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

Contents

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Introduction

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

2. The Special Rapporteur submitted three reports, 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 2008[5] and 2011,[6] respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, 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 immunity of State officials from foreign criminal jurisdiction.[8] In the preliminary report, she clarified the terms of the debate up to that point, identified the principal remaining points of contention, the issues to be considered and the methodology to be followed, and set out an indicative workplan for consideration of the topic. The Commission considered the preliminary report at its sixty-fourth session,[9] and the Sixth Committee of the General Assembly did likewise at the sixty-seventh session of the General Assembly.[10] In both cases, the Special Rapporteur’s proposals were approved.

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

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

[3] 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 Special Rapporteur Kolodkin are contained in *Yearbook … 2008*, vol. II (Part One), 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] *Yearbook … 2008*, vol. II (Part Two), paras. 266 5 to 311.

[6] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 104 to 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 to 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 to 38.

5. The Special Rapporteur subsequently submitted six more reports, in 2013, 2014, 2015, 2016, 2018 and 2019.[11] Since considering those reports,[12] the Commission has so far provisionally adopted the following draft articles, together with the commentaries thereto: draft article 1 (on the scope of the draft articles);[13] draft article 2 (e) and (f) (on the concepts of "State official" and "act performed in an official capacity");[14] draft articles 3 and 4 (on the normative elements of immunity *ratione personae*);[15] draft articles 5 and 6 (on the normative elements of immunity *ratione materiae*);[16] and draft article 7 (on crimes under international law in respect of which immunity *ratione materiae* shall not apply) and annex.[17] The text of the draft articles and the annex relating to draft article 7 provisionally adopted so far by the Commission is included in the present report as annex I. At the seventy-first session, held in 2019, the Drafting Committee started considering draft articles 8 to 16, which the Special Rapporteur had proposed in her seventh report, and also received some proposals from other Commission members. However, owing to a lack of time, the Committee was not able to complete its work on the pending draft articles; it was only able to provisionally adopt a new draft article (draft article 8 *ante*).[18] The Chair of the Drafting Committee briefed the Commission on the progress of work on the pending draft articles, which should continue at the seventy-second session.

6. The Sixth Committee of the General Assembly considered the reports of the Commission on the present topic at its sessions from 2013 to 2019.[19]

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[11] A/CN.4/661 (second report), A/CN.4/673 (third report), A/CN.4/686 (fourth report), A/CN.4/701 (fifth report), A/CN.4/722 (sixth report) and A/CN.4/729 (seventh 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 seventy-first sessions: *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 43 to 49; ibid., *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 126 to 132; ibid., *Seventieth Session* (A/70/10), paras. 174 to 243; ibid., *Seventy-first Session, Supplement No. 10* (A/71/10), paras. 193 to 250; ibid., *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 71 to 141; ibid., *Seventy-third Session, Supplement No. 10* (A/73/10), paras. 270 to 330; and ibid., *Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 122 to 201.

[13] Ibid., *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] Draft article 8 *ante*, provisionally adopted by the Drafting Committee, reads as follows:

"Draft article 8 *ante*. Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles." (A/CN.4/L.940, mimeographed version available on the Commission's website, documents of the seventy-first session; see also *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 125 and footnote 1469).

[19] See documents A/CN.4/666, paras. 10 to 30; A/CN.4/678, paras. 37 to 51; A/CN.4/689, paras. 68 to 76; A/CN.4/703, paras. 51 to 61; and A/CN.4/713, paras. 29 to 44, which contain the topical summaries prepared by the Secretariat of the debate held in the Sixth Committee during its sixty-eighth to seventy-second sessions. The debates held in the Sixth Committee are covered in the summary records contained in documents A/C.6/68/SR.17 to SR.19, A/C.6/69/SR.21 to SR.26 and A/C.6/70/SR.20 and SR.22 to SR.25. The full 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/71st and http://papersmart.unmeetings.org/es/ga/sixth/72nd-session/agenda. The debates of the Sixth Committee on the sixth report are examined in the present introduction.

7. In concluding this summary of the work done on the present topic, it should be recalled that since 2013 the Commission has been addressing various questions to States on matters concerning the topic of immunity of State officials from foreign criminal jurisdiction. In 2014, the following States submitted comments: Belgium, Czechia, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[20] In 2015, the following States sent contributions: Austria, Cuba, Czechia, Finland, France, Germany, Netherlands, Peru, Poland, Spain, Switzerland and United Kingdom of Great Britain and Northern Ireland.[21] In 2016, written contributions were received from the following States: Australia, Austria, Netherlands, Paraguay, Spain, Switzerland and United Kingdom of Great Britain and Northern Ireland.[22] In 2017, the following States sent written comments: Austria, Czechia, France, Germany, Mexico, Netherlands and Switzerland.[23] In 2018 and 2019, the following States submitted comments: Austria, El Salvador, Morocco, Netherlands, Spain, and United Kingdom of Great Britain and Northern Ireland.[24] In 2020, Belarus and the Netherlands responded to the Commission's questions.[25] In addition, in the Sixth Committee, various States referred to the issues contained in the questions that the Commission had addressed to them. The Special Rapporteur wishes to thank those

[20] At its sixty-fifth session (2013), 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", *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 25.

[21] At its sixty-sixth session (2014), 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", ibid., *Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 28.

[22] At the sixty-seventh session (2015), 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", ibid., *Seventieth Session* (A/70/10), para. 29.

[23] At the sixty-eighth session (2016), the Commission asked States to provide "information on their national legislation and practice, including judicial and executive practice, with reference to the following issues: (a) the invocation of immunity; (b) waivers of immunity; (c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution); (d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered; (e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered." Ibid., *Seventy-first Session* (A/71/10), para. 35. That request was reiterated in 2017, ibid., *Seventy-second Session* (A/72/10), para. 30.

[24] At the seventieth session (2018), 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", ibid., *Seventy-third Session* (A/73/10), para. 34.

[25] At the seventy-first session (2019), the Commission asked States to provide 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", ibid., *Seventy-fourth Session* (A/74/10), para. 29.

States for their comments, which are invaluable for the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments, as well as the observations contained in the oral statements by delegations in the Sixth Committee, were duly taken into consideration in the preparation of the present report.

8. As she indicated, the Special Rapporteur concluded the analysis of the various issues included in the programme of work submitted for the Commission's consideration in 2012 in her seventh report. However, she also indicated in the report her intention to submit for the Commission's consideration some reflections on the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. She had stated that intention in 2018 but those reflections had not been included in her seventh report, because when the report was finalized, the appeal by Jordan against the judgment of Pre-Trial Chamber II of 11 December 2017 in the *Jordan Referral re Al-Bashir* case was still pending before the International Criminal Court.[26] Although the Appeals Chamber had rendered its judgment on 6 May 2019,[27] the Special Rapporteur did not consider it appropriate to have the issue considered at the seventy-first session of the Commission. As almost a year has passed since then, the Special Rapporteur thinks now is the right time for a general and comprehensive examination of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. That issue is the focus of chapter I of the present report.

9. The two issues mentioned in the seventh report are also examined in the present report, namely the definition of a mechanism for the settlement of disputes between the forum State and the State of the official (chap. II), and the identification and recommendation of good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity (chap. III). Both issues are examined in the light of the comments made by Commission members at the seventy-first session and by States during the debates in the Sixth Committee in 2019, and the written comments received from the States mentioned above.

10. Finally, the present report includes several annexes containing the draft articles provisionally adopted by the Commission to date (annex I); a draft article provisionally adopted by the Drafting Committee and presented to the Commission for information (annex II); the draft articles submitted to the Commission for consideration in 2013 and 2019 and that have not yet been taken up by the Drafting Committee (annex III); and the draft articles submitted to the Commission for consideration at its seventy-second session (annex IV).

[26] *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir* (decision under article 87, paragraph 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), 11 December 2017 (ICC-02/05-01/09-309).

[27] *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).

I. Relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals

11. The relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals has been present in the work of the Commission on the current topic from a very early stage, having been mentioned in the document that provided the basis for the inclusion of the topic in the long-term programme of work of the Commission,[28] as well as in the memorandum by the Secretariat prepared in 2008 at the request of the Commission.[29] The two successive Special Rapporteurs who have worked on the topic have also referred to the issue,[30] which has been the subject of various pronouncements by Commission members and by States.

12. This issue needs to be examined carefully, since it is contingent, above all, on the very scope of the present topic, defined in paragraph 1 of draft article 1 provisionally adopted by the Commission as follows:

> "The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State."[31]

The Commission clarified that scope in its commentary to the draft article as follows:

> "... the Commission decided to confine the scope of the draft articles to immunity from 'foreign' criminal jurisdiction, that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to the immunity from criminal jurisdiction 'of another State'. Consequently, the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles. This exclusion should be understood as meaning that none of the rules governing the operation of immunities before such tribunals are to be affected by the content of the present draft articles".[32]

13. It goes without saying, therefore, that the present topic has nothing to do with immunities before international criminal tribunals. However, while that it is true, it is also true that immunity from foreign criminal jurisdiction does not operate in the abstract, outside the new reality represented by international criminal tribunals established to prosecute the most serious crimes of concern to the international community. Given that such crimes may also be committed by State officials who could be prosecuted in both national and international criminal tribunals, it seems impossible to deny that some relationship could exist between the present topic and the phenomenon of international criminal jurisdiction. The Commission itself noted that potential relationship in its commentary to draft article 1, as follows:

> "Nevertheless, the need to consider the special problem presented by so-called mixed or internationalized criminal tribunals has been raised. Similarly, a

[28] *Yearbook ... 2006* (vol. II (Part Two), para. 257 and annex I, paras. 12 and 19 and footnotes 15 and 16.

[29] A/CN.4/596 [and Corr.1] (see footnote 3 above), paras. 67 to 87.

[30] See the preliminary report of Special Rapporteur Kolodkin (A/CN.4/601) (note 4 above), paras. 8 to 11, 44 and 103, and the report of Special Rapporteur Escobar Hernández (A/CN.4/661), paras. 21 and 27 to 30).

[31] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 48. See also annex I below.

[32] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49, para. (6) of the commentary to draft article 1.

question has been raised regarding the effect that existing international obligations imposed on States to cooperate with international criminal tribunals would have on the present draft articles. Although diverse views were expressed with regard to both subjects, it is not possible at this stage to definitively address these aspects."[33]

14. It is therefore clear to this Special Rapporteur that while the scope of the present topic does not allow the Commission to address the issue of immunity before international criminal tribunals directly, the Commission also cannot complete its work without examining at least the possible interaction between foreign criminal jurisdiction and international criminal jurisdiction in relation to immunity. In any event, that interaction is intricately linked to the principle of accountability and to the fight against impunity for crimes under international law, and has also been acknowledged by a large number of Commission members and a certain number of States which, in the debates in the Sixth Committee, have emphasized the need to ensure that the draft articles reflect and do not undermine the substantive and institutional strides made in the area of international criminal law.

15. Guided fully by the scope of the present topic, the Special Rapporteur has drawn attention in several of her reports to the special problem posed by the relationship between the topic and international criminal tribunals, addressing it in particular in the context of the definition of acts performed in an official capacity and the limitations and exceptions to immunity, on the one hand (in her fifth report), and of the procedural aspects of immunity, on the other hand (in her sixth and seventh reports). In both cases, the consideration of the reports gave rise to an interesting debate in the Commission that deserves to be revisited briefly in the present report.

A. Acts performed in an official capacity, crimes under international law, and limitations and exceptions to immunity

16. In her fifth report on the immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur analysed the case law of various international criminal tribunals in order to determine, first, the extent to which those tribunals had considered that crimes under international law falling within their jurisdiction could be considered acts performed in an official capacity; and, secondly, the extent to which those tribunals had considered the international character of such crimes as a bar to the invocation of immunity.[34] On the basis of that analysis, draft article 7 proposed by the Special Rapporteur, dealing with crimes in respect of which immunity from foreign criminal jurisdiction shall not apply, included a paragraph 3, which read as follows:

> "3. Paragraphs 1 and 2 are without prejudice to:
>
> (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;
>
> (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State".[35]

17. During the consideration of the report by the Commission, that proposal had given rise to an interesting debate, during which some members noted that the reference to the obligation to cooperate with international criminal tribunals had no place in a draft article devoted to limitations and exceptions to immunity and should

[33] Ibid.
[34] A/CN.4/701, paras. 96 to 246.
[35] Ibid., para. 248.

simply be deleted. Some of them made express reference to the fact that the inclusion of such a provision could prejudge a question (the scope of the obligation to cooperate with the International Criminal Court) which at the time was *sub judice* before the Court in the case concerning the non-cooperation by South Africa in the arrest and surrender of then-President Al-Bashir of the Sudan. Other members considered, on the contrary, that paragraph 3 of draft article 7 proposed by the Special Rapporteur should be retained, since the Commission's work on the present topic should not alter the jurisdiction of the International Criminal Court and the obligations freely assumed by States parties to the Rome Statute of the International Criminal Court.[36] For other members, the content of the paragraph was useful and should be included in the draft articles, although they felt that draft article 7 was not the most appropriate place to do so, and that it was probably preferable for it to be included under a more general formulation that could apply to the draft articles as a whole. Some of them noted that it was perhaps more appropriate to include that content in the part of the draft articles devoted to the procedural aspects of the topic.

18. Following that debate and the work of the Drafting Committee, the Commission finally adopted by a large majority a draft article 7 that confined the limitations and exceptions contemplated therein to immunity *ratione materiae* and from which the paragraph 3 mentioned above was deleted.[37]

19. In any event, it should be noted that the paragraph 3 of draft article 7 proposed by the Special Rapporteur was part of a draft article that was intended to regulate the question of limitations and exceptions to immunity of State officials from foreign criminal jurisdiction in a holistic manner, although separate regimes for immunity *ratione personae* and immunity *ratione materiae* were contemplated therein. However, following the work of the Drafting Committee, the draft article was amended, based on the view that it was preferable for the draft article to be confined to limitations and exceptions to immunity *ratione materiae*, since the Commission had previously pronounced on the full nature of immunity *ratione personae*. Nonetheless, the change to limit the scope of draft article 7 does not affect the nature and scope of paragraph 3 of the original draft article 7 which, by its general nature, had been designed from the beginning to apply to both immunity *ratione personae* and immunity *ratione materiae*.

B. Cooperation with international criminal tribunals

20. The question of the relationship between the topic of immunity of State officials from foreign criminal jurisdiction and international criminal tribunals involves not just substantive elements but also procedural elements pertaining to cooperation between national criminal tribunals and international criminal tribunals. In that connection, the Special Rapporteur noted in her sixth report[38] that the issue had been left pending in 2017, and that she intended to address it in the context of the procedural aspects of immunity in her seventh report.

21. However, by the time that report was submitted, two new developments had occurred, to which the Special Rapporteur drew the Commission's attention. First, the question of immunity of State officials from foreign criminal jurisdiction was being discussed indirectly before the International Criminal Court in the appeal by Jordan against the decision of Pre-Trial Chamber II to refer to the Assembly of States Parties

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

[37] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140. See also annex I below.

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

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.[39] Secondly, an agenda item entitled "Request for an advisory opinion of 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" had been included on the agenda of the General Assembly, at the request of Kenya on behalf of the African States Members of the United Nations. The item was directly related to the debate on cooperation with the International Criminal Court concerning the charges brought against various African leaders, in particular Presidents Al-Bashir of the Sudan and Kenyatta of Kenya.[40] In view of those two developments, the Special Rapporteur felt that it was not appropriate to examine the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals in her seventh report. She noted, however, that in view of the issues being discussed in both cases and the possibility that the judicial decisions might affect the topic being considered by the Commission, she reserved the right to revisit the issue once the International Criminal Court had rendered its judgment. She had included that notification essentially because the proceedings before the Court had given rise to a variety of questions that may be of relevance to the present topic, and the Court had referred to the Commission's work on immunity on various occasions during its public hearings.[41]

22. With regard to those two circumstances, the assumption that the International Court of Justice could pronounce on the matter does not seem feasible at this stage, given that the African Union, at its February 2020 summit, decided to urge African countries to withdraw the request for an advisory opinion that had been placed on the agenda of the General Assembly at their behest.

23. The International Criminal Court issued its judgment in the above-mentioned case on 6 May 2019. Despite the relevance of the judgment to the definition of the system of international criminal justice established by the Rome Statute, the assessment made of the judgment from different academic positions and by some States and the Court itself has not been kind. In any case, it does not seem necessary for the Commission to examine the judgment in detail, much less to assess it. Such assessment would not only be outside the Commission's mandate, but would also generate a far-reaching debate that cannot be initiated without analysing matters that are outside the material scope of the present topic and the scope of the draft articles being elaborated by the Commission. With that in mind, the Special Rapporteur herself informed the Commission in 2019 that she did not intend to submit a specific report on the judgment of the International Criminal Court.[42] That proposal was supported by some Commission members.[43]

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[39] *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir* (decision under article 87, paragraph 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) (see footnote 26 above). The appeal was filed by Jordan on 12 March 2018 (ICC-02/05-01/09-326).

[40] Agenda item 89 of the seventy-third session of the General Assembly (A/73/251). See also A/73/144.

[41] See transcript of public hearings of the Appeals Chamber of the International Criminal Court, held from 10 to 14 September 2018 (ICC-02/05-01/09-386 and annexes 1 to 5).

[42] See provisional summary record of the 3480th meeting of the Commission (A/CN.4/SR.3480), available on the Commission's website.

[43] See statements by Messrs. Tladi (A/CN.4/SR.3481), Park (ibid.), Murphy (ibid.), Hassouna (A/CN.4/SR.3485), Zagaynov (A/CN.4/SR.3486), Wood (A/CN.4/SR.3487) and Reinisch (ibid.). Mr. Gómez-Robledo opposed it (A/CN.4/SR.3486). Mr. Hmoud said that since he had acted on behalf of Jordan in the case before the International Criminal Court, he would refrain from stating his position at the current stage. However, he reserved the right to comment on the matter in the future (A/CN.4/SR.3480). The provisional summary records of the seventy-first session of the Commission are available on the Commission's website.

24. However, it is useful at this stage to mention some of the Court's findings relating to issues that fall within the scope of the present topic and that have already been addressed throughout the Commission's work on the topic. For present purposes, they could be summarized as follows:

(a) National tribunals and the International Criminal Court are subject to different rules with regard to immunity: while immunity of State officials may be invoked before a foreign criminal court, it cannot be invoked before the Court;

(b) Heads of State enjoy immunity before the national criminal tribunals of a third State, but not before international criminal tribunals.[44]

25. These findings are not inconsistent with the Commission's work or with the draft articles adopted so far under the present topic, and therefore do not need to be examined in more detail. Nonetheless, three other findings of the Appeals Chamber may have some bearing on the present topic, particularly on the very concept of foreign criminal jurisdiction, namely:

(a) States parties to the Rome Statute have an obligation to cooperate fully with the International Criminal Court, including by arresting and surrendering persons accused of committing crimes that fall within the jurisdiction of the Court;

(b) The obligation to cooperate is linked to article 27 of the Statute, which creates both vertical effects (jurisdiction of the International Criminal Court) and horizontal effects (jurisdiction of national courts);

(c) In complying with the Court's request for cooperation, "the requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of the Court's jurisdiction".[45]

26. It is undoubtedly this last finding of the judgment that can generate greater debate in relation to the topic at hand, given that, when interpreted more broadly, it could affect the very concept of foreign criminal jurisdiction in the context of which immunity of State officials from criminal jurisdiction is applied; it could also exclude from said category proceedings of national criminal courts initiated pursuant to a request for cooperation from the International Criminal Court.

27. However, in the view of the Special Rapporteur, the Commission does not need to take a position on this issue in the context of the current work, not even to define the concept of foreign criminal jurisdiction, for two main reasons. First, the purpose of the Commission's work on the present topic is to prepare draft articles that define the general regime applicable to immunity of State officials from foreign criminal jurisdiction in all cases where a relevant and more specific treaty-based regime is absent. The concept of foreign criminal jurisdiction should therefore be understood in general terms, such that it can be applied in any circumstance and with respect to the criminal jurisdiction of any State, whether or not that State is a party to specific international treaties, including the Rome Statute. Secondly, the findings of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case should be understood exclusively in the context of the obligations assumed by States parties under the Rome Statute. Consequently, the characterization that the Court makes of the actions taken by the criminal courts of those States to

[44] *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 the International Criminal Court of 6 May 2019 (see footnote 27 above), paras. 101, 102, 110, 111 and 113. It should be noted that, in its judgment, the Court refers only to the immunity of Heads of State from criminal jurisdiction.

[45] Ibid., para. 4.

comply with the duty to cooperate with the Court is relevant only in the context of said special legal regime and cannot be extrapolated to define the nature of the actions of said courts in the general framework in which the Commission is undertaking the present work.

C. International criminal tribunals in the draft articles

28. At this juncture, it is worth considering whether it is appropriate to include an express reference to international criminal tribunals in the draft articles, a question that should be assessed from two different but complementary perspectives.

29. First, as immunity before international criminal tribunals does not fall within the ambit of the present topic, the question may be asked whether it is appropriate to adopt any draft article that refers to obligations arising from legal regimes established in international treaties that may thus have some legal implications for the draft articles. That option could clash with the general nature of the regime on immunity of State officials from foreign criminal jurisdiction that the draft articles are intended to establish. Indeed, as indicated above, the Commission defined the scope of the present topic and limited it to the foreign criminal jurisdiction of States, to the exclusion of that of international criminal tribunals. However, unlike with other special regimes that regulate specific forms of immunity from criminal jurisdiction, international criminal tribunals can only be excluded from the scope of the draft articles following an *a contrario* interpretation of draft article 1, paragraph 1, as reflected in the commentary reproduced above.

30. Nonetheless, many Commission members and States in the Sixth Committee have pointed to the relevance of international criminal tribunals in the fight against impunity for the most serious crimes of international concern, noting that, in carrying out its work on the present topic, the Commission needs to take into consideration the strides made by the international community in international criminal law, in order to ensure that the final outcome of the work does not undermine the substantive and institutional norms developed in that area. That was also reflected in the commentary to draft article 1, where the Commission expressly stated as follows:

> "This exclusion must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles."[46]

31. It is worth remembering, on the other hand, that the importance for the Commission to preserve the rightful place of international criminal tribunals in contemporary international law in its work was corroborated by the fact that the International Court of Justice, in the *Arrest Warrant of 11 April 2000* case, identified such tribunals as an alternative means of avoiding impunity in cases where the criminal courts of a State cannot exercise jurisdiction.[47] This would allow a case to be referred to an international criminal tribunal as a way of ensuring that the immunity of State officials from foreign criminal jurisdiction is respected and, at the same time, that international criminal responsibility for the commission of certain categories of crimes is clearly established. Indeed, that possibility had been included in a proposal made by one member of the Commission in connection with draft article 7 and procedural safeguards.

[46] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 49, para. (6) of the commentary to draft article 1.

[47] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, *I.C.J. Reports 2002*, p. 3 et seq., especially pp. 25 and 26, para. 61.

32. In the light of the foregoing, the Special Rapporteur believes that the Commission could consider including in the draft articles an express provision, in the form of a "without prejudice" clause, that allows both elements to be accommodated. The following draft article is therefore proposed:

Draft article 18

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

II. Settlement of disputes

33. One of the purposes of the set of procedural measures proposed in the seventh report is to help build trust between the State of the official and the forum State, thereby facilitating the settlement of disputes that may arise between them in the process of determining and applying immunity. It is also true, however, that in certain circumstances the discrepancy between the legal positions of the two States may persist, leading to a dispute in the strict sense that can be resolved only through the means of peaceful settlement of disputes generally applicable in contemporary international law. In the opinion of the Special Rapporteur, this makes it necessary to consider whether it is possible and advisable to include in the draft articles a specific provision on the settlement of disputes. This issue was also raised by former Special Rapporteur Kolodkin and by one State in the Sixth Committee.

34. In paragraph 176 of the seventh report, the Special Rapporteur sought the opinion of the members of the Commission on this issue.[48] The responses were varied. For some members of the Commission, the inclusion of such a provision will depend on the final form of the Commission's work on the present topic. One member emphasized that a provision on the peaceful settlement of disputes would make sense only if the purpose of the draft articles was to serve as the basis for an international treaty at a later stage, since only in that type of instrument would it make sense to establish specific mechanisms for dispute settlement. For some members, it would be useful in any event to formulate suggestions concerning dispute settlement; one member emphasized that only through that approach would it be possible to resolve subsequent problems associated with the determination and application of immunity. In that connection, some members made specific suggestions relating to the issue, in particular the possibility of using the model already agreed upon for the topics "Peremptory norms of general international law (*jus cogens*)" and "Crimes against humanity". One member of the Commission also pointed out that the inclusion of a provision of this type in the draft articles would have to be analysed to determine how effective it might be. In any event, the majority of Commission members who participated in the debate on this issue in 2019 were in favour of including a provision on dispute settlement mechanisms.

35. The Sixth Committee has also dealt with the issue.

36. The Special Rapporteur is fully aware that the Commission's practice until very recently has largely been to avoid including provisions on means of dispute settlement in its texts. She is also aware that such provisions are typically included in treaty instruments, in which it makes sense to provide for specific means of dispute settlement, even though they are always limited and optional in nature. In that context, it should be borne in mind that the question of what the outcome of the work on the

[48] A/CN.4/729, para. 176.

present topic should be is still pending at present; it is preferable to wait until the text is finalized on second reading to take a final decision on the matter.

37. From that perspective, it could be considered that no proposal on the settlement of disputes should be included at the current stage of work. However, in the opinion of the Special Rapporteur, there are sufficient grounds for including the issue in the draft articles; two of these in particular should be highlighted. First, the Commission is due, at the current session, to adopt the draft articles on immunity of State officials from foreign criminal jurisdiction on first reading. The text should be considered a full set of draft articles that offers States a complete view of what the Commission is proposing with regard to the topic, thus allowing them to submit comments and observations that the Commission will have to consider when adopting the draft articles on second reading. From that perspective, postponing the adoption of a draft article on the settlement of disputes to the second reading would prevent States from being informed about a proposal that a number of Commission members consider would be useful in the treatment of the topic. Secondly, the Commission recently included a proposal relating to the settlement of disputes in a topic in respect of which there is absolutely no intention to elaborate an international treaty; the provision in question is conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted on first reading in 2019.[49]

38. That said, it is necessary to analyse what form a reference to the settlement of disputes might take in the draft articles. It should be emphasized, first of all, that the inclusion of a draft article on the issue would not affect or interfere in any way with the model for the settlement of disputes that is well established in contemporary international law. On the contrary, it is obvious that any dispute that arises between two States in relation to the determination and application of immunity of a State official from foreign criminal jurisdiction can be settled through traditional means of dispute settlement, including through the courts. This is made clear by the practice already analysed in previous reports of the Special Rapporteur, in particular with regard to the International Court of Justice, to which various cases directly related to the present topic have been referred.[50] In all those cases, the question of immunity of State officials from foreign criminal jurisdiction was presented from different perspectives, and the Court ruled on questions relating to immunity, settling the dispute that had arisen between the State of the official and the forum State. The Court has also issued advisory opinions on these questions,[51] such as one in which it also ruled on questions relevant to the determination and scope of immunity of an individual that have also been addressed in the work on the present topic.

39. However, while that means of dispute settlement is always an option, it remains true that it has always been used after the forum State has adopted decisions on immunity, which may constitute an internationally wrongful act entailing the international responsibility of the wrongdoing State. In that sense, the traditional mechanisms for dispute settlement have functioned as a last resort for identifying and restoring international legality, but have not served the aforementioned purpose of offering States ways of settling a dispute at an early stage, thereby strengthening mutual trust and reducing the risk of unstable and conflictual international relations.

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[49] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 56.

[50] See the cases concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 47 above); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008,* p. 177; *Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003,* p. 102; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*.

[51] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999,* p. 62.

That purpose can be achieved primarily through the system of consultations set out in draft article 15 submitted to the Commission for consideration, and through the systems of exchange of information provided for in draft article 13, both of which are before the Drafting Committee. However, if neither of those mechanisms works, it might be appropriate to propose a dispute settlement mechanism that provides for the possibility of referring an incipient dispute to a third party with recognized capability to settle it in a neutral and impartial way, issuing a kind of out-of-court ruling. The referral of the issue to a means of settlement would thus become a ground for the suspension of court proceedings in the forum State, while the decision adopted by the third party would become binding on both the forum State and the State of the official, which would undertake to adapt their positions to the solution proposed by the third party.

40. The approaches to be established in this regard may vary significantly, both with respect to the identification of the third party and with respect to the conditions for referral of the dispute and the possible effects of recourse to a specific means of settlement.

41. With regard to the first of these issues, there are basically three possible options: (a) referral to the International Court of Justice; (b) referral to arbitration; and (c) referral to a permanent ad hoc international body.

42. The first two options – the referral of a case to the International Court of Justice or to an arbitral body – do not present particular difficulties, but for the requirement to comply with the specific rules of each body on establishment of jurisdiction. It will therefore be for the States concerned to act on a case-by-case basis or, in the case of the International Court of Justice, in accordance with the system for acceptance of the Court's jurisdiction set out in Article 36 (6) of its Statute. Referral to either of these mechanisms has the advantage that they are existing, well-established means available to the States concerned without the need to adopt complex organic decisions and, particularly in the case of referral to an arbitral body, they allow States some flexibility.[52]

43. Referral to a permanent ad hoc body would be beneficial in that such a body is specialized and that it would be open to any State; case-by-case agreement would not be necessary. Another benefit would be immediacy of response: referral to an open permanent body would mean that there would be no need to await completion of the complex process of forming an arbitral body. The committees established under the various United Nations human rights treaties could serve as models.[53] However, practice shows that the establishment and formation of this type of specialized body requires broad consensus; such bodies have been put into operation only under international treaties. In the present case, any such treaty should be universal. This would make it difficult to form such a body without eliminating the discretion enjoyed by States as to whether or not to accept the contentious jurisdiction of such bodies.

44. The Special Rapporteur therefore considers it preferable to opt for an approach that offers States greater flexibility and that does not require new specialized permanent structures to be established, although this could be a feasible approach in

[52] With regard to flexibility, it should also be remembered that there is the possibility, already used in practice, of forming an ad hoc chamber of the International Court of Justice.

[53] This possibility was considered by the Commission in relation to the topic "Crimes against humanity" but was ultimately not included in the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading at its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 44. See, in particular, the memorandum prepared by the Secretariat, at the Commission's request, on information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN.4/698).

the longer term. Furthermore, opting for a more flexible mechanism offers the added advantage that there is no international treaty that establishes or prevents the establishment of such a mechanism, which leaves open the question of the decision that the Commission will have to make in due course on the final outcome of its work on the present topic.

45. In the light of the foregoing, the Commission may consider it of interest to study the two most recent formulations concerning the settlement of disputes that it has adopted in its work, namely conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*) and article 15 of the draft articles on prevention and punishment of crimes against humanity. Both approaches have been mentioned by different members of the Commission as a source of inspiration for a draft article on the settlement of disputes under the present topic. The Commission may also consider the conciliation mechanism referred to in article 66 of the Vienna Convention on the Law of Treaties,[54] which was also mentioned by another member of the Commission.

46. Conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*) reads as follows:

> **"Conclusion 21. Procedural requirements**
>
> 1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.
>
> 2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.
>
> 3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
>
> 4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.
>
> 5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned."[55]

47. Article 15 of the draft articles on prevention and punishment of crimes against humanity reads as follows:

> **"Article 15. Settlement of disputes**
>
> 1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

[54] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[55] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 56. The Commission's commentaries to the draft conclusions may be found in ibid., para. 57.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration."[56]

48. Although neither of the texts reproduced above can be used in its entirety as a model for dispute settlement as defined in the present chapter, it should be noted that both incorporate elements of considerable interest that merit consideration: (a) the reference to notification as a prerequisite and the identification of the effects of a lack of objection to such notification; (b) the reference to negotiation as the primary means for settling disputes and openness to the use of other means of settlement; (c) the reference to judicial settlement (the International Court of Justice) or arbitration as the final means of dispute settlement and the effects that this would have on the measures that the State initiating the proceedings proposes to take.

49. All the elements listed in the foregoing paragraph are related to various questions that also arise under the present topic. Some of these questions were addressed in the last two reports of the Special Rapporteur and are reflected in the draft articles currently under consideration by the Drafting Committee, in particular, notification by the forum State (draft article 12) and the response of the State of the official, whether by way of invocation or waiver of immunity (draft articles 10 and 11), and the holding of consultations (draft article 15). The remaining elements of the texts reproduced above are useful for defining a system of dispute settlement that could be included in the draft articles, in particular the following elements: (a) the referral of the dispute to a third party that could give a binding decision on the immunity from foreign criminal jurisdiction of the official of the affected State; (b) the need to establish a deadline for the parties to settle the dispute themselves before it is referred to a third party; and (c) the effects that referral of the dispute to a third party would have on the exercise of jurisdiction by the forum State.

50. With regard to the first of these elements, the two models mentioned above concern in particular the International Court of Justice and arbitration. In addition, conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*) refers to the other means of dispute settlement mentioned in Article 33 of the Charter of the United Nations; these should include conciliation, which is provided for in article 66 of, and the annex to, the Vienna Convention on the Law of Treaties, which were also mentioned in the debate. In any event, both texts contain references to means of settlement that culminate in decisions that are binding on the States involved, which is without doubt the essential element that must be preserved in any proposal regarding dispute settlement under the present topic, since only if the decision is binding will the proposal be effective and will it have any effect on the ability of the forum State to exercise jurisdiction under the rule of out-of-court settlement.

51. Moreover, in order for any system of dispute settlement that may be proposed under the present topic to be effective, a deadline must be set for the bilateral settlement of the dispute (through consultations or negotiations) before referral to an external system. The deadline should also be established taking into account the particular characteristics of immunity and the fact that the measures under dispute

[56] Ibid., para. 44. The Commission's commentaries to the draft articles may be found in ibid., para. 45.

may affect the rights of the foreign official, the proper performance of his or her functions, the exercise of jurisdiction by the authorities of the forum State (in particular the judicial authorities) and the stability of international relations. The deadline should therefore be as short as possible and should always reflect the particular circumstances of each case.

52. Lastly, it should be borne in mind that a third-party dispute settlement system will be more effective if it prevents the forum State or the State of the official from taking decisions that may entail its responsibility. From that perspective, it seems logical to conclude that the referral of a dispute to an external settlement system should result in suspension of the exercise of jurisdiction by the forum State until the body responsible for settling the dispute adopts a final decision that is binding on both parties.

53. On the basis of these elements, it is possible to define a model for the settlement of disputes that serves as a final safeguard for the forum State and the State of the official. Such a mechanism will be subject to the general rules for the system of dispute settlement under contemporary international law and must therefore be optional in nature. It will nonetheless be a useful safeguard for States wishing to defend their own interests and will also prevent the possibility of a situation of fait accompli that could conflict with or be detrimental to respect for and protection of the immunity of State officials from foreign criminal jurisdiction.

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

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.

III. Recommended good practices

55. In paragraph 176 of the seventh report, the Special Rapporteur suggested the possibility of including in the draft articles on immunity of State officials from foreign criminal jurisdiction a reference to “good practices” which States could be recommended to adopt in relation to the topic, mentioning in particular two points: (a) the desirability of decisions relating to the determination and application of immunity being adopted by high-level national authorities; and (b) the usefulness of States preparing manuals or guides intended for the State organs that may have to be involved in the process of determining and applying immunity. This suggestion reflected, in particular, the finding that, in a number of cases, the State organs responsible for adopting decisions in this regard were not familiar with the particular problem of immunity in international law, its relationship with the fundamental principles of international law and the impact that decisions concerning the immunity of a foreign official might have on the State’s international relations. This was the

reason for the selection of these two areas of "good practices" that could be recommended to States in a general, non-prescriptive way, without precluding the identification of other good practices by other members of the Commission or by States themselves. It was also the basis for the request included in chapter III of the Commission's report to the General Assembly on the work of its seventy-first session,[57] in 2019. The responses received show, however, that there are no guides or manuals on the immunity of State officials from foreign criminal jurisdiction in national legal systems.

56. During the debate at the Commission's seventy-first session, a number of members expressed their views on whether it would be appropriate and useful to recommend good practices. Some members took the view that it was not necessary or useful to do so, while others said that they could be of some use. In addition, some members of the Commission referred to "good practices" from a perspective different from that set out above. In this third group, some members took the reference to "good practices" to imply the preparation by the Commission itself of a guide to good practices that could accompany the draft articles but would be separate from them. From that point of view, they said, quite correctly, that this would add to the work already under way and would delay the completion of that work and make it impossible for the draft articles to be adopted on first reading in 2020. They were therefore not in favour of preparing such a guide to good practices. A second set of members in this third group expressed interest in the proposal to include "good practices" in the draft articles but from a completely different perspective. For them, good practices could consist of some elements already included in the draft articles on procedural questions that have to be considered by the Commission, which would make it possible to reduce the content of the draft articles to the essentials and present the remainder of the procedural questions in an orderly form in a "guide to recommended best practices", although no proposal was made as to which elements should be included in the draft articles and which should be included in the guide to good practices. However, there was no express pronouncement on the two types of good practices suggested by the Special Rapporteur, although some members of the Commission, in their different statements, offered interesting examples relating to their own national legal systems or gave their views on the desirability of decisions by the national authorities competent to rule on immunity from foreign criminal jurisdiction being adopted at the highest level.

57. During the debate in the Sixth Committee, various States expressed their opinion on the question of "recommended good practices".

58. The Special Rapporteur shares the view of Commission members that the amount of time that would be required to prepare a guide to good practices would prevent the adoption on first reading of the draft articles at the current session. She would also like to place on record that it was never her intention to suggest that possibility, as it represents a complete departure from the nature of the work that the Commission has been doing for almost three quinquenniums, and in particular the past two. Furthermore, although she recognizes that the proposal to detach part of the content of draft articles 8 to 16 and turn them into a kind of "practical guide" may have some merit, she is also not completely convinced that this is the best approach for dealing systematically with the procedural aspects of immunity. In any event, this question will be considered by the Drafting Committee, which now has the draft articles before it, and she therefore does not consider it necessary to formulate any proposal in that regard.

59. Nonetheless, the Special Rapporteur continues to believe that the two issues that she identified in her seventh report under the category of "good practices" are still of

[57] Ibid., para. 29.

value for the draft articles. The recommendation that decisions on immunity be taken at the highest possible level was supported by many members of the Commission in their statements, and also in one proposal made by a member of the Commission, in which the issue was emphasized in relation to the preparation of a specific provision on particular safeguards applicable in those cases in which there is an exception or limitation to immunity. However, this issue may have been addressed adequately in the draft articles already submitted to the Commission for consideration, bearing in mind in any event the variety of jurisdictional models existing at State level and the specific nature of each national legal system.

60. With regard to the suggestion that States consider the possibility and usefulness of preparing manuals or guides for State organs which, by virtue of their purview, may deal with matters of immunity, it is sufficient to recall the interesting examples from Germany and the Republic of Korea that were presented to the Commission last year. These are tools that do not affect the autonomy of State organs or limit their competence and that may, nonetheless, help to resolve practical difficulties that might cause real problems that could be avoided easily, such as the detention of a foreign official, the identification of such an official or the requisition of some of his or her property; or the way in which information is provided about such extreme cases when they occur and the authority to which such information should be addressed. This is the type of guide that has already been prepared in some States in relation to diplomatic agents and consular officials and that, therefore, would not be completely new in State practice. In any event, it would be for States to prepare such a guide or manual; the Commission would limit itself, where appropriate, to recommending that such a guide or manual be prepared, if that is understood to be a “good practice”.

61. Bearing in mind the foregoing, the Special Rapporteur does not consider it necessary to formulate specific proposals regarding the issue of “recommended good practices”. The present report is therefore limited to drawing attention to the problem in relation to the two points identified in 2019, on the understanding that, if the Commission considers it appropriate, both questions may be addressed in another context, whether in relation to the draft articles already presented or as part of the specific or general commentaries that are to accompany the draft articles.

IV. Future workplan

62. With the submission of the present report, the Special Rapporteur considers that she has completed the consideration of all the issues that may be of interest to the Commission in the treatment of the topic of immunity of State officials from foreign criminal jurisdiction. She therefore hopes that, after the debate on the topic and the analysis of the draft articles proposed in the present report and those that are still pending in the Drafting Committee, the Commission will be in a position to adopt the draft articles on this topic on first reading at the current session.

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

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 article provisionally adopted by the Drafting Committee at the seventy-first session and presented to the Commission for information

Draft article 8 *ante*
Application of Part Four

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

Annex III
Draft articles submitted to the Commission for consideration and pending in the Drafting Committee

Part One
Introduction

Draft article 2 [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;

(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;

(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".

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.

Annex IV
Draft articles submitted to the Commission for consideration at its seventy-second session

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.

Draft article 18

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