Chapter X

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

265. 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 Kolodkin as Special Rapporteur.[615] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[616]

B. Consideration of the topic at the present session

266. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/601), as well as a memorandum of the Secretariat on the topic (A/CN.4/596). The Commission considered the report at its 2982nd to 2987th meetings, from 22 to 25 and 29 to 30 July 2008.

1. Introduction by the Special Rapporteur of his preliminary report

267. The Special Rapporteur indicated that his preliminary report aimed at briefly describing the history of the consideration of this subject by the Commission and the Institute of International Law, as well as at outlining the issues which the Commission should analyse as part of its consideration of this topic and in its possible formulation of any future instrument. He noted that, since the publication of the syllabus that was annexed to the report of the Commission on its 2006 session,[617] attention to the question of immunity of State officials from foreign criminal jurisdiction had not abated: new academic work on the topic had been published and several national and international judicial decisions had been rendered, including the recent judgment of the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters*.[618] A substantial amount of available information had been considered both in his preliminary report and in the informative Secretariat memorandum, but it was far from being exhausted. The preliminary report, he emphasized, tried to describe objectively the different opinions that had been expressed on the matter, and the Special Rapporteur had occasionally given his preliminary views on certain questions.

268. The Special Rapporteur highlighted that the report contained an examination of only some of the questions for further consideration by the Commission and that he intended to cover the remaining preliminary issues in his subsequent report. These issues included the question of the scope of immunity of State officials from foreign criminal jurisdiction and some procedural questions, such as the waiver of immunity.

269. According to the Special Rapporteur, the very title of the topic gave guidance to determining its boundaries. The Commission was to examine only the immunity of State officials from foreign criminal jurisdiction, thus leaving aside questions relating to immunity with respect to international criminal tribunals and the domestic courts of the State of nationality of the official, as well as immunity in civil or administrative proceedings before foreign jurisdictions. Furthermore, the topic should focus on immunity under international law, and not under domestic legislation: provisions contained in national laws should only be relevant as evidence of the existence of customary international law.

270. The Special Rapporteur emphasized that the issue of immunity of State officials from foreign criminal jurisdiction arose in inter-State relations. In conformity with the predominant legal literature and case law (and despite some judicial decisions that had justified immunity by reference to international comity), the Special Rapporteur considered that there was sufficient basis to affirm that the source of immunity of State officials from foreign criminal jurisdiction was not international comity but, first and foremost, international law, particularly customary international law.

271. He further observed that criminal jurisdiction was not to be restricted to its judicial dimension and covered executive actions undertaken long before the actual trial, the issue of immunity being thus often settled by States through diplomatic channels at the pretrial stage. The Special Rapporteur also noted that criminal jurisdiction was not exercised over the State, but that criminal prosecution of a foreign State official may affect the sovereignty and security of that State and constitute interference in its internal matters, especially in the case of senior officials. He did not consider it appropriate to analyse further the issue of jurisdiction *per se*.

272. In the Special Rapporteur's view, the legal norm or principle of immunity implied a right of the State of

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[615] At its 2940th meeting, on 20 July 2007, see *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376. The General Assembly, in paragraph 7 of 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 I of the report of the Commission, *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257.

[616] *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

[617] *Yearbook ... 2006*, vol. II (Part Two), Annex I, pp. 191–200.

[618] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177. The text of the judgment is available on the official website of the Court: www.icj-cij.org.

the official and of the official himself or herself not to be subject to jurisdiction and a corresponding obligation incumbent upon the foreign State. It should be further examined whether the latter obligation encompassed only the negative duty not to exercise jurisdiction or also a positive obligation to take measures to prevent breaches of immunity. Furthermore, the Special Rapporteur considered that immunity was procedural, and not substantive, in nature: while it exempted the individual from executive and judicial jurisdiction, it did not free him or her from prescriptive jurisdiction, i.e. from the obligation to abide by the laws of the foreign State and from his or her criminal responsibility in case of breach of that law. The Special Rapporteur also noted that, already at this stage of the study, he had the impression that the issue under consideration was in fact not that of the immunity from foreign criminal jurisdiction, but rather the immunity from certain legal measures of criminal procedure or from criminal prosecution. However, he added, this issue would only become clearer after the study of the scope of immunity.

273. The Special Rapporteur raised the question whether it was necessary for the Commission to define the notion of "immunity" for the purposes of the present topic. He recalled that the Commission had rejected this idea in its work on the topic of jurisdictional immunities of States and their property. The Special Rapporteur further observed that a distinction is usually drawn between two types of immunity of State officials: immunity *ratione personae* (or personal immunity) and immunity *ratione materiae* (or functional immunity). The distinction appeared to be useful for analytical purposes, although these two types of immunity shared some common characteristics.

274. The Special Rapporteur expressed the view that the immunity of State officials from foreign criminal jurisdiction was explained by a combination of the "functional necessity" and "representative" theories, and that its more fundamental legal and policy rationale was to be found in the principles of sovereign equality of States and non-interference in internal affairs, as well as in the need to ensure the stability of international relations and the independent performance of State activities.

275. As regards the scope of the topic with respect to the persons covered, the Special Rapporteur observed that the title generically referred to the notion of "State officials". Although, in some instances, reference had been made in this context only to Heads of State, Heads of Government and Ministers for Foreign Affairs, it was widely recognized that all State officials enjoy immunity *ratione materiae*. In practice, States faced the issue of immunity from foreign criminal jurisdiction in respect of different categories of their officials. The Special Rapporteur suggested therefore that the notion of "State officials" be retained and that it could be defined by the Commission for the purposes of this topic. He also pointed out that the Commission should examine the status of both incumbent and former officials.

276. With respect to immunity *ratione personae*, the Special Rapporteur observed that, particularly in light of the judgment of the ICJ in the *Arrest Warrant* case,[619] it was obvious that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed this kind of immunity. The question was left open, however, as to whether other high-ranking officials (e.g. ministers of defence, deputy Heads of Government, etc.) would also enjoy personal immunity. This issue could hardly be solved by an enumeration of the relevant official positions and it seemed that the Commission should rather endeavour to identify criteria to establish those officials who enjoy personal immunity.

277. Finally, the Special Rapporteur drew the attention of the Commission to two issues that were found on the margins of the topic, namely that of the role of recognition in the context of immunity and that of the immunity of family members of State officials, and primarily of high-ranking officials. The Special Rapporteur was of the view that the former question arose only in exceptional cases. He was thus doubtful that further consideration should be given to both issues.

2. Summary of the debate

(a) *General comments*

278. The Special Rapporteur was commended for the thoroughness of his preliminary report, which constituted an excellent basis for a discussion on the topic. Members also expressed their appreciation to the Secretariat for its high-quality and detailed memorandum.

279. There was support for the proposition by the Special Rapporteur that the Commission should not consider, within this topic, the questions of immunity before international criminal tribunals and immunity before the courts of the State of nationality of the official.

280. Some members emphasized that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations had already been codified and did not need to be addressed in the context of this topic.

(b) *Sources*

281. Members agreed with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law, and not merely on international comity. It followed that the work of the Commission on the topic could be founded on a solid normative basis and would truly constitute a codification of existing rules. In this connection, some members pointed out that the Commission should examine relevant judicial decisions of national tribunals. At the same time, it was noted that the Commission should be cautious in assessing the value of those decisions for the purposes of determining the state of international law on the subject. In the view of some members, there was also room for progressive development of international law in this field.

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[619] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 20–21, para. 51.

(c) *Basic concepts*

282. Members commented on the basic concepts examined in the preliminary report. As regards the notion of "jurisdiction", some members agreed with the Special Rapporteur's view that the notion covered the entire spectrum of procedural actions, and support was expressed for the idea of giving special attention to the pretrial phase. It was also noted that, as explained in the preliminary report and in conformity with the opinion of the ICJ in the *Arrest Warrant* case,[620] jurisdiction logically preceded immunity, in the sense that any question of immunities only arises once the tribunal has established its jurisdiction to hear the case.

283. Some members suggested that the Commission consider the implications for immunity of the principle of universal jurisdiction, taking into account the developments in national legislation and national case law and in the light of the developments in the international system, in particular the establishment of the International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction had led to misunderstandings and escalation of inter-State tensions and had given rise to perceptions of abuse on political or other grounds.[621]

284. With respect to the notion of "immunity" itself, some members supported the idea that the Commission should attempt to define this notion. It was observed, in this regard, that immunity was procedural in nature and did not absolve the State official from his or her duty to abide by national law and from his or her criminal responsibility in case of breach. Support was expressed for the Special Rapporteur's analysis that immunity was a legal relationship which implied a right for the State official not to be subjected to foreign criminal jurisdiction and a corresponding obligation incumbent upon the foreign State concerned.

285. Some members were of the view that, contrary to what had been suggested in the preliminary report, the Commission should not refrain from dealing with the question of immunity from interim measures of protection or measures of execution; some other members, however, endorsed the suggestion contained in the report. While some members supported the Special Rapporteur's intention to consider existing practice in relation to immunities of State officials and of the State itself from foreign civil jurisdiction, on account of their common features with the present topic, some other members maintained that those immunities were too different in nature from immunity from criminal jurisdiction for the relevant practice to be relied upon in this context.

286. Some members expressed support for the view that, in its rationale, immunity had both a functional and a representative component, and that it was justified by the principles of sovereign equality and non-interference in internal affairs, and by the need to ensure stable relations among States. While some members emphasized the emerging role of the functional component of immunity in recent practice, some other members recalled that the representative component continued to be relevant since certain officials were granted immunity because they were considered to embody the State itself.

287. It was generally agreed that a distinction could be drawn between two types of immunity of State officials: immunity *ratione personae* and immunity *ratione materiae*. Some members underlined the importance of these concepts to differentiate the status of high-ranking and other State officials, and that of incumbent and former officials. According to one view, it was preferable to set aside this typology and consider the concepts of "official" and "private" acts and the time dimension of immunity (e.g. with respect to acts carried out before office or by former officials while in charge). It was also pointed out that immunity *ratione materiae* of officials should not be confused with the immunity of the State itself; according to another view, however, all immunities of officials derive from the immunity of the State.

(d) *Persons covered*

288. With respect to the terminology to be employed to refer to the persons covered by immunity, some members supported the Special Rapporteur's proposal to continue to use, at this stage, the expression "State officials". Some other members suggested, however, that the terms "agents" or "representatives" could be preferred. It was noted that, in any event, the precise persons covered by those terms should be determined. A view was expressed that the scope of persons covered could be narrowed down to those who exercise the specific powers of the State (a criterion which would make it possible to exclude from the scope of the topic certain categories of officials, such as teachers and medical workers); reference was made in this regard to the notion of "public service" used by the Court of Justice of the European Communities.

289. Support was expressed for the Special Rapporteur's view that all State officials should be covered by the topic, given that they enjoy immunity *ratione materiae*. However, some members were of the opinion that only the question of immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs should be considered by the Commission. The Special Rapporteur was encouraged to study further the status of former officials, notably in light of the *Pinochet* case[622] and paragraph 61 of the judgment of the ICJ in the *Arrest Warrant* case.[623]

290. Some members supported the view that Heads of State, Heads of Government and Ministers for Foreign Affairs (the so-called "troika") enjoyed immunity *ratione personae*. It was argued by some members, however, that the finding of the ICJ, in the *Arrest Warrant* case, that such immunity was enjoyed by Ministers for Foreign Affairs did not have a firm basis in customary international law as was explained in the dissenting opinions in

[620] *Ibid.*, p. 20, para. 46.

[621] See, for example, the Decision of the Assembly of the African Union on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec.199 (XI) of 1 July 2008).

[622] See, in particular, United Kingdom House of Lords, *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, reproduced in ILM, vol. 38 (1999), pp. 581–663.

[623] *Arrest Warrant* (see footnote 619 above), p. 25, para. 61.

that case. Some other members, however, pointed to the pre-eminent role of the Minister for Foreign Affairs in the conduct of international relations and his or her representative character, as justification for treatment of the Minister for Foreign Affairs on the same footing as the Head of State for purposes of according immunity. The question was also raised in the debates whether personal immunity extended to other categories of high-ranking officials. Some members excluded this possibility, pointing to the particular representative role in international relations of the three categories of officials mentioned above, to the insufficient practice to support any extension of immunity, and to policy considerations. Some other members believed that certain senior officials (which could include, in addition to those mentioned by the Special Rapporteur, Vice-Presidents, cabinet ministers, Heads of Parliament, presidents of the highest national courts, heads of component entities of federal States, etc.) were also to be granted such immunity; they called for the Commission to determine criteria, such as the representative nature or the importance of the functions performed, for the identification of those officials. The judgment of the ICJ in the *Arrest Warrant* case[624] was invoked in support of the latter argument, although certain members remarked that the Court appeared to have adopted a more restrictive approach in its more recent decision in *Certain Questions of Mutual Assistance in Criminal Matters*.[625] Some other members, while acknowledging that other senior officials besides the Head of State, Head of Government and Minister for Foreign Affairs could enjoy immunity *ratione personae*, were of the view that the Commission should limit its examination to the latter three and leave the question open as to whether immunity might also be granted to other officials. It was emphasized that, in any event, no official would continue to enjoy personal immunity after the end of his or her functions. According to a view, certain State officials enjoyed immunity *ratione personae* when exercising official functions abroad because they would be considered as being on a special mission.

291. The suggestion was made that the Commission should also analyse the question of immunity of military personnel deployed abroad in times of peace, which was often the subject of multilateral or bilateral agreements, but also raised issues of general international law.

292. On the role of recognition in the context of immunity, a view was expressed that this issue was central to the present topic and should be examined by the Commission. Some members, however, supported the Special Rapporteur's view that the question of recognition was not part of the Commission's mandate on this topic and that, at most, a "without prejudice clause" could be adopted on the matter. It was indicated by some members that, if a State was in existence, immunity should be granted to its officials independently from recognition. The view was also expressed, however, that immunity should not be extended to officials of those self-proclaimed States which had not received the general recognition of the international community. Some members believed that the Commission should examine the consequences of the non-recognition of an entity as a State on the immunity of that entity's officials.

293. Some members considered that the immunity of the family members of State officials was mainly based on international comity and remained outside the scope of the topic. Some other members, however, suggested that this subject should be dealt with by the Commission.

(e) *The question of possible exceptions to immunity*

294. Some members insisted that the Special Rapporteur, in examining the scope of immunity in his subsequent report, should devote special attention to the central question of whether State officials enjoy immunity in the case of crimes under international law.

295. In this regard, some members expressed the view that there was sufficient basis both in State practice and in the previous work of the Commission (notably in its 1996 draft code of crimes against the peace and security of mankind[626]) to affirm that there exists an exception to immunity when a State official is accused of such crimes. It was argued by some members that the fact that immunity was excluded in the statutes and case law of international criminal tribunals could not be ignored when dealing with immunity from foreign criminal jurisdiction. Some members further contended that the position of the ICJ in the *Arrest Warrant* case[627] ran against the general trend towards the condemnation of certain crimes by the international community as a whole (as exemplified by the position of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Blaškić* case[628]), and that the Commission should not hesitate to either depart from that precedent or to pursue the matter as part of progressive development. According to some members, the Commission should further determine whether international law had changed since the said judgement, notably in light of national legislation passed in the meantime for the implementation of the Rome Statute of the International Criminal Court. Some other members considered that the content and implications of the judgement merited further consideration by the Commission.

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[624] *Ibid.*, pp. 20–21, para. 51.

[625] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 618 above), at pp. 243–244, para. 194.

[626] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[627] *Arrest Warrant* case (see footnote 619 above), p. 3.

[628] *Prosecutor* v. *Blaškić*, *Case No. IT-95-14*, *Judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgement of 29 October 1997*, para. 41:

> "It is well known that customary international law protects the internal organization of each sovereign State ... . The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. Similarly, other classes of persons (for example, spies, as defined in Article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907), although acting as State organs, may be held personally accountable for their wrongdoing."

296. Some members mentioned several possible explanations of exceptions to immunity, including the non-official character of crimes under international law, the *jus cogens* nature of the norm prohibiting such crimes or the condemnation of those crimes by the international community as a whole. The Special Rapporteur was called to examine such possible explanations in his subsequent report to determine, in particular, whether such exceptions applied to all, or only some, crimes under international law and whether, and to what extent, it was applicable to immunity *ratione materiae* or also to immunity *ratione personae*. Some members pointed out that these questions put into play a balancing of the interests of stopping impunity for such crimes and of ensuring freedom of action for States at the international level. It was suggested that consideration be also given to the ways in which such exceptions to immunity could be structured to strengthen international criminal tribunals, taking into account the complementary jurisdiction of the International Criminal Court: for example, it could be envisaged that, while officials from States having accepted the jurisdiction of the Court would have complete immunity from foreign criminal jurisdiction, officials from States that had not done so would not enjoy immunity in the case of crimes under international law.

297. Some other members maintained that there were good reasons for the Commission to hesitate before restricting immunity. In their opinion, the *Arrest Warrant* judgment reflected the current state of international law, and the developments after this judgment in international and national jurisprudence, as well as in national legislation rather confirmed this state of affairs than called it into question. It could therefore not be said that the *Arrest Warrant* judgment went against a general trend. The absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary. The *Prosecutor* v. *Blaškić* judgement of the International Tribunal for the Former Yugoslavia was therefore not pertinent. In the opinion of those members, important legal principles, as well as policy reasons, spoke in favour of maintaining the state of international law, as it is expressed, for example, in the *Arrest Warrant* judgment. According to them, the principles of sovereign equality and of stability of international relations were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules on the use of force.

298. These members maintained that, while the Commission should, as always, consider the possibility of making proposals *de lege ferenda*, it should do so on the basis of a careful and full analysis of the *lex lata* and of the policy reasons which underpin this *lex lata*. It was only on this basis that a balancing of interests between the principles of immunity and the fight against impunity could be fruitfully undertaken. In the opinion of these members, the *jus cogens* character of certain international norms did not necessarily affect the principle of immunity of State officials before national criminal jurisdictions.

299. Some members emphasized that the Commission should also consider other possible exceptions to the immunity of State officials, namely in the case of official acts carried out in the territory of a foreign State without the authorization of that State, such as sabotage, kidnapping, murder committed by a foreign secret service agent, aerial and maritime intrusion or espionage.

3. Concluding remarks of the Special Rapporteur

300. In summarizing the main trends of the debate, the Special Rapporteur observed that there was general agreement that the basic source of the immunity of State officials from foreign criminal jurisdiction was to be found in international law, particularly customary international law. He noted that some members had highlighted the importance of national practice and judicial decisions in this regard.

301. With respect to the notion of immunity, general support had been expressed for the idea that it implied a legal relationship involving rights and corresponding obligations, and that it was procedural in nature (although one member had argued for its substantive character). It was also widely accepted that immunity of State officials from foreign criminal jurisdiction covered both executive and judicial jurisdiction and that it was particularly relevant in the pretrial phase. There were divergent views on the question whether the Commission should study the issue of jurisdiction: the Special Rapporteur explained that his intention was to consider analytically this issue in his future work, without, however, proposing draft articles on the subject.

302. As to the rationale of immunity, some members had acknowledged the existence of its mixed functional and representative components and that the different grounds of immunity were interrelated. The view had been expressed, however, that the immunity of different officials had different rationales. For example, it had been argued that the immunity of the Head of State was to be justified by his or her status as personification of the State itself and that this ground would not be applicable to justify the immunity of other officials.

303. Members had also recognized that the distinction between immunity *ratione personae* and immunity *ratione materiae* was useful for methodological purposes, although, as the Special Rapporteur noted, it was seldom used in normative instruments.

304. The debates had also clarified the scope of the topic as understood by the Commission. The general perception was that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations were outside the topic. The majority of members were also of the view that the question of immunity from international criminal jurisdiction was also to be excluded from the topic, although the Special Rapporteur indicated that, as suggested by some members and without prejudice to his future findings, he intended to consider the issue of international criminal jurisdiction when dealing with possible exceptions to immunity.

305. In light of the different opinions articulated on the issue of recognition, the Special Rapporteur suggested that the Commission could examine the possible effects of non-recognition of an entity as a State on whether immunity is granted to its officials.

306. On the scope of the topic with respect to the persons covered, the majority of members had favoured consideration of the status of all "State officials" and had supported the use of such term, which was to be defined in the future work of the Commission.

307. As to immunity *ratione personae*, there was broad agreement that it was enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs, but divergent views had been expressed as to its extension to other high-ranking officials. According to some members, personal immunity was limited to the three categories of officials mentioned above. Some other members confirmed the possibility that other State officials could enjoy personal immunity, but expressed concerns with respect to the idea of expanding such immunity beyond the "troika". Some other members favoured the idea of an extension of immunity, but pointed to the necessity of being very cautious in this regard: they recommended the identification of criteria, rather than an enumerative approach, to establish those other State officials to whom personal immunity might also be granted. The Special Rapporteur noted that further consideration should be given, in this regard, *inter alia* to the judgment of the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case.

308. Opinions seemed to be equally divided as to whether it was desirable for the Commission to look into the issue of immunity of family members of State officials. So far, at least, the debates had not persuaded the Special Rapporteur to reconsider his view according to which it was not feasible to deal with this issue under the present topic, but he would consider the issue further.

309. The Special Rapporteur also noted that it had been proposed that the Commission also consider the question of immunity of military personnel stationed abroad in times of peace.

310. The Special Rapporteur then turned to the prospective content of his subsequent report. He reiterated his intention to study therein the scope and limits of the immunity of State officials from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*), including the question of possible exceptions to immunity in the case of crimes under international law and official acts unlawfully carried out in the territory of a State exercising jurisdiction. He would consider, in particular: the relationship of immunity with peremptory norms of general international law (*jus cogens*) and with State responsibility; the effects on immunity of the implementation of universal jurisdiction for core crimes under international law; and the practice relating to other crimes, such as corruption or money-laundering. He would also examine the distinction between "official" and "private" acts for the purposes of immunity *ratione materiae*, notably the question whether the nature or gravity of an unlawful act could affect its qualification as an act carried out in an official capacity. The Special Rapporteur emphasized that the important question was whether there were exceptions to immunity under general international law, because the possibility of establishing exceptions to immunity by concluding treaties was beyond any doubt. He would further analyse the immunities enjoyed by incumbent and former State officials. His subsequent report would finally look into the procedural aspects of immunity, notably the waiver of immunity and some questions raised by the recent judgment in *Certain Questions of Mutual Assistance in Criminal Matters* (such as whether the State which seeks to claim immunity for one of its officials should notify the authorities of the foreign State concerned or whether it should claim and prove that the relevant act was carried out in an official capacity).

311. The Special Rapporteur concluded with some comments on his methodology and approach to the topic. In his view, the 2002 judgment of the ICJ in the *Arrest Warrant* case was both a correct and also a landmark decision. It had been adopted by a large majority and contained a clear and accurate depiction of the current state of international law in this field. He emphasized that his reports would be based, first of all, on a careful study of State practice, international and national judicial decisions and the legal literature. With regard to judicial practice, he noted that the relevant decisions rendered by various tribunals should be examined taking into account their chronological sequence. As to domestic judicial decisions, they were relevant both *per se* and because they were based on materials by which States expressed their position on the subject matter. The Special Rapporteur also continued to think that decisions relating to immunity from civil jurisdiction could be significant for this topic. Lastly, he emphasized that his ultimate goal was not to formulate abstract proposals as to what international law might be, but to work on the basis of evidence of the existing international law in the field.