented.

5. The Commission considered the eighth report at its 3520th, 3521st and 3523rd to 3528th meetings, from 12 to 21 May 2021.

6. Following its debate on the report, the Commission, at its 3528th meeting, on 21 May 2021, decided to refer draft articles 17 and 18, as contained in the Special Rapporteur's eighth report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

7. At its 3530th meeting, on 3 June 2021, the Commission received and considered the reports of the Drafting Committee (A/CN.4/L.940 and A/CN.4/L.953), and provisionally adopted the draft articles 8 *ante*, 8, 9, 10 and 11 (see sect. C.1 below).

8. At its … to … meetings, on … and … 2021, the Commission adopted the commentaries to the draft articles (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the eighth report

9. The Special Rapporteur recalled that, in the seventh report, which had been submitted for the consideration of the Commission at its seventy-first session, she had completed her consideration of the questions set forth in the workplan submitted to the Commission in 2012. However, in chapter V of the seventh report, particular attention had been drawn to three general issues that warranted examination by the Commission before the conclusion of the first reading, namely the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the possibility of establishing a mechanism for the settlement of disputes and the possible inclusion of recommendations of good practices in the draft articles. Those questions were the subject of consideration in the eighth report.

10. The Special Rapporteur explained that the eighth report was divided into an introduction and four chapters. The purpose of the introduction was to describe the treatment of the topic by the Commission. Chapter I examined the relationships between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. Chapter II considered the problems related to the settlement of disputes and proposed the establishment of a specific mechanism for that purpose. Chapter III addressed the issue of recommended good practices. Chapter IV concerned the future workplan.

11. Regarding the draft articles that the Drafting Committee had yet to examine, the Special Rapporteur stated that she had held two rounds of informal consultations before the start of the present session to review the current status of the Commission's work and to formulate proposals that would allow the Drafting Committee to make progress in the light of the difficult circumstances of and methods of work for the current session. She thanked the members who had participated in the consultations.

At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74, 76 and 140–141).

At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session (A/CN.4/L.940). The Commission took note of the interim report of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only (*ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para.125 and footnote 1469.

12. Concerning the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the Special Rapporteur recalled that, in the sixth report, she had referred to the need to address in a subsequent report the possible effect that the obligation to cooperate with international criminal tribunals might have on the immunity of State officials from foreign criminal jurisdiction.[8] Two events had led her not to address the issue in the seventh report. The first was the fact that the question of the relationship between immunity and the obligation to cooperate had been raised before the International Criminal Court in the *Jordan Referral re Al-Bashir* case, which was *sub judice* at the time. The second was that, when the report had been completed, an item had been on the agenda of the General Assembly concerning a potential request for an advisory opinion of the International Court of Justice on the issue of immunity of heads of State and the relationship thereof to the duty to cooperate with the International Criminal Court.[9] The Special Rapporteur noted that the demand for an advisory opinion appeared to have waned and that the International Criminal Court had issued its judgment in the aforementioned case on 6 May 2019.[10] The current state of affairs therefore allowed the Commission to address the relationship of immunity of State officials from foreign criminal jurisdiction and international criminal tribunals from a general perspective.

13. The question of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been analysed by both the Special Rapporteurs who had dealt with the present topic. It was closely linked to the scope of the draft articles, which had been defined in draft article 1 as adopted by the Commission. It was clear that the topic did not deal with immunities before international criminal tribunals. Nor it could be denied, however, that the discussion of immunity of State officials from foreign criminal jurisdiction could not proceed in the abstract and without regard to the existence of international criminal tribunals created to consider crimes of concern to the international community. Given that international crimes could be committed by State officials, who might then be subject to prosecution before both national and international criminal courts, it seemed impossible to deny that a relationship existed between the present topic and international criminal jurisdiction. The relationship was also closely linked to the principle of accountability and the efforts against impunity for crimes under international law, which had been recurrent themes in the Commission's debates.

14. Specific questions relating to the relationship between international criminal tribunals and the present topic had arisen in two areas. The first was the possible definition of an exception to immunity derived from the obligation to cooperate with an international criminal tribunal. The second was the standing of foreign criminal jurisdiction in the light of the same obligation to cooperate. The Commission had addressed the first question in 2016 and 2017, deciding not to retain such an exception in draft article 7. The second question was addressed by the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, in which the Court affirmed that, when a State party to the Rome Statute[11] acts pursuant to a request for assistance by the Court, the State assists the Court in exercising its jurisdiction, rather than exercising national criminal jurisdiction.[12]

15. The Special Rapporteur reiterated her view, expressed orally at the seventy-first session and in her eighth report, that it would neither useful nor necessary for the Commission to examine the judgment of the International Criminal Court for the purposes of its work. The judgment had to be understood in the context of the specific legal regime established by the Rome Statute, and it did not seem possible to extrapolate it to the topic before the

[8] A/CN.4/722, para. 43.

[9] Agenda item 89, 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" (A/73/251 and Add.1)

[10] *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal*, judgment of the Appeals Chamber of 6 May 2019 (ICC-02/05-01/09-397-Corr).

[11] Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[12] See footnote 10 above.

Commission, which had a general scope and should be applicable to any State with respect to whose criminal jurisdiction a question of immunity might arise.

16. Nevertheless, it did not seem reasonable for the Commission to ignore the existence of international criminal tribunals when considering an issue that bore a certain relationship to those tribunals. While the topic was limited in scope to immunity from foreign criminal jurisdiction, a number of both members of the Commission and States had stated that the ongoing work of the Commission should not ignore the achievements of the international community in the field of international criminal law and that its work should neither alter nor damage the substantive and institutional norms of international criminal law.

17. Draft article 18,[13] proposed for the consideration of the Commission, responded thereto. It was formulated as a without prejudice clause that would safeguard both the separation and the independence of the regimes applicable to immunity before national criminal courts and international criminal tribunals and preserve the special norms that govern the functioning of international criminal tribunals. The Special Rapporteur also noted similarity between draft article 18 and draft article 1, paragraph 2, as without prejudice clauses and proposed that the former might be incorporated as paragraph 3 of draft article 1.

18. Turning to the question of the settlement of disputes, the Special Rapporteur noted, as indicated in the eighth report, that the procedural provisions proposed in the sixth and seventh reports were intended to help build trust between the State of the official and the forum State, thereby facilitating the settlement of disputes that could arise in the process of determining and applying immunity. Nevertheless, it remained possible that a divergence of legal positions between the States involved could give rise to a dispute that could only be resolved through the peaceful means applicable in contemporary international law. In the opinion of the Special Rapporteur, it was therefore necessary to include a specific provision on the settlement of disputes in the present draft articles.

19. It was clear that any dispute that might arise between the forum State and the State of the official could be submitted to a dispute settlement mechanism accepted by States, as had indeed happened in practice. However, those traditional dispute resolution mechanisms had often functioned in an *ex post facto* manner, operating as a last resort for the restoration of international lawfulness. They had not offered States the opportunity to resolve the controversy at an early stage, avoiding a *fait accompli* that would be difficult to reverse later.

20. The consultation mechanism proposed in draft article 15 and the information exchange system provided for in draft article 13 (renumbered as draft article 12) were both intended to facilitate the early resolution of disputes. However, in case neither worked, it could also be appropriate to establish a mechanism to submit the dispute to a neutral and impartial third party. The Special Rapporteur explained that, to be useful, the mechanism should be structured around two basic elements: linking the submission to third-party dispute settlement to the suspension of the exercise of criminal jurisdiction by the forum State; and the binding effect of the decision taken by the third party.

21. The proposal submitted to the Commission opted for arbitration or the International Court of Justice to avoid the long negotiation process necessary to establish an *ad hoc* body. It was considered that both the mechanisms and their procedural rules were well known to States. The status of the International Court of Justice as a common court of international law would also make the Court particularly suitable to rule on the complex questions that might arise in cases relating to immunity from foreign criminal jurisdiction.

22. Based on those considerations, the proposed draft article 17[14] submitted to the Commission for its consideration established a system for the settlement of disputes divided

[13] The draft article proposed by the Special Rapporteur reads as follows:

"**Draft article 18**

The present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals."

[14] The draft article proposed by the Special Rapporteur reads as follows:

into three consecutive phases: consultations, negotiations (both understood as mandatory mechanisms), and recourse to arbitration or the International Court of Justice (as alternative mechanisms of a voluntary nature). That model, which would be subject to the general rules on dispute settlement in force in contemporary international law, would give States a useful instrument for the defence of their respective rights and interests, avoiding situations of *fait accompli*.

23. The Special Rapporteur noted that the Commission had included provisions on the settlement of disputes in much of its recent work, including in projects that did not follow the traditional model of draft articles, for example the work on peremptory norms of general international law (*jus cogens*). However, she acknowledged that dispute settlement mechanisms were especially linked to instruments of a normative nature and that the Commission had not yet decided whether it would recommend to the General Assembly that the draft articles become a treaty. Even if not, draft article 17 would be fully justified in the context of Part Four of the draft articles, which was dedicated to procedural provisions and safeguards.

24. Concerning good practices, the Special Rapporteur recalled that, in the seventh report, she had raised the possibility of incorporating into the draft articles some reference to good practices, the adoption of which could be recommended to States. The practices included, in particular, a high-level national authority taking the decisions regarding the determination and application of immunity and States drafting manuals or guides for the use of State bodies involved in the process of determining and applying immunity. The Special Rapporteur explained that that approach was due to the finding that, in a number of cases, the competent State authorities were not familiar with the special problems raised by immunity in international law, its relationship with the fundamental principles of international law, or the influence that decisions on the immunity of a foreign State official might have on the international relations of the forum State.

25. In the debate in the Commission at its seventy-first session, several members had addressed the issue of good practices, and the Special Rapporteur recalled that the opinions expressed differed widely. One proposal had been to transform Part Four of the draft article into an annex that could be recommended to States as good practices. The Special Rapporteur did not consider that form appropriate. Other members had expressed the view that the inclusion of good practices in the draft articles would not be useful. A third group had considered that, while the inclusion of good practices could be useful, it would take a long time to draft and delay the completion of the work of the Commission on the topic.

26. The Special Rapporteur also noted that only one State had replied to the request in the report of the Commission on the work of its seventy-first session for information "on the existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State."[15] The reply of that State had been that it had no such guide.

27. In view of the considerations expressed, the Special Rapporteur explained that the eighth report contained no specific proposal on recommended good practices. This did not,

"**Draft article 17**
Settlement of disputes

1. If, following consultations between the forum State and the State of the official, there remain differences with regard to the determination and application of immunity, the two States shall endeavour to settle the dispute as soon as possible through negotiations.

2. If no negotiated solution is reached within a reasonable period of time, which may not exceed [6] [12] months, either the forum State or the State of the official may suggest to the other party that the dispute be referred to arbitration or to the International Court of Justice.

3. If the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling."

[15] *Official Records of the General Assembly, Seventy-Fourth Session, Supplement No. 10* (A/74/10), para. 29.

however, prevent the practices she had identified from being included in the draft articles, either in Part Four, or in the general commentary.

2. Summary of the debate

(a) General comments

28. Members commended the Special Rapporteur for her extensive work on the eighth report, which they considered provided a clear, well-researched, succinct and comprehensive treatment of the questions of the relationship between the topic and international criminal jurisdiction, the possibility of adding a dispute settlement clause and recommended good practices. Members expressed appreciation for her organization of several rounds of informal consultations, both before and during the session. In the view of a number of members, that had enabled the Drafting Committee to progress in its work at the current session.

29. It was recalled that the Special Rapporteur had now completed her plan of work on the topic, including the additional questions dealt with in the eighth report. A number of members expressed the hope that the Commission would complete its first reading either at the present session or during the quinquennium. The importance of giving States an opportunity to comment on a full set of draft articles at the conclusion of the first reading was emphasized. It was also noted that the topic had been on the current programme of work of the Commission since 2007, making it the longest-running topic before the Commission. It was considered that the time that the Commission had taken to work on the topic reflected its complexities and the controversial nature of some of its fundamental aspects. In that respect, it was noted that States had called upon the Commission to come together on a way forward on the topic. In that connection, it was suggested that the Commission would need to overcome the divergent views of its members on draft article 7 before completing its first reading on the topic. The need to consider the question of inviolability and the outstanding definitions in draft article 2 (formerly draft article 3) was also recalled.

(b) Specific comments

Draft article 18

30. Members agreed that any question of immunity before international criminal tribunals was outside the scope of the present topic. Several members noted that immunity before a particular international criminal tribunal was governed by the instrument establishing its respective legal regime. Nevertheless, a number of members considered it important for the Commission to address the relationship specifically in the draft articles. It was noted that the two fields of law shared the important goals of promoting accountability and preventing impunity for the most serious crimes under international law. The point was made that international criminal courts must often exercise their jurisdiction in reliance on States. Several members expressed the importance of avoiding casting a shadow on the interpretation and application of the substantive and institutional norms of international criminal law. In particular, the importance of the obligation of States Parties to the Rome Statute to cooperate with the International Criminal Court and the cooperation obligations of States under Security Council resolutions 955 (1994) and 827 (1993) was recalled. It was also noted that, in its past practice, the Security Council had created horizontal obligations for States to assist in criminal investigations by other States. However, a number of members also emphasized the importance that the draft articles be written in a way that would apply equally to States Parties and non-parties to the Rome Statute of the International Criminal Court.

31. Several members supported the inclusion of draft article 18, sharing the view of the Special Rapporteur that a without prejudice clause would be useful to address the relationship of the draft articles with the rules governing the functioning of international criminal tribunals. It was considered that the draft articles made clear that they neither applied to nor addressed the autonomous regimes of international criminal tribunals. It was suggested that draft article 18 would clarify to States that the draft articles did not impact any other obligations that States could have previously accepted or undertaken. It was also noted that the Commission had frequently used without prejudice clauses in its previous work, and that they had served to delimit the scope of a topic rather than create hierarchical relationships.

32. A number of other members opposed the adoption of draft article 18. The view was expressed that the potential overlap between national and international jurisdictions was not sufficient to create a relationship between them. Some members considered that the relationship between the topic and international criminal tribunals had been made clear in draft article 1, paragraph 1, and in the commentary. A number of members also doubted that the draft articles, if adopted without draft article 18, could undermine developments in international criminal law. Concern was expressed that a without prejudice clause could be interpreted as creating a hierarchical relationship between the norms governing international criminal tribunals and the law of immunity of State officials from national courts. It was also noted that to give precedence to the jurisdiction of the International Criminal Court over the jurisdictions of national courts would be contrary to the principle of complementarity. It was emphasized that a provision on the relationship between the topic and international criminal tribunals should not create an exception to immunity that did not exist under customary international law. A number of members emphasized that, while States could agree in their relations with each other not to recognize immunities, those States could not extend those rules to States not parties to the treaty. With respect to authorizations by the Security Council, the need for close attention to the text of such authorization to determine their content was recalled. It was noted that previous instruments relating to national jurisdiction over international crimes, including the draft articles on prevention and punishment of crimes against humanity and the International Convention for the Protection of All Persons from Enforced Disappearance,[16] did not contain similar without prejudice clauses. Additionally, a number of members suggested that the complexities of the consideration of draft article 18 could cause unnecessary delays to the completion of the first reading on the topic.

33. Several members addressed the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case. A number of members noted that the judgment had been controversial. Members agreed that the Commission should not discuss the judgment in its work on the present topic. Accordingly, it was suggested that it was important that a without prejudice clause set the questions raised by the judgment to one side. It was also emphasized that no link be made between the judgment and draft article 18 in the commentary.

34. With respect to the text of draft article 18, several specific proposals were made. To accommodate the existence of hybrid tribunals, which were neither entirely national nor entirely international in character, several members supported a proposal to refer to "internationalized criminal tribunals" instead of "international criminal tribunals". It was also proposed the reference to "the rules governing … international criminal tribunals" be supplemented with "and practices", drawing on the texts of savings clauses in the Vienna Convention on Diplomatic Relations[17] and the Vienna Convention on Consular Relations. Support was also voiced for an explicit reference to obligations resulting from decisions of the Security Council. Some members expressed concerns that scope of the rules covered by draft article 18 was too broad or otherwise unclear. It was noted that the without prejudice clause proposed in draft article 18 had a larger scope than the relevant commentary to draft article 1, as the former referred to the "functioning" of international criminal tribunals and the latter referred to immunities before them. One member proposed refining to the text to read: "The present draft articles are without prejudice to the applicability of immunity before international criminal tribunals under the relevant constituent instruments establishing such international criminal tribunals." Another proposal was to make reference to States' pre-existing obligations under international law. Other members proposed that "jurisdiction" would be the appropriate term, considering that immunities did not exist before international criminal tribunals. In that regard, it was highlighted that the existence of multiple such jurisdictions should be accommodated in the text. It was also suggested that a clause providing that the drafting articles "do not deal with" the question of international criminal tribunals would be preferable.

35. Regarding the placement of the proposed text, several members expressed their preference that the provision be included as a new paragraph 3 of draft article 1. Other

[16] New York, 20 December 2006, United Nations, Treaty Series, vol. 2716, No. 48088, p. 3.
[17] Vienna, 18 April 1961, *ibid.*, vol. 500, No. 7310, p. 95.

members considered that either placement for the provision would be acceptable. That would, in the view of some members, highlight the relationship between the without prejudice clause already contained in draft article 1, paragraph 2, and draft article 18. It was emphasized that, in any event, the two provisions would have to be read together.

36. As the Special Rapporteur had not proposed a title for draft article 18, one member suggested that "Relationship with internationalized tribunals" could be adopted if the provision was retained as a standalone draft article. Other suggested titles included "Without prejudice", "Relationship to specialized treaty regimes", "Cases outside the scope of the present draft articles" and "Relationship between the present draft articles and instruments establishing international criminal tribunals."

Draft article 17 (Settlement of disputes)

37. Several members agreed with the inclusion of a draft article relating to the settlement of disputes. It was noted that a dispute resolution clause could be seen as a final procedural safeguard, building on draft articles 8 to 16. The procedural mechanisms proposed in the draft articles could be seen as a whole, intended to finely balance the interests of the forum State and the State of the official. It was noted that the inclusion of such a clause might be welcomed by States, some of which had been contemplating the establishment of an international mechanism to resolve disputes relating to immunity of State officials. Furthermore, on a practical level, several members noted that the inclusion of a dispute settlement clause on first reading would invite potentially useful comments from States. However, the view was also expressed that a dispute resolution clause would be an inappropriate addition to draft articles in general. In particular, it was suggested that States might be hesitant to commit to a mechanism that could be seen as a restriction of their respective exercise of national criminal jurisdiction.

38. A number of members expressed the view that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty. Some members considered that the inclusion of a dispute resolution clause did not depend on the nature of the final outcome of the work of the Commission. It was pointed out that it could not yet be ruled out that the draft articles might become a treaty, and it was therefore suggested that a dispute resolution clause would be appropriate. Several members saw a need for more clarity on the intended purpose of the provision, so as to determine its appropriate formulation. In the view of some members, a typical compromissory clause would be more appropriate were the draft articles to become a treaty. If the draft articles were not intended to become a treaty, however, a more general clause regarding procedural recommendations would be appropriate.

39. A number of members considered that provisions relating to dispute settlement adopted by the Commission in its recent work on other topics could serve as models for that provision. In particular, draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*)[18] and draft article 15 of the draft articles on prevention and punishment of crimes against humanity[19] were cited: the former was noted as a potential model for procedural recommendations to States; the latter as a good model of an effective compromissory clause. However, a number of members recommended the omission under the present draft articles of paragraphs 3 and 4 of draft article 15 of the draft articles on prevention and punishment of crimes against humanity, concerning reservations to dispute settlement. The view was also expressed that draft conclusion 21 would not be an appropriate model as the work of the Commission on peremptory norms of general international law (*jus cogens*) had not yet been finalized. It was also recalled that draft conclusion 21 had been motivated by the particular negotiating history of article 53 of the Vienna Convention on the Law of Treaties,[20] which did not apply to the present topic.

40. Several members expressed views concerning the means of dispute settlement contained in the draft article. It was noted that the draft article focuses on negotiation, arbitration and judicial settlement, without reference to the other means of peaceful

[18] A/74/10, para. 56.
[19] *Ibid.*, para. 44.
[20] Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

settlement of disputes set forth in Article 33 of the Charter of the United Nations. A number of members supported adding additional means to the draft article. It was suggested that expanding the choice of means would enable closer alignment of the provision with State practice. Part XV of the United Nations Convention on the Law of the Sea[21] was cited as a potential model.

41. The importance was also emphasized of highlighting the obligation of all States under Articles 2, paragraph 3, and 33 of the Charter to settle any differences between them by peaceful means. A number of members highlighted the importance of the freedom of States to choose the means of dispute resolution. It was suggested that either an additional paragraph making express reference to the principle could be incorporated in the draft article or that the point could be explained in the commentary. It was also noted that, rather than being contrary to the principle of free choice of means, draft article 17 could be seen as an exercise of such freedom.

42. With respect to paragraph 1, some members requested further clarification about the distinction between consultations and negotiations. It was proposed that paragraph could be amended to add "through any other means of their own choosing" to "negotiations". It was suggested to change "as soon as possible" to "as soon as practicable", to allow States an appropriate degree of flexibility. Alternately, the addition of time limits for consultations and negotiations was proposed, in order to facilitate the resolution of disputes.

43. Regarding paragraph 2, the view was expressed that it was not clear whether recourse to judicial or arbitral dispute resolution was intended to be compulsory. Some members supported using compulsory language, making draft article 17 a compromissory clause. However, others preferred the current language. It was suggested that, if the provision were to serve as a reminder to States, it should be of a general nature. Thus, some members expressed the view that including a time limit of either 6 or 12 months would only make sense if the provision were made compulsory. It was also stated that, in view of the sensitivities involved in disputes regarding immunity, even 6 months might be too long a delay. Clarification was requested as to whether a dispute could be referred to judicial or arbitral settlement before the expiration of the 6- or 12-month period, for example if negotiations had no reasonable prospect of success. A number of members suggested reference to additional judicial forums, including, where appropriate, the International Tribunal for the Law of the Sea and an eventual African Court of Justice and Human Rights. It was also proposed to add conciliation, mediation and the use of good offices to the list of available means. A number of members proposed that draft article 17 should clarify the consequences if a State did not accept another State's invitation to dispute settlement. Several members also expressed the view that the creation of a new standing body to deal with disputes regarding immunity would not be advisable.

44. A number of members supported paragraph 3 of draft article 17. However, some members expressed doubts regarding the provision. It was noted that existing treaties relating to immunities did not provide for the suspension of proceedings pending dispute resolution. One member noted that the suspension of national proceedings pending international dispute settlement would be extremely deferential to the State of the official. Some members considered that the draft article failed to address the situation of the State official whose immunity was being examined. It was proposed that the draft article could instead proscribe the further development of the criminal procedure, leaving open the question of continued detention. Several members suggested that the question of suspension should treated on a case-by-case basis by the court or arbitral tribunal in the context of provisional measures. It was noted that, in past cases where claims relating to the immunity of State officials had been raised before the International Court of Justice, the Court had not indicated provisional measures. It was also noted that it would be necessary to ensure that domestic legal systems had provisions to give effect to any suspension. Additionally, a number of members suggested that the draft article should specify the effect for the domestic proceedings of an eventual decision of the International Court of Justice or arbitral tribunal. It was also suggested that the dispute resolution clause might establish a form of preliminary reference

[21] Montego Bay, 10 December 1982, *ibid.*, vol. 1833, No. 31363, p. 3.

procedure, to allow national courts to seek guidance from a third-party dispute settlement mechanism.

45. It was noted that there was a risk that draft article 17 as proposed could interfere with existing obligations to accept dispute settlement. The addition of a without prejudice clause to address that was proposed.

46. With respect to the title of the draft article, it was suggested that "procedural requirements" might be a more appropriate title for the provision, because "settlement of disputes" suggested the creation of a binding obligation on States.

Recommended good practices

47. The members generally agreed with the Special Rapporteur that there was no need to formulate new proposals with respect to recommended good practices. While a number of members supported the idea to reflect good practices in principle, some considered that such inclusion would not be consonant with the formality of the draft articles. Other members also considered that to work extensively on recommended good practices would unnecessarily delay the conclusion of the Commission's first reading on the topic. The potential difficulty of developing a set of good practices that would apply easily to diverse national legal systems was also noted. Several members expressed their support for the proposal of the Special Rapporteur to address the good practices that could already be identified in the context of either those draft articles already before the Commission or, more likely, in the commentaries. It was also suggested that States' recommended good practices could be inferred from their comments, so no direct mention of the practices would be necessary in the work of the Commission.

3. Concluding remarks of the Special Rapporteur

48. The Special Rapporteur expressed her appreciation to the members for their comments on the eighth report. In her view, the comments, observations, criticisms and suggestions of members would contribute to the advancement of the work of the Commission.

49. Responding first to the concerns expressed about the development of work on the topic, the Special Rapporteur noted that several substantive issues were pending before the Commission that would require an additional effort to successfully address before adopting the draft articles on first reading. She noted that some members had mentioned draft article 7 on exceptions to immunity *ratione materiae* in that context. She emphasized, however, that the Commission was making efficient progress in addressing a matter that gave rise to legal difficulties and political sensitivities. That progress was due to a large degree to a workplan and a methodology that had received broad support in the Commission over the previous two quinquennia. She expressed her confidence that the Commission would be able to resolve the problems, which inevitably arise in the process of progressive development and codification of international law, in line with its characteristic spirit of collegiality.

50. With respect to the future outcome of the Commission's work on the topic, the Special Rapporteur was of the view that the topic had been developed in the form of draft articles, whose purpose was to offer States a proposal on the general regulation of the topic, in accordance with the mandate of the Commission to promote the progressive development and codification of international law. She saw no reason to change the format of the work of the Commission at the current stage, especially in the light of the normative dimension of the work, and expressed her belief that the Commission shared that opinion. For that reason, the work of the Commission on the topic would take the form of draft articles, regardless of whether the Commission recommended on second reading that the General Assembly use them as the basis for a possible treaty. In her view, the nature of the instrument being prepared and the potential recommendation to be made to the General Assembly on further treatment of the draft articles were two issues that should remain separate.

51. With respect to draft article 18, the Special Rapporteur remarked that the statements of members, while revealing diverse opinions, reflected the importance of the issue.

52. Regarding the scope of the draft articles, the Special Rapporteur recalled that a number of members considered it unnecessary for the Commission to examine the relationship

between the topic and international criminal tribunals, as the question was outside the scope of the topic. However, she also noted that the majority of members had spoken in favour of examining the issue and retaining draft article 18. The Special Rapporteur agreed with the latter approach and considered that it would be difficult to justify the purposeful exclusion of a reference to the autonomy of the regimes applicable to international criminal tribunals in the light of the evolution of international law. That was especially so considering the number of cases in practice in which the issue of immunity from foreign criminal jurisdiction had been raised in connection with the same crimes that fell within the jurisdiction of international criminal tribunals. To acknowledge that connection and to formally declare the autonomy of the legal regimes applicable to such courts would not prejudice the scope of the topic and would allow the Commission to resolve the confusion in the debate on immunity before national criminal courts and international criminal tribunals.

53. Concerning the judgment of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, the Special Rapporteur recalled that some members expressed opposition to draft article 18 because of concerns that it had a direct connection to the Court's judgment and could be read as validation or support for it. The Special Rapporteur did not think such concerns were justified. While she had waited for the International Criminal Court to issue its judgment before addressing the question, she had always reserved the right to return to the question of the relationship between the topic and international criminal tribunals. As she had already indicated in 2019, it was not necessary for the Commission to consider the judgment, as it was not relevant to the topic. For that reason, her reference to the judgment in the eighth report was limited to recalling the main conclusions of the judgment and explaining why it was irrelevant to the work of the Commission. She reiterated her view that draft article 18 could not be viewed as validating, endorsing or supporting the judgment of the International Criminal Court and was confident that the Drafting Committee would take the concerns of members in mind when considering the draft article.

54. Additionally, the Special Rapporteur noted that, while several members had seized upon the phrasing in the English translation of the eighth report the reception of the judgment "has not been kind",[22] in her view a preferable translation would have been "has been contentious".

55. On the question of the effect of the proposed without prejudice clause, the Special Rapporteur noted the view expressed that the text proposed for draft article 18 would amount to a recognition that the rules governing the functioning of international criminal tribunals were hierarchically superior to those governing the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur shared the view that the conventional norms governing an international criminal tribunal were generally only applicable to the States parties to the relevant convention, but disagreed that draft article 18 would in any way affect that principle. She recalled that the Commission had frequently used without prejudice clauses in its work and that the Commission had not understood such clauses to give rise to hierarchical relationships. Rather, she agreed with the members who considered that draft article 18 merely separated different legal regimes whose validity and separate fields of application were intended to be preserved.

56. Concerning the placement of draft article 18, the Special Rapporteur noted that practically all of the members who supported the inclusion of draft article 18 were of the view that the provision would be best included as draft article 3, paragraph 1. That placement was more appropriate because draft article 18 was closely related to the scope of the draft articles and could complement the without prejudice clause contained in draft article 1, paragraph 2. The Special Rapporteur expressed her intention to make appropriate proposals to the Drafting Committee in that regard.

57. In response to specific drafting proposals made by the members, the Special Rapporteur underscored in particular the suggestion to refer to "internationalized" rather than "international" criminal tribunals, but considered that the study of all such proposals would be more appropriately left to the Drafting Committee.

[22] A/CN.4/739, para. 23.

58. With respect to draft article 17, the Special Rapporteur emphasized that the proposal to include a draft article dedicated to dispute settlement had received support from a majority of Commission members. She also noted that some members had linked the inclusion of a draft article on dispute settlement to the idea that the final outcome of the work of the Commission would be a treaty. Others, however, had considered that a dispute settlement provision could also be understood as an extension of the procedural guarantees included in Part Four of the draft and that it would therefore be appropriate to include such a clause regardless of the final outcome of the work. Draft article 17 corresponded to the latter perspective, which also explained the placement of the provision directly after the other provisions proposed in Part Four. Nevertheless, the Special Rapporteur agreed that the final outcome of the work of the Commission could be relevant to the content of draft article 17. A traditional compromissory clause could be more appropriate for a draft treaty, and a provision offering guidance to States on how to resolve a dispute would be more appropriate if the Commission did not intend to propose a treaty. The Special Rapporteur had not intended for the draft article to become a compromissory clause but was open to discussing the observations and suggestions of members in the Drafting Committee. She also recalled that, regardless of the final decision of the Commission on the nature of its work, it would be useful to include a dispute resolution clause at first reading to allow for feedback thereon from States.

59. With respect to the means of dispute resolution included in draft article 17, the Special Rapporteur took note of proposals to include other means of dispute settlement or other judicial forums in the draft article. However, she considered that the provision was intended to provide a simple and useful model for dispute settlement. While it was obvious that States could use any other means of dispute settlement, it would not add value to reiterate that list in the provision. The Special Rapporteur was nevertheless open to the possibility of including other specific means that would be particularly useful for the purpose pursued in draft article 17. She also considered it appropriate to limit the reference to judicial means to the International Court of Justice, in view of the general approach of the draft articles. With respect to the reference to arbitration, the Special Rapporteur explained that a general reference was appropriate to respect the principle of free choice of means, while it was obvious from the context that the reference pertained to inter-State arbitration. The Special Rapporteur also took note of the view shared by members that it would not be useful to create a specialized body.

60. Concerning the characteristics of the proposed dispute settlement mechanism and in response to a question raised in the debate, the Special Rapporteur explained that her proposal was structured in three phases: consultation, negotiation and judicial or arbitral settlement. Noting that consultations and negotiations might overlap, she clarified that the two were distinguished by the level of formality and by the particular aim of negotiation to find a solution bilaterally. The Special Rapporteur also noted the points raised by members relating to the suspension of the exercise of national jurisdiction should the States decide to submit a dispute to arbitration or to the International Court of Justice. However, she explained that the provision was intended to serve as a safeguard for the State of the official against abusive or politically motivated prosecutions. She noted that it would be necessary to take into account the need to guarantee an adequate balance between the protection of the interests of the forum State and those of the State of the official, in order to avoid a *fait accompli* that could deprive the forum State of the right to exercise criminal jurisdiction or the State of the official of immunity. With respect to the issues raised concerning the legal effect of the outcome of a dispute settlement mechanism in the legal order of the forum State, the Special Rapporteur expressed her view that the issue was important and should be considered by the Drafting Committee, along with the practical consequences that might arise from the optional nature of recourse to the International Court of Justice or to arbitration.

61. Regarding the question of good practices, the Special Rapporteur noted that the members had been practically unanimous in their support of her proposal not to include a provision on the question in the draft articles. She indicated her intention, in line with the suggestion of some members, to include reference to the examples of good practices in the commentary that she would submit to the Commission.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

62. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Part One
Introduction

Article 1
Scope of the present draft articles

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

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.

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*

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.

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*

Article 5
Persons enjoying immunity *ratione materiae*

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

Article 6
Scope of immunity *ratione materiae*

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

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

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

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.

…*

Article 8 *ante*
Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

Article 8
Examination of immunity by the forum State

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

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

(*a*) before initiating criminal proceedings;

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

* The Commission has yet to adopt the title of this part.

Article 9
Notification of the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.

2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Article 10
Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.

2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Article 11
Waiver of immunity

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

2. Waiver must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

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.