Chapter VII

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

102. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[508] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[509]

103. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur.[510] The Commission had also before it a memorandum by the Secretariat on the topic.[511] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[512]

B. Consideration of the topic at the present session

104. At the present session, the Commission had before it the second report of the Special Rapporteur.[513] The Commission considered the report at its 3086th, 3087th and 3088th meetings, on 10, 12 and 13 May, and at its 3111th and 3115th meetings, on 25 and 29 July 2011.

105. The Commission also had before it the third report of the Special Rapporteur (A/CN.4/646). The Commission considered the report at its 3111th, 3113th, 3114th and 3115th meetings, on 25, 27, 28 and 29 July 2011.

1. Introduction by the Special Rapporteur of his second report

106. The second report—a continuation of aspects raised in the preliminary report—reviewed and presented a detailed overview of the issues concerning the scope of immunity of a State official from foreign criminal jurisdiction, including questions relating to immunity *ratione personae* and *ratione materiae*, and the territorial scope of immunity; further discussed what criminal procedural measures may be implemented against an official of a foreign State and what measures would violate that official's immunity, in particular, reviewing the various phases in a criminal proceeding, including the investigatory phase; addressed whether there were any exceptions to immunity, including examining the various rationales for such possible exceptions; and drew a number of conclusions relating to the various issues raised in the report.[514]

107. The Special Rapporteur noted that since the Commission began its consideration of the topic, the question of immunity of a State official had continued to be considered, both in practice, as new judicial decisions were rendered, and in academia. Attention was drawn, in particular, to the resolution on "The immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", adopted by the Institute of International Law in 2009,[515] as well as to some judicial decisions.[516] While acknowledging the ongoing debate and the diverse opinions that exist in relation to the topic, the Special Rapporteur emphasized the importance of looking at the actual state of affairs as the starting point for the Commission's consideration of the topic and explained that it was from the perspective of the *lex lata* that he had proceeded to prepare his report.

108. In the opinion of the Special Rapporteur, immunity of a State official from foreign criminal jurisdiction was the norm and any exceptions thereto would need to be proven. He observed that State officials enjoy immunity *ratione materiae* in respect of acts performed in an official capacity since these acts are considered acts of the State, and these included unlawful acts and acts *ultra vires*. He pointed out that these acts are attributed both to the State and to the official and suggested that the criterion for attribution of the responsibility of the State for a wrongful act also determined whether an official enjoys immunity *ratione materiae* and the scope of such immunity, there being no objective reasons to draw a distinction in that regard. It was precisely by using the same criterion of attribution for the purpose of State responsibility and of immunity of State officials *ratione materiae* that the responsibility of the State, as well as individual criminal responsibility, would be engaged for the same conduct. The scope of the immunity of a State and

[508] 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 its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex I of the report of the Commission (*Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257).

[509] *Yearbook … 2007*, vol. II (Part Two), para. 386.

[510] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601.

[511] A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

[512] See *Yearbook … 2009*, vol. II (Part Two), p. 145, para. 207; and *Yearbook … 2010*, vol. II (Part Two), p. 193, para. 343.

[513] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631.

[514] *Ibid.*, para. 94.

[515] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), Third Commission, p. 226; available from www.idi-iil.org, "Resolutions".

[516] For example, United States Supreme Court, *Samantar* v. *Yousuf et al.* (No. 08-1555) 560 U.S. 305 (2010); and the decision concerning the request for an arrest warrant for Mikhail Gorbachev taken by the City of Westminster Magistrates' Court (United Kingdom), BYBIL *2011*, vol. 82-1, pp. 570 *et seq.*; available from www.bybil.oxfordjournals.org.

the scope of the immunity of its officials were nevertheless not identical, despite the fact that in essence the immunity was one and the same.

109. With regard to former State officials, the Special Rapporteur stated that these persons continued to enjoy immunity *ratione materiae* with respect to acts undertaken by them in an official capacity during their term in office but that such immunity did not extend to acts that were performed by an official prior to his or her taking up office and after leaving it. Such immunity was therefore of a limited nature.

110. Concerning immunity *ratione personae*, which is enjoyed by the so-called "troika", namely incumbent Heads of State, Heads of Government and ministers for foreign affairs, and possibly by certain other incumbent high-ranking officials, the Special Rapporteur considered such immunity to be absolute and to cover acts performed in an official and a personal capacity, both while in office and prior thereto. In the light of the link between the immunity and the particular post, immunity *ratione personae* was temporary in character and ceased upon the expiration of their term in office; such former officials nevertheless continued to enjoy immunity *ratione materiae*.

111. On the question of which acts of a State exercising criminal jurisdiction would violate the immunity of an official and what criminal procedure measures would be permissible, reference was made to the *Arrest Warrant* case[517] and the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*,[518] in which the International Court of Justice developed some criteria for deciding such issues. The Special Rapporteur agreed with the Court and pointed out that the only criminal procedure measures that could not be taken were those that were restrictive in character and would prevent a foreign official from discharging his or her functions by imposing a legal obligation on that person.

112. Concerning the territorial scope of immunity, the Special Rapporteur considered that immunity takes effect from the moment the criminal procedure measure imposing an obligation on the foreign official is taken, irrespective of whether the official is abroad.

113. Turning to the issue of possible exceptions to immunity of a State official from foreign criminal jurisdiction, the Special Rapporteur observed that in the case of immunity *ratione personae*, the predominant view seemed to be that such immunity was absolute and that no exceptions thereto could be considered. In his opinion, the question of exceptions would thus only be pertinent with regard to immunity *ratione materiae* in the context of crimes under international law. Nevertheless, after having analysed the various rationales put forward in the doctrine and in certain judicial decisions justifying such exceptions (which were in one way or another, interrelated, namely (*a*) grave criminal acts cannot be official acts; (*b*) immunity is inapplicable since the act is attributed both to the State and the official; (*c*) *jus cogens* prevails over immunity; (*d*) a customary international law norm has emerged barring immunity; (*e*) universal jurisdiction; and (*f*) the concept of *aut dedere aut judicare*),[519] the Special Rapporteur remained unconvinced as to their legal soundness. He further expressed doubt that any justification for exceptions could be considered having emerged as a norm under international law. Upon careful scrutiny, none of the cases referred to by various advocates for exceptions to immunity gave evidence against immunity.[520] At the same time, attention was also drawn to certain cases in which immunity had been upheld. In this context, the *Belhas et al.* v. *Ya'alon* decision could be considered significant in that it upheld the proposition that, under customary international law, immunity *ratione materiae* covers acts performed by every official in the exercise of his or her functions and that a violation of a *jus cogens* norm did not necessarily remove immunity.[521]

114. While the Special Rapporteur acknowledged the widely held opinion that the issue of exceptions to immunity fell within the sphere of progressive development of international law, he wondered to what extent those exceptions should apply. In his view, the issue raised serious concerns, including in relation to politically motivated prosecutions, trials *in absentia* and evidentiary problems as a result of the lack of cooperation of the State concerned. He cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law. The Commission would have an important role in harmonizing the application of immunities in national jurisdictions, which would serve to avoid any dubious practice involving disregard of immunity. The Special Rapporteur also drew attention to the fact that not all rationales for exceptions to immunity had been analysed in the second report. Reference was made in particular to the question of refusal to recognize immunity as countermeasure in response to a breach of an international obligation by the State of the official facing criminal charges.

115. Finally, the Special Rapporteur also recommended that the question relating to immunity of military personnel in armed conflict not be considered under this topic since it was covered by a special legal regime.

2. Summary of the debate on the Special Rapporteur's second report

(a) *General comments*

116. The Special Rapporteur was commended for the thoroughness of his report, which was considered clear and well structured, and for the wealth of relevant

[517] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[518] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177.

[519] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, para. 56.

[520] *Ibid.*, paras. 69–70.

[521] United States District Court for the District of Columbia, *Belhas et al.* v. *Ya'alon*, 14 December 2006, 466 F. Supp. 2d 127; and United States Court of Appeals for the District of Columbia Circuit, *Belhas et al.* v. *Moshe Ya'alon, Former Head of Army Intelligence Israel*, 15 February 2008, 515 F.3d 1279. Reference was also made to the decisions by the French and German authorities between 2005 and 2008 concerning the request for the opening of criminal procedures against the former United States Secretary of Defence, Donald Rumsfeld. In both cases, immunity was upheld.

material it contained, while the point was made that the Special Rapporteur could also have had recourse to other available material and doctrinal sources.

117. Members dwelt at length on the *general orientation of the topic*, acknowledging in particular its obvious political ramifications, as well as its impact on international relations. Recognizing that the topic was difficult and challenging, it was pointed out that it was imperative to agree on matters of principle and on the direction of the topic before the Commission could meaningfully proceed further in the discussion. Some members agreed broadly with the reasoning and conclusions of the report. While some other members welcomed the inclusion in the report of competing arguments voiced in relation to the topic, they also expressed concern that the report presented certain biased conclusions, failing to take into consideration developing trends in international law concerning, in particular, the question of grave crimes under international law. The very premise on which the topic had been analysed—from the concept of absolute sovereignty—was questioned, noting that the report raised fundamental preliminary questions on the substance. It was observed that this conception of the law had evolved, particularly in the aftermath of the Second World War, and that the consequences thereof could not remain static. Moreover, while it could hardly be disputed that principles of sovereign equality and non-interference were important in the conduct of international relations, the content of the rights and obligations deriving from such principles took into account the changes that occur on the international level and the different perspectives attached by the international community to the content of such rights and obligations. Whereas the notion that immunity over official acts belonged to the State seemed correct, it did not signify that the State and its officials could undertake any acts they desired.

118. It was emphasized that the topic also brought to the fore the Commission's own role in the implementation of its mandate, in the progressive development of international law and its codification, that could not be overlooked. In particular, questions were raised as to the perspective from which the Commission should approach the topic, whether, for example, by focusing on *lex lata* or *lex ferenda*. It was noted that even if one chose to adopt the approach of the Special Rapporteur, who had analysed the issues from a strict *lex lata* perspective, the interpretation given to the relevant State practice and judicial decisions available on this subject could plausibly lead one to different conclusions as to the existing law. To approach the topic from a *de lege ferenda* perspective raised other questions involving competing policy considerations, including to what extent the Commission should develop the law and whether it would be appropriate for it to take a lead in this area in the light of the divergent policy considerations involved. The point was also made that the issues of principle implicated by the topic may not necessarily be best described in terms of *lex lata* versus *de lege ferenda*, but rather involved the application of rules that were all *lex lata*.

119. Views were also expressed that the topic was particularly suitable to codification and progressive development and thus allowed the Commission to approach it from both aspects of its mandate. It was however necessary to proceed with caution in order to achieve an acceptable balance between the need to ensure stability in international relations and the need to avoid impunity for grave crimes under international law. In this regard, it was pointed out that in deciding on the approach to be adopted, it would be essential to keep in mind the practical value of the end product, which, after all, was intended to serve the interests of the international community. It was further observed that in approaching the question of immunity, it was important to recall that it was the legal and practical interests of the State that were engaged and not those of the individual. Attention was also drawn to the relevance of the law of special missions, both conventional and customary international law, for the consideration of the topic.

120. Some members were of the view that the Commission should establish a working group to consider the questions raised in the discussions, as well as the question of how to proceed with the topic. While some members considered that the second report constituted a good point of departure for the elaboration of texts, the view was also expressed that the general direction in which the Commission wished to steer the topic had to be settled prior to moving forward. Whereas it was suggested that such a working group should be established already at the current session, some members considered it premature and preferred to postpone such a decision to the Commission's next session. Such an approach would allow for further reflection and would benefit from the input of Member States in the framework of the Sixth Committee, and of other interested entities.

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

121. Diverse views informed the debate within the Commission on possible exceptions to immunity. It was pointed out that the Special Rapporteur, by arguing in his report that he did not find the various rationales for exceptions convincing and could not definitively assert that a trend towards the establishment of a norm on exceptions to immunity had developed, had set a very high standard that the exceptions must be founded in customary law. While some members agreed with the findings of the Special Rapporteur on this point, some other members expressed the view that the Commission could not limit itself to the *status quo* and had to take into account relevant trends that had an impact on the concept of immunity, in particular developments in human rights law and international criminal law. The assertion that immunity constituted the norm to which no exceptions existed was thus unsustainable. In this context, it was pointed out that the question of how to situate the rule on immunity in the overall legal context was central to the debate.

122. It was observed, for example, that with a different perspective, one could arrive at an opposite conclusion on what the law is; one could argue that a superior interest of the international community as a whole had evolved in relation to certain grave crimes under international law, which resulted in an absence of immunity in those cases. Instead of addressing the matter in terms of rule and exception, with immunity being the rule, it seemed more accurate to examine the issue from the perspective

of responsibility of the State and its representatives in those limited situations—which shocked the conscience of humankind—and consider whether any exceptions thereto, in the form of immunity, might exist.

123. According to another view, instead of starting from the premise that, as a general rule, State officials generally enjoyed immunity, and then considering exceptions as the Special Rapporteur had done, a reverse approach that started from the premise that everyone should be treated equally regardless of whether one was a Head of State or a private citizen should be followed. Accordingly, State officials would not be presumed to be immune, unless there were special reasons for immunity to be granted, and such would not be the case in respect of grave crimes under international law.

124. Views were also expressed that the principle of non-impunity for grave crimes under international law constituted a core value of the international community which needed to be considered while examining the question of immunity. The topic would thus be more appropriately addressed from the perspective of hierarchy of norms, or norms between which there existed some tension. It was contended that the practice of States in this area was far from uniform, affording the Commission an opportunity to weigh in for accountability.

125. Some members argued that there was sufficient basis in State practice to affirm the existence of exceptions to immunity of State officials when such officials had committed grave crimes under international law, and references were also made to the previous work of the Commission, and in particular to the 1996 draft Code of Crimes against the Peace and Security of Mankind.[522] In this context, it was observed that the status of the individual under international law had drastically changed since the Second World War: the individual not only enjoyed rights under international law but also had international obligations. It was also pointed out that the fact that an individual bore international criminal responsibility for certain acts did not signify the absence, or dissolution, of the responsibility of the State for those same acts; such responsibilities overlapped but each one had a separate existence.

126. References were also made to treaties concerning the repression of international crimes, which generally did not contain provisions concerning immunity or were silent on the question. It was contended that such silence could not be taken as an implicit recognition that immunity applied in all cases in relation to the crimes these treaties cover; such an interpretation would render them meaningless. The question was however also posed as to how widely one could construe silence in these circumstances as pointing to a particular direction and conclude that immunity would not apply in respect of such acts.

127. It was further observed by some members that it had become increasingly clear that the International Criminal Court would not enjoy the full jurisdictional range that was once anticipated. It was therefore necessary to ensure that there were other means to try alleged offenders of grave crimes under international law, irrespective of whether they were State officials. It was argued that these trends could not simply be dismissed, and even if the Commission were to concede that there was no basis in customary international law for exceptions to immunity, which was not certain, it should still engage in progressive development in that area.

128. Some other members supported the Special Rapporteur's conclusions concerning exceptions to immunity. They nevertheless envisaged the possibility of some further analyses to elucidate possible limitations to immunity as part of the progressive development of international law. In this context, the view was expressed that in establishing any such limitations, immunity *ratione personae* must cease to exist only after the high-level officials were done serving their term of office. In order to facilitate future discussions, it was suggested that a further analysis of the earlier work of the Commission in this area should be made, as well as a study on exceptions to immunity, focusing on State practice, distinguishing clearly between the *lex lata* and proposals *de lege ferenda*. It was further pointed out that it would be essential to shed more light on terms like "international crimes", "grave crimes" or "crimes under international law" for the purpose of the topic. The point was also made that the Commission should limit itself to considering immunity from criminal jurisdiction, as immunity from civil jurisdiction raised fundamentally different issues.

129. Some members also recalled the important role that the principle of immunity, which was well established in customary international law, continued to play in ensuring stability in international relations and for the effective discharge by the State of its functions. It was pointed out that, as such, these factors were also of value to the international community. The idea that the principle of immunity was built on comity and reciprocity was also perceived as important in the context of the current debate, in particular in the light of the imperative need to remove the risk of politically motivated criminal proceedings. Undue limitations on immunity may lead to serious frictions in international relations. In the light of the foregoing, it was considered necessary, particularly seen against the background of contemporary developments in the law, to strike a balance in this area between the different policy considerations. A reference was made to the approach adopted by the Institute of International Law in its resolution of 2009[523] as a possible way forward.

130. Commenting individually on the *various rationales for possible exceptions* to immunity, some members contended that several of them merited further examination. Some members considered that the rationale that peremptory norms of international law prevail over the principle of immunity had merit. In their view, the report failed to provide a convincing analysis for the

[522] *Yearbook … 1996*, vol. II (Part Two), pp. 18–19.

[523] Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes adopted by the Institute of International Law in 2009, art. III: "1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes. 2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases … " (Institute of International Law, *Yearbook*, vol. 73, Parts I and II (see footnote 515 above), p. 229).

assertion that the different nature of the norms in play, procedural on the one hand and substantive on the other hand, prevented the application of hierarchy of norms; these aspects needed to be further analysed in the light of existing State practice. It was contended that the reasoning of the minority in the case of *Al-Adsani* v. *the United Kingdom*[524] was convincing, meriting further consideration, and the fact that the case involved immunity from civil rather than criminal jurisdiction needed to be taken into account in appreciating the European Court's decision. On the other hand, some members agreed with the Special Rapporteur that norms of a different nature should not be confused; to conclude that *jus cogens* norms were superior to rules governing immunity would be to confuse substance with rules of procedure.

131. The view that the commission of serious crimes under international law could not be considered as acts falling within the definition of official duties of a Head of State generated some support in the Commission, and references were made to the *Bouterse* case[525] and the opinions expressed in the *Pinochet* case.[526] It was noted that if immunity was justified on the theory of preserving the honour and dignity of the State, then it was undercut when its officials committed grave crimes under international law. It was suggested that the Commission should identify the offences that could under no circumstances be considered as part of the official functions, referring to the crimes under the Rome Statute of the International Criminal Court as a useful starting point. The opinion was also expressed that in cases of universal jurisdiction, there were also grounds to argue that exemptions to immunity existed.

(c) *Scope of immunity*

132. Comments were also made in a more general manner concerning the scope of immunity. While it was observed that immunity *ratione personae* covered acts both of a private and an official nature, concern was nevertheless expressed by some members over the categorical conclusion in the report that such immunity was absolute.[527] According to a view, immunity *ratione personae* should be limited to acts conducted while in office and not be extended to include acts undertaken prior thereto. Some members supported the view that, in addition to Heads of State or of Government, ministers for foreign affairs also enjoyed immunity *ratione personae*, and the judgment of the International Court of Justice in the *Arrest Warrant* case[528] was cited in support for such a position. Some other members disagreed, however, with the finding of the Court, pointing out that prior to it, it was far from generally accepted that immunity *ratione personae* could be extended in such a manner. In this regard, references were made to the dissenting and separate opinions in the *Arrest Warrant* case and the resolution by the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law,[529] as well as to the work of the Commission in the context of its draft articles on jurisdictional immunities of States and their property.[530]

133. While some members were of the opinion that the list of officials benefiting from immunity *ratione personae* should be restricted to the three categories of officials—the troika—views were also expressed in favour of extending immunity to certain other high-level officials representing the State in its international relations and whose work involves a considerable amount of travel abroad. In order to determine how far the class of persons entitled to immunity *ratione personae* extended beyond the troika, it was suggested that the Commission consider the rationale behind such immunity.

134. The importance of ensuring uniformity between the rules governing immunity *ratione personae* in general and those governing immunity from certain criminal procedure measures entailing sanctions in case of non-compliance was also emphasized. Any gaps in immunity of the troika would inhibit their ability to perform their duties efficiently.

135. While it was generally agreed that immunity *ratione materiae* only covered acts by State officials undertaken in their official capacity during their term in office, it was stressed that the issue raised many difficult considerations that still needed to be determined concerning the scope of such immunity and persons to be covered. It was observed that the question of attribution of conduct for the purpose of determining which acts were "official" and thus attributable to the State, and which were "private", also remained to be examined in closer detail. It was suggested that a more detailed review of the rationales behind immunity *ratione materiae* might be useful for this purpose, with the possibility of rethinking the whole notion of attribution. Recalling that immunity *ratione materiae* was a reflection of the immunity of the State, some members were of the opinion that *ultra vires* or unlawful acts should not be covered by such immunity since, in those situations, the official is acting neither under the instruction of the State nor under the authority of his functions. It was further pointed out that criminal proceedings against State officials and the establishment of State responsibility were not necessarily procedurally connected and that, if such a necessary connection existed, there was a risk that the State would waive immunity of its officials in an attempt to exonerate itself, even if only at a political level, from responsibility. In contrast, some other members agreed with the Special Rapporteur that, other than in a few exceptional situations, a link between the attribution of conduct for the purpose of State responsibility and of immunity necessarily existed, including with regard to acts *ultra vires*.

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[524] *Al-Adsani* v. *the United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2001-XI.

[525] *Bouterse* case, Court of Appeal of Amsterdam, para. 4.2 (Gerechtshof Amsterdam, 20 November 2000) (*Yearbook of International Humanitarian Law*, vol. 3 (2000), pp. 677–691. See also *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266–282).

[526] See the opinions by Lord Steyn and Lord Nicholls, *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 1)*, England, House of Lords, 25 November 1998, ILR, vol. 119 (2002), pp. 50 *et seq.*

[527] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, para. 94 (*i*).

[528] *Arrest Warrant* (see footnote 517 above).

[529] Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743–755.

[530] *Yearbook … 1991*, vol. II (Part Two), para. 28.

(d) *Other comments*

136. Some members emphasized that jurisdictional rules should not be confused with those on immunity. Absence of immunity would not necessarily lead to criminal proceedings; the jurisdictional conditions must still be fulfilled. Attention was drawn to the condition set forth in the 2005 resolution of the Institute of International Law[531] that the alleged offender be present in the territory of the prosecuting State when exercising universal jurisdiction.

137. The view was expressed supporting the conclusion in the report[532] that immunity was valid irrespective of whether the official was abroad or in his or her own State. The point was also made that the Rapporteur was correct in referring to absence of immunity where a State exercised criminal jurisdiction in situations when the State in question had neither consented to the performance on its territory of the activity which led to the crime nor to the presence on its territory of the foreign official.[533] It was also suggested that this kind of situation merited further discussion.

138. It was suggested that the Commission consider the question of immunity of military personnel in armed conflict in its consideration of the topic. It was observed that it was in the field of international humanitarian law that the issue of exemptions on grounds of immunity had been discussed and analysed to a large extent. The evidentiary problems involved with such criminal procedures should not affect the underlying principle of the matter. A contrary observation was also made against covering military personnel for the purpose of the topic, since the matter was already largely regulated by treaty. It was observed that, with respect to immunity for military personnel in time of peace, there was need to distinguish between members of stationed forces and those of visiting forces; the former were governed by status-of-forces agreements, while the immunity of the latter was based in customary law—although it was not so significant in practice.

139. It was also noted that, in taking a maximalist approach in terms of scope, caution should be taken to exclude those categories of State officials whose immunities are provided by rules that have already been a subject of codification and progressive development.

140. It was also suggested that, as part of the topic, it might be useful to ensure adequate safeguards on prosecutorial discretion in order to avoid abuse.

3. Introduction by the Special Rapporteur of his third report

141. While in his preliminary[534] and second reports, the Special Rapporteur considered the substantive aspects of the immunity of State officials from foreign criminal jurisdiction, the third report (A/CN.4/646)—intended to complete the entire picture—addressed the procedural aspects, focusing in particular on questions concerning the timing of consideration of immunity, its invocation and waiver, including whether immunity can still be invoked subsequent to its waiver. The Special Rapporteur stressed that while the previous reports had been based on an assessment of State practice, the present report, even though there was available practice, was largely deductive, reflecting extrapolations of logic and offering broad propositions, not exactly precise in terms of drafting, for consideration. It was also underscored that the issues considered in the third report were of great importance in that they went some way in determining the balance between the interests of States and safeguarding against impunity by assuring individual criminal responsibility.

142. As regards the *timing*, namely when and at what stage immunity should be raised in criminal proceedings, the Special Rapporteur recalled in particular the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, which found that questions of immunity were preliminary issues that must be expeditiously decided *in limine litis*.[535] He also stressed that the question of the immunity of a State official from foreign criminal jurisdiction should in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking criminal procedural measures which are precluded by immunity in respect of the official. Any failure to do so may be viewed as a violation of the obligations of norms governing immunity by the State exercising jurisdiction, even in situations which may relate to the consideration of the question of immunity at the pretrial stage of the exercise of criminal jurisdiction at the time when the question of the adoption of measures precluded by immunity was addressed.

143. However, such violation may not necessarily be involved where the State of the official who enjoys immunity *ratione materiae* does not invoke his or her immunity or invokes it at a later stage in the proceedings; any possibility of violation ensues after invocation.

144. On the *invocation of immunity*, meaning, *inter alia*, who was in a position legally to raise the issue of immunity, the Special Rapporteur emphasized that only the invocation of immunity or a declaration of immunity by the State of the official, and not by the official, constituted a legally relevant invocation or declaration capable of having legal consequences.

145. In order for immunity to be invoked, the State of the official must know that corresponding criminal procedural measures were being taken or planned in respect of the official to whom the invocation related. Accordingly, the State that was planning such measures must inform the State of the official in this regard. The Special Rapporteur drew attention to the distinction that ought to be made based on immunity *ratione personae* and immunity *ratione materiae*.

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[531] Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), resolution on universal criminal jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes, pp. 297 *et seq.*; available from www.idi-iil.org, "Resolutions".

[532] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, para. 94 (*m*).

[533] *Ibid.*, para. 94 (*p*).

[534] See footnote 510 above.

[535] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 87 above), p. 88, para. 63.

146. First, in respect of a foreign Head of State, Head of Government or minister for foreign affairs—the troika—the State exercising criminal jurisdiction itself must consider *proprio motu* the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. The Special Rapporteur suggested that in this case it was perhaps appropriate to ask the State of the official in question only for a waiver of immunity. Accordingly, the State of the official in this case did not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

147. Second, where an official enjoying immunity *ratione materiae* was concerned, the burden of invoking immunity resided in the State of the official. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed immunity and acted in an official capacity. Otherwise, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.

148. Third, there was also the possible case of an official other than the troika who enjoyed immunity *ratione personae*, in which case the burden of invoking immunity also lay with the State of the official in relation to whom immunity was invoked. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal immunity since he or she occupied a high-level position which, in addition to participation in international relations, required the performance of functions that were important for ensuring the sovereignty of the State.

149. On the *mode* of invocation, the State of the official, irrespective of the level of the official, was not obliged to invoke immunity before a foreign court in order for that court to consider the question of immunity; communication through the diplomatic channels sufficed. The absence of an obligation on the part of a State to deal directly with a foreign court was based on the principle of sovereignty and the sovereign equality of States.

150. With regard to possible *grounds* for invocation, the State of the official invoking immunity was not obliged to provide grounds for immunity other than to assert that the person in question was its official and enjoyed immunity having acted in an official capacity, or that the person in question was its official who enjoyed immunity *ratione personae* since he or she occupied a high-level post which, in addition to participation in international relations, required the performance of functions that were important for ensuring that State's sovereignty.

151. On the other hand, the Special Rapporteur pointed out that the State (including its court) that was exercising jurisdiction, it would seem, was not obliged to "blindly accept" any claim by the State of the official concerning immunity. However, a foreign State could not disregard such a claim if the circumstances of the case clearly did not indicate otherwise. It was the prerogative of the State of the official, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of the functions carried out by a high-ranking official for the purpose of ensuring State sovereignty.

152. Concerning *waiver of immunity*, the Special Rapporteur noted that the right to waive the immunity of an official was vested in the State, not in the official. When a Head of State or of Government or a minister for foreign affairs waived immunity with respect to himself or herself, the State exercising criminal jurisdiction against such an official had the right to assume that such was the wish of the State of the official, at least until it was otherwise notified by that State.

153. The waiver of immunity of a serving Head of State, Head of Government or minister for foreign affairs must be express. In a hypothetical situation in which the State of such an official requested a foreign State to carry out some type of criminal procedure measures in respect of the official, such act could possibly constitute an exception. Such a request unequivocally involved a waiver of immunity with respect to such measures and in such a case the waiver was implied.

154. A waiver of immunity for officials other than the troika but who enjoyed immunity *ratione personae*, for officials who had immunity *ratione materiae*, as well as for former officials who also had immunity *ratione materiae*, may be either express or implied. Implied waiver in this case may be imputed, *inter alia*, from the non-invocation of immunity by the State of the official.

155. In the view of the Special Rapporteur, it would seem that, following an express waiver of immunity, it was legally impossible to invoke immunity. At the same time, it was also noted that an express waiver of immunity could in some cases pertain only to immunity with regard to specific measures.

156. In the case of an initial implied waiver of immunity expressed in the non-invocation of the immunity in respect of an official enjoying immunity *ratione materiae* or of an official enjoying immunity *ratione personae* other than the troika, immunity may, in the view of the Special Rapporteur, be invoked at a later stage in the criminal process, including, *inter alia*, when the case was referred to a court. However, there was doubt as to whether a State that had not invoked such immunity in the court of first instance may invoke it subsequently in appeal proceedings. In any event, the procedural steps which had already been taken in such a situation by the State exercising jurisdiction in respect of the official at the time of the invocation of immunity may not be considered a wrongful act.

157. The Special Rapporteur pointed out that once a waiver of immunity was validly made by the State of the official, it was possible to exercise to the full extent foreign criminal jurisdiction in respect of that official.

158. The Special Rapporteur also alluded to a related aspect concerning the *relationship between a State's assertion that its official had immunity and the responsibility of that State for an internationally wrongful act*,

in respect of the conduct which gave rise to invocation of immunity of the official. He had underscored that irrespective of the waiver of immunity with regard to its official, the State of the official was not exempt from international legal responsibility for acts attributed to it in respect of any conduct that may have given rise to questions of immunity. Since the act in respect of which immunity was invoked could also constitute an act attributable to the State itself, the necessary prerequisites engaging the responsibility of the States could be in place making it amenable for a claim to be instituted against it.

4. Summary of the debate on the Special Rapporteur's third report

(a) *General comments*

159. The Special Rapporteur was once more commended for a thorough, well-researched and well-argued report which, together with previous reports, provided a comprehensive view of the topic and laid the foundation for future work, although no draft articles had been provided.

160. Generally, it was considered that the analysis made in the report was convincing and the extrapolations drawn logical. Although the third report was viewed as less open to debate than the second report, some comments were nevertheless made that procedurally it would have been more appropriate to consider it after the Commission had reached definitive conclusions on the second report, the debate concerning which highlighted the fact that there were still a number of basic issues that needed to be resolved, bearing on the direction of the topic as a whole. As a consequence of these unresolved issues—including the scope of immunity *ratione personae* in the case where grave international crimes had been committed—there were certain aspects in the third report, particularly some of the conclusions drawn, that were substantively problematic.

161. On the other hand, some members took the view that the third report was an important part of the overall picture drawn by the Special Rapporteur and could easily have been part of the second report. Nevertheless, some other members preferred to comment on the third report with a caveat, noting in particular that their concerns raised in regard to the second report remained, including the seemingly absolutist and expansive approach to immunity.

162. It was also observed that some of the views presented certain risks for the future not only for the Commission but also for the development of international law itself. It was cautioned that there was a risk to the reputation of the Commission if there was a greater tilt towards State interests; the Commission would not be in a position to find the necessary balance between the old law—based on an absolute conception of sovereignty—and the new expectation of the international community in favour of accountability. Others preferred a balance between legitimate interests of sovereign States and the concern for accountability. Some members noted that the Commission had no cause to be concerned about risking its reputation since it was part of its functioning always to balance different legitimate considerations and not let itself be disproportionately swayed by any one of them. What would be damaging to the Commission would be if it adopted unrealistic positions, eschewing practical solutions, based on its collective wisdom informed by the available tools of analysis of the practice, addressing practical concerns of States.

(b) *Timing*

163. There was general agreement that immunity ought to be considered at the early stage of the proceedings or indeed earlier during the pretrial stages, including when a State exercising jurisdiction takes criminal procedure measures against an official that would otherwise be precluded by immunity. It was however recognized that in practice such a goal might be difficult to realize, and would likely necessitate appropriate domestic legislation. It was suggested that failure to consider immunity at an early stage might involve possible violations of obligations of immunity arising as a result of such failure. The point was also made that the report did not address directly the question of inviolability, which could bear on issues of timing and the inconvenience presented by arrest or detention of an official, and was relevant to invocation as well; these aspects required further consideration.

(c) *Invocation of immunity*

164. At a more general level, it was noted that it might be useful to have more information about the procedural position in the practice of States under the various legal systems. However, some members largely agreed with the Special Rapporteur in his conclusions on invocation. There was agreement in the general proposition that only the invocation of immunity by the State of the official and not by the official constituted a legally relevant invocation of immunity. It was however suggested that in practice this did not preclude the official—because of the element of time and being present—from notifying the State exercising jurisdiction that he or she enjoyed immunity; such notification could then trigger the process by which the State exercising jurisdiction informed the State of the official about the situation of the official.

165. It was also generally accepted that it was sufficient for the State claiming immunity to notify the State exercising jurisdiction through diplomatic channels. According to a particular viewpoint, a State was well advised to be categorical if it sought to have the immunity of its official upheld, and where the legal or factual issues surrounding immunity were complex it could participate directly, although there was no obligation to do so, in the proceedings to explain its case.

166. On the issue of who has the *burden* of invoking immunity, some members agreed with the Special Rapporteur that in respect of the troika, the State exercising jurisdiction must itself consider the question of immunity.

167. It was also noted that in respect of other officials enjoying immunity *ratione materiae*, the State of the official must invoke the immunity. It was however contended that the reasoning for the State exercising jurisdiction raising the question of immunity *proprio motu* could not

be limited to cases where the immunity of the troika was implicated. It was claimed that it was equally applicable to cases where it was manifestly apparent, in the circumstances of the case, that jurisdiction would be exercised with respect to an official who has acted in his or her official capacity. Such a standard would protect the smooth conduct of international relations and would prevent mutual recriminations in a case, for example, where the measures taken were politically motivated. Moreover, while agreeing that the State exercising jurisdiction had no obligation in respect of immunity *ratione materiae* to inquire into immunity *proprio motu*, it was nevertheless suggested that some guidelines as to the circumstances in which the State exercising jurisdiction may exercise discretion *proprio motu* could be recommended.

168. Another view was expressed that there was no clear distinction between invocation in relation to the troika and invocation as it concerned such other high-level officials who may enjoy immunity *ratione personae*. It was thus doubted that any hard and fast rules could be laid down since much depended on the particular circumstances of each individual case.

169. It was also noted that some of the uncertainties over whether the troika should be enlarged to include other high-level officials, such as ministers of international trade or of defence, that were raised in the debate on the second report were germane to the present report. This was more so when considered against the differentiation drawn between the troika and other State officials enjoying immunity *ratione materiae*. While the reasons offered by the Special Rapporteur for the differentiation seemed plausible and convincing, it was contended that if in contemporary international relations a minister for foreign affairs was only one among several State officials who frequently represented the State abroad, then a distinction in the way immunity was to be asserted—based on being widely known—did not appear to be justified. Consequently, there could be a basis for considering further the Special Rapporteur's conclusions on who bears the burden of invoking immunity, allowing the State of the official to invoke immunity without making any distinction. Similar considerations could be taken into account in respect of waiver of immunity.

170. It was also suggested that further consideration may need to be given to the possibilities of enhancing cooperation between States in matters relating to invocation between the State exercising jurisdiction and the State of the official, in respect of the troika as well as the others.

171. Some other members viewed the conclusions of the Special Rapporteur on invocation from a different perspective. For instance, doubt was expressed regarding whether immunity *ratione personae* should be extended to the minister for foreign affairs, on the one hand, and other high-level officials, on the other, for the purposes of the topic, viewing the matter as a still open question and as evidencing an expansive approach, raising the spectre of criticism that the Commission wished to expand immunity at a time when there was demand for limited immunity, more accountability and less impunity. Quite apart from the available case law on the question, some members however recalled that the questions of immunity of Heads of State, Heads of Government, ministers for foreign affairs and other high-level officials had been discussed in the Commission before, most recently in the context of its work on jurisdictional immunities of States and their property, and appeared to have been settled when the Special Rapporteur for that topic conceded that he would not object to adding a reference to such persons while doubting that their families had special status "on the basis of established rules of international law".[536] The view was also expressed that there was no doubt that under customary international law, Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity. Any attempts to cast doubts on this were misplaced.

172. It was also noted that the Special Rapporteur in the present report, as in previous reports, had not distinguished "ordinary" crimes, concerning which matters were implicated in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*,[537] from grave international crimes, in relation to which special considerations applied, as had been countenanced in the debate on the second report. Consequently, it was pointed out that the Special Rapporteur had failed to address the possibility that the procedural issue at hand was not one of invocation of immunity or waiver thereof but rather of absence of immunity in respect of situations in which grave international crimes were committed, although it was also countered by other members that the assertion that there was no immunity for such "core crimes" was abstract and general, and the Commission would have to deal with these matters in greater detail at a later stage.

173. It was also observed that the Special Rapporteur in his report did not consider the procedural problems that would arise in relations between States when domestic law prohibited invocation of immunity in respect of "core crimes" as a result of implementation by such States of its international obligations, as was the case with domestic legislation implementing the Rome Statute of the International Criminal Court.

174. Comments were also made regarding the question of *substantiation* of immunity in respect of immunity *ratione materiae*. Regarding the conclusion of the Special Rapporteur that it was the prerogative of the State of the official to characterize the conduct of an official as being official conduct of the State, but that the State exercising criminal jurisdiction did not have to "blindly accept" such a characterization, it was suggested that such a conclusion seemed rather broad and unclear. It was necessary to find a balance, each case had to be assessed on its merits, and the use of terms like "prerogative" and the suggestion that there was a "presumption" arising out of mere appointment of an official were going too far (although some members did not see anything untoward in its use). In the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, on which the Special Rapporteur relied, the Secretary-General in fact claimed that the individual concerned was acting as an official. That advisory opinion was a confirmation of the general proposition that if the official capacity

[536] *Yearbook … 1989*, vol. II (Part Two), paras. 443–450.

[537] See footnote 518 above.

of the person and the official nature of his or her acts were manifest in a specific situation, the burden to demonstrate that he or she was acting in an official capacity was significantly alleviated. Moreover, since the "presumption" did not operate in respect of officials other than the troika, it was pointed out that the granting of or refusal to grant immunity must be decided on a case-by-case basis, taking into account all the elements in the case. The national courts would assess whether they were dealing with acts performed in the context of official functions or not.

175. It was also pointed out that the State invoking immunity should at least be encouraged to provide the grounds for its invocation. Some concerns were expressed that if a State could invoke immunity for all of its officials enjoying immunity *ratione materiae* without substantiation as to the nature of the act, other than to say that an official was acting in an official capacity, that would be tantamount to according *de facto* immunity *ratione personae* to all its State officials, leading to the possibility of immunity for acts in fact committed in a private capacity. In order to avoid such a possibility—and the obvious potential for impunity—a State should have an obligation to substantiate when invoking immunity *ratione materiae*. It was also suggested that the State claiming immunity must be made to justify its plea for immunity when grave international crimes were involved; there ought to be an obligation of justification, not merely of assertion of immunity.

(d) *Waiver of immunity*

176. Some members agreed with the Special Rapporteur that the right to waive immunity vested in the State of the official not in the official himself or herself, and that waiver of immunity *ratione personae* must be express.

177. It was, however, observed that the two situations concerning waiver of immunity needed to be distinguished, namely waiver of immunity in individual cases and renunciations of immunity for certain categories of cases which may be contained in a treaty rule. While in both cases, the common standard identifying such exceptions to otherwise applicable immunity was whether the waiver or renunciation was "certain", it should not obscure the fact that the determination of when immunity was excluded was different, the issue in the latter case being one of treaty interpretation.

178. In this regard, while some members agreed that there was a general reluctance to accept an implied waiver based on the acceptance of an agreement, some doubts were expressed by others regarding the assertion by the Special Rapporteur in his report that States' consent to be bound by an international agreement establishing universal jurisdiction for grave international crimes or precluding immunity did not imply consent to the exercise of foreign criminal jurisdiction in respect of its officials, and therefore waiver of immunity. It was contended that to suggest that such an agreement could not be construed as implicitly waiving the immunity of the official of the State party, unless there was evidence that that State so intended or desired, seemed to run contrary to article 31 of the 1969 Vienna Convention. In the *Pinochet* (No. 3) case, the House of Lords reached its conclusion in respect of the Convention against torture and other cruel, inhuman or degrading treatment or punishment after a detailed analysis of the terms of that Convention. It was asserted that concluding an agreement establishing universal jurisdiction, with *aut dedere aut judicare* provisions and establishing criminal jurisdiction for grave international crimes without any distinction based on official capacity of the perpetrator, pointed to a construction that the States parties intended to exclude immunity. However, the view was also expressed that such an inference could not be lightly drawn and that the *Pinochet* proposition could not be applied across the board as a general proposition.[538]

179. In the case of a waiver in an individual case, the standard of certainty implied some *bona fide* duty to inquire with the other State in case where there were any doubts, as it could not be lightly assumed that certain conduct by another State constituted a waiver of immunity. At the same time, States had a duty to express themselves clearly within a reasonable time, if they wished to claim immunity, when they were confronted with a situation which required their response.

180. On whether *non-invocation* by a State of the immunity of an official could be considered an implied waiver, it was noted that as long as a State did not have knowledge which was certain of the exercise of jurisdiction over one of its officials, or had not yet had sufficient time to consider its response, the non-invocation of immunity could not be taken as a waiver. However, once the State concerned had been fully informed and given an appropriate time for reflection (which need not be very long), non-invocation of immunity would usually have to be considered as constituting an implied waiver.

181. Some members agreed that a waiver once made cannot be revoked, as this was necessary in the interest of legal certainty and procedural security. It was important that the character of a waiver as a unilateral legal act which finally determined the position of a State with respect to one of its rights not be called into question. In this regard, some members doubted that, following the non-invocation of immunity *ratione materiae* of an official or immunity *ratione personae* of an official other than the troika, immunity could be invoked when the proceedings were in the appeal stage.

182. However, it was acknowledged that a limited waiver that enabled a State to take certain preliminary measures would not preclude the invocation of immunity at a later stage of a trial with respect to a prosecution.

(e) *Relationship between invocation of immunity and the responsibility of that State for an internationally wrongful act*

183. Some members agreed with the assertion by the Special Rapporteur that the State that invoked immunity of its official on the grounds that the act with which that official was charged was of an official nature was

[538] *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, 24 March 1999, ILR, vol. 119 (2002).

acknowledging that such act was an act of the State itself; by doing so, however, it was not necessarily acknowledging its responsibility for that act as an internationally wrongful act.

184. It was noted, however, that it had to be recognized that there were times when immunity could be invoked to avoid the possibility of a serious intrusion into the internal affairs of a State, not to mention that the State of the official might itself wish to investigate and, if warranted, prosecute its own official or a State might wish to invoke immunity quickly, in order to avoid undue embarrassment or suffering on the part of its official.

185. Looking forward, it was suggested that at the following session, preferably in the context of a working group, the Commission should first examine the general direction of the topic, focussing on the question concerning the extent to which there ought to be exceptions to immunity of State officials, particularly in respect of grave crimes under international law. In the light of the conclusions reached in such a working group, a decision could then be made on how the Commission would move forward on the topic.

5. Concluding remarks of the Special Rapporteur

186. The Special Rapporteur thanked members for the very useful, interesting and critical comments on his reports, noting that the interventions revealed a variety of schools of thought.

187. The Special Rapporteur contextualized the issues by recalling that there were many truisms in international law, including that the development of human rights had not resulted in the disappearance of sovereignty or the elimination of the principles of sovereign equality of States and non-interference in the internal affairs, despite it having a serious influence on their content. The central issue for consideration in the present topic was not so much the extent to which changes occurring in the world and in international law had had an influence on sovereignty as a whole, but rather how more specifically there was an influence on the immunity of State officials, based on the sovereignty of a State; the essential question was how the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular had been affected.

188. While conceding that the impact on the vertical relationship, namely how international criminal jurisdiction had been affected, was very clear, the Special Rapporteur noted such was not the case with respect to the quite distinct and separate horizontal relationship involving interactions between sovereign States and their national criminal jurisdictions. The question of international criminal jurisdiction was entirely one that was to be separated and distinguished from foreign criminal jurisdiction. In his view, article 27 of the Rome Statute of the International Criminal Court, which was often invoked as evidencing the changes that had taken place, was unlikely to be relevant with respect to foreign criminal jurisdiction. If it was to be asserted, it could not be done without taking full account also of the implications of article 98 of that Statute.

189. The Special Rapporteur affirmed that his explicit positions on the issues as reflected in the second report were reached not on *a priori* basis but after a review of State practice, case law and the doctrine, bearing in mind his professional life experience and legal background. This review revealed that the interaction between sovereignty and immunity in respect of foreign national jurisdiction had not become insignificant. States were still cautious about protecting their interests, particularly in respect of the exercise of jurisdiction, much more so with respect to criminal jurisdiction than to civil jurisdiction, because it involved the deprivation of freedom, and possibilities of detention and arrest; all these indirectly affected the exercise of sovereignty of a State and the internal competence of the State. This was why immunity was still important; despite the various developments in the international system, the fundamentals on this aspect remained the same.

190. He stressed that practice and doctrine had led him to accord significance to the distinction between immunity *ratione personae* and immunity *ratione materiae*, and this difference needed to be taken into account in the substantive and procedural consideration of the topic.

191. He confirmed the assumption that immunity *ratione materiae* applied to all State officials and former officials in respect of acts carried out in an official capacity.

192. Regarding the circle of persons enjoying immunity *ratione personae*, the Special Rapporteur reaffirmed that there was no doubt, based on an objective legal analysis, that the troika enjoyed immunity. Such immunity was not exclusive to the troika. Indeed, the nature of representation in international relations had changed; it was no longer exclusive to the troika, and the judicial decisions, at the international and national levels, showed that certain high-level State officers enjoyed immunity *ratione personae*. On the contrary, there was no case to his knowledge that concluded that such immunity would not be extended to officials beyond the troika. It was in recognition of the need to be prudent that he had suggested that there might be a need to establish criteria for high-level officials enjoying immunity *ratione personae*, and to maintain a distinction between such officials and the troika in respect of invocation and waiver of immunity as a matter of procedure.

193. He acknowledged that there were serious conceptual differences in the debate concerning immunity and exceptions to immunity. However, whichever position was preferred conceptually, it was firmly established in international law that certain holders of high-ranking office in a State enjoyed immunity, both civil and criminal, from jurisdiction in other States. This was a norm—not allowing exceptions—which applied to the troika. This was confirmed by two decisions of the International Court of Justice and was broadly supported by State practice, in national court decisions and doctrine. He conceded that his use of "absolute" in the report was not entirely felicitous because even in case of immunity *ratione personae*, such immunity was limited in time and substance.

194. In the circumstances, if there was room for exceptions, the Commission would have to look to immunity *ratione materiae*. Practice and decisions, however,

did not reveal a trend in favour of such exclusions, except in the one case when the crime was committed in the territory of the State exercising jurisdiction.

195. He stressed that in order for a trend to establish an emerging norm, practice needed to be prevalent and this was not the case with respect to exceptions, even in the case of immunity *ratione materiae*. He noted, however, that there was room to consider other justifications for such exclusion that were not considered in his second report, such as suspension of immunity as a countermeasure or non-declaration of immunity. It might be useful for States to provide information on these aspects.

196. The Special Rapporteur also noted that despite all this, the Commission was not precluded from developing new norms of international law when expectations with regard to its effectiveness were justified.

197. Addressing the various rationales for possible exceptions, the Special Rapporteur noted, with regard to an exclusion on the basis of equality before the law, that he did not think it was entirely convincing, considering that some officials within their own jurisdictions enjoy immunity.

198. The Special Rapporteur also noted that to juxtapose immunity with combating impunity was incorrect, as it did not tell the whole story; combating impunity had a wider context involving a variety of interventions in international law, including the establishment of international criminal jurisdiction. The Special Rapporteur, in responding to the comments on the need for balance, recalled that immunity did not mean impunity. Moreover, immunity from criminal jurisdiction and individual criminal responsibility were separate concepts. Immunity and foreign criminal jurisdiction constituted the issue to be grappled with, and not immunity and responsibility. The rules on immunity as they presently existed already provided some balance in the way the system as a whole operated. He also noted that the institution of universal criminal jurisdiction was itself not popular among States, not because of immunity but because there was a reluctance to employ it in relation to the interaction *vis-à-vis* other States. He recalled that he had written in his second report, and he continued to think that it was the case, that the exercise of extraterritorial jurisdiction was undertaken mostly in developed countries with respect to serving or former officials of developing States.

199. On the third report, he welcomed the fact that it was less contentious and the various conclusions had broadly been found reasonable. He agreed that issues of inviolability were important and needed to be addressed.

200. The Special Rapporteur noted that in future it would be necessary to devote attention to circumstances in which cooperation among States could be enhanced on issues of the immunity of State officials and exercise of jurisdiction, as well as on matters concerning settlement of disputes.

201. He clarified that the various conclusions in the reports were not intended to be draft articles; they only reflected a summary for the convenience of the reader. To formulate draft articles at this stage before resolving the basic issues would be premature.

202. On the question of the interaction, at this stage, with States, the Special Rapporteur noted that it might be useful to receive their detailed comments in the Sixth Committee on the debate at the present session, taking into account in particular the second report, as well as information on State practice, including legislation and court decisions on the issues raised in the second and third reports and in the debate.

203. Responding to comments about the reputation of the Commission, the Special Rapporteur opted to emphasize the importance of the responsibility of the Commission and of those who write on issues of international law, noting in particular that what is written, as constituting subsidiary sources of international law, had consequences, positive and negative, for the development of international law.