# Chapter VI

# IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

## A. Introduction

82. 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.[298] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[299]

83. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report[300] at its sixtieth session (2008) and the second[301] and third reports[302] at its sixty-third session (2011). The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[303]

## B. Consideration of the topic at the present session

84. The Commission, at its 3132nd meeting, on 22 May 2012, appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission.

85. The Commission had before it the preliminary report of the new Special Rapporteur (A/CN.4/654). The Commission considered the report at its 3143rd to 3147th meetings, on 10, 12, 13, 17 and 20 July 2012.

### 1. Introduction by the Special Rapporteur of the preliminary report

86. The preliminary report analysed the Commission's work thus far, providing *inter alia* an overview of the work by the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly. It also addressed the issues about which there was no consensus and which ought to be considered during the present quinquennium, focusing in particular on the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*; the distinction and the relationship between the international responsibility of the State and the international responsibility of the individual, and their implications for immunity; the scope of immunity *ratione personae* and immunity *ratione materiae*, including possible exceptions; and the procedural issues related to immunity. The report also offered a suggested workplan.

87. In her introduction of the report, the Special Rapporteur underlined that the report was "transitional" in nature as it took into account the work carried out by the previous Special Rapporteur in his three reports and by the Secretariat in its memorandum (which would continue to be useful for the future work of the Commission), as well as the progress in the debates of the Commission and of the Sixth Committee, while seeking to identify issues for consideration during the present quinquennium in a way that would foster a structured debate and provide an effective response to the myriad of issues raised by the topic. In this connection, the Special Rapporteur focused on a number of methodological aspects. First, it was underscored that the topic was complex and politically sensitive. Despite three reports by the previous Special Rapporteur and debates in the Commission and the Sixth Committee, there were still a variety of perspectives attendant to the topic and many points of difference requiring a fresh approach, while bearing in mind the valuable work done previously. Second, it was stressed that the mandate of the Commission covered the promotion of both the progressive development of international law and its codification. In that regard, it was within the working methods of the Commission to look at both *lex lata* and *lex ferenda*. The topic was a classical one in international law, which, however, had to be considered in the light of new challenges and developments. Third, it was underscored that in the treatment of the topic it was necessary to take a systemic approach, bearing in mind that the product to be elaborated by the Commission would have to be incorporated into and form part of the international legal system. This meant that it was crucial to take a systemic approach that interrogated the various relationships between the rules relating to immunity of State officials and structural principles and essential values of the international community and international law, including those seeking to protect human rights and combat impunity. In that regard, there was a need to take into account a balancing of interests. Fourth, there was need to have a focused and structured debate on the various issues, singling out clearly identified blocks of basic questions to be discussed one at a time, even though it was recognized

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[298] At its 2940th meeting, on 20 July 2007 (see *Yearbook … 2007*, vol. II (Part Two), 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), para. 257).

[299] *Yearbook … 2007*, vol. II (Part Two), para. 386. For the memorandum prepared by the Secretariat on that topic, see A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

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

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

[302] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646.

[303] See *Yearbook … 2009*, vol. II (Part Two), para. 207, and *Yearbook … 2010*, vol. II (Part Two), para. 343.

that the substantive issues appertaining to the topic were cross-cutting and interrelated. It was pointed out that the proposed workplan contained in the preliminary report had been suggested with this goal in mind.

88. The Special Rapporteur also highlighted a number of substantive questions that were considered crucial to address in unravelling the issues surrounding the topic. The first was the distinction between immunity *ratione personae* and immunity *ratione materiae*. Although the distinction was well made doctrinally, it was necessary to consider further the consequences that may be drawn from such a distinction and its impact. Second, it was necessary to clarify the functional dimension of immunity to ensure that it did not conflict unnecessarily with other principles and values of the international community. Third, it would be necessary to determine the beneficiaries of immunity *ratione personae* and whether it would be appropriate to establish a list, open or closed. Fourth, it would be appropriate to determine the scope of "official act" for purposes of immunity, including the implications in relation to the responsibility of the State for an internationally wrongful act and the international criminal responsibility of the individual. Fifth, it would be necessary to analyse whether there were any possible exceptions to immunity and the applicable rules in relation thereto. Sixth, it would be of vital importance to consider the question of international crimes in the light of the general question of the essential values of the international community; and finally, it would be appropriate to consider the procedural aspects pertaining to the exercise of immunity. The Special Rapporteur recalled that the previous Special Rapporteur had addressed those aspects to a large extent. However, since a consensus had not been reached on them, it would be useful for the Commission to consider the controversial issues from a fresh perspective. To that effect, the Special Rapporteur indicated that she was willing to present draft articles as early as in her next report.

### 2. Summary of the debate

#### (a) *General remarks*

89. Members welcomed the preliminary report of the Special Rapporteur and its focus on methodological, conceptual and structural aspects, with a view to setting out a road map for the future work of the Commission. Members joined the Special Rapporteur in acknowledging the scholarly and outstanding contribution of Mr. Roman Kolodkin, as previous Special Rapporteur, whose work, together with the memorandum by the Secretariat, would continue to be useful in the efforts of the Commission.

90. Members also recalled the complexity of the topic and the political sensitivities that it engendered for States. In that connection, some members cautioned that it was important to ensure that any methodological and conceptual approach taken would be neutral in nature and would not prejudice discussion on matters of substance. The point was also made that a change in the Special Rapporteur did not necessarily lend itself to a radical change in approach.

91. Some other members expressed the hope that the outcome of the work of the Commission would contribute positively to the fight against impunity and not erode the achievements made thus far in that area.

#### (b) *Methodological considerations*

##### (i) Progressive development of international law and its codification

92. Some members considered the distinction between progressive development of international law and its codification as particularly important in the consideration of the present topic. It was suggested that, where possible, the Commission should distinguish between what was codification and what were proposals to States for progressive development of the law; that was especially the case because this area of the law was applied chiefly by domestic courts, in cases that were politically sensitive. Such differentiated specification would help to provide guidance to such courts.

93. Moreover, since in the consideration of the present topic the Commission would most probably be confronted with issues concerning "evolving" aspects of international law, it was countenanced that it should, in the interest of transparency, analytically distinguish determinations constituting *lex lata* from proposals *de lege ferenda*.

94. Some members concurred with the view of the Special Rapporteur that, in the consideration of the topic, it would be useful to focus, initially, on considerations that reflect *lex lata*, and then at a later stage take into account any proposals *de lege ferenda*.

95. Some other members, on the other hand, underlined that it was essential not to transform the difference between codification and progressive development into a contrived opposition between a law that was conservative and a law that was progressive, nor to conflate *lex lata* with codification or progressive development with *lex ferenda*. When the Commission engages in an exercise in the progressive development of the law, it does more than simply identify what it thinks the law is or should be; it proceeds on the basis of an assessment of the practice of States even though the law may not have been sufficiently developed or is unclear, or the matter remains unregulated. Progressive development of international law was as much the mandate of the Commission as was codification. The entire process was subtle and seamless rather than marked by a clear divide.

96. In that connection, it was doubted that there was a compelling argument for drawing a sharp distinction, for purposes of methodology, between the codification and progressive development of international law. It was recalled that, in the practice of the Commission, there was no such differentiation drawn between codification and progressive development; it was probably a distinction borne out by the rhetoric rather than by practice, even though occasionally, in the commentary on draft articles, an indication is given that the direction taken by the Commission on a particular issue represents progressive development.

97. What was considered critical for the Special Rapporteur was to undertake an objective analysis of the relevant evidence of practice, of the doctrine and of

any emerging trends, in the light of relevant values and principles of contemporary international law and, on that basis, propose as appropriate draft articles for the topic.

(ii) Systemic approach

98. Some members viewed the systemic approach proposed by the Special Rapporteur, albeit seemingly valuable, as abstract and deductive. It was sharply contrasted with a practice-oriented and inductive approach, which was viewed as best suited to reaching solid determinations of the law, regardless of whether the aim was to identify *lex lata* or proposing developments *de lege ferenda*. It was emphasized that even abstract categorizations had empirical foundations and must be justified as such.

99. However, it was cautioned that there was no need to be hasty in passing judgment on what was entailed by a systemic approach. It was important that the Commission exercise its legal choices, taking into account the need to find a balance between the respect for sovereignty and the concern for the vulnerable, including victims of egregious crimes. It was essential that the Commission be sensitive to the value-laden nature of contemporary international law, which, while continuing to respect sovereignty and concepts associated with it such as immunity, also favoured legal humanism and recognized the existence of an international society.

(iii) Trends in international law

100. Some members pointed out that the Commission should be cautious with respect to the contention that a "trend" existed to limit immunities before national jurisdictions and their scope. Indeed, it was recalled that, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,[304] the International Court of Justice had rejected the contention of Italian courts that a trend existed in international law according to which the immunity of the State was in the process of being restricted in the application of the territorial tort principle for *acta jure imperii*, when in fact there was a contrary trend reaffirming immunity before national criminal jurisdictions. Moreover, it was noted that the *Pinochet* decision,[305] rendered in 1999, had not been widely followed. Some other members referred to the Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case,[306] in which they seemed to indicate that, at best, no rule existed in relation to immunity *ratione materiae* in terms of the most serious international crimes and that a trend pointing to the absence of immunity could exist.

(iv) Values of the international community

101. On the related question of values of the international community, some members drew attention to the possible difficulty of translating "values" into operational rules and principles of international law. It was opined that giving effect to other principles and values of the international community, which were also in the process of incorporation into international law, in particular the value to combat impunity as suggested by the Special Rapporteur, might not be as decisive in the consideration of the topic as would the more appropriate question of how such values could be given effect. In that regard, it was pointed out that the rules on immunity were themselves representative of values of the international community. If any balancing process were to take place, it would have to have a solid foundation and be undertaken and scrutinized within the framework of the general rules on the formation and evidence of customary international law.

102. An element of caution was also expressed regarding the use of terms like "system of values", as they could be construed as euphemisms intended to privilege certain values over others.

103. Some other members, expressing a contrary view, observed that the law did not exist in a vacuum and was not necessarily neutral. In any event, the approach proposed by the Special Rapporteur was more revealing of her intentions to proceed in a transparent manner than indicative of a radical departure from what the Commission had always done, namely to deal with the principles and values of the international community, a typical function of the law in society. Indeed, the syllabus on the topic highlighted those aspects and possible approaches.[307] The central issue at the core of the topic, whether to further the value of immunity in inter-State relations or to move in the direction of the value that privileges the fight against impunity, was fundamentally a debate about the principles and values of the international community.

(v) Identification of basic questions

104. It was acknowledged that the identification of basic questions for analytical review and study, taking a step-by-step approach, was a useful technique. It was, however, signalled that it was important to remain conscious of the interrelated and interconnected nature of certain issues between which distinctions might be sought to be drawn, even if it were for analytical purposes only. That was even more important if it was recognized that immunity *ratione personae* and immunity *ratione materiae* derived from a common legal source of the rule on immunity, namely the immunity of the State. Similarly, it was pointed out that there was a close relationship between immunity in criminal and in civil matters, as developments in one area could bear on the other.

(c) *Substantive considerations*

105. Some members considered that, while State immunity and the immunity of State officials were not identical, they originated from the same underlying premise that, as a matter of international law, it was problematic for one State to readily sit in judgment, in its own domestic courts, on another State or its officials; both the official and its State were implicated when a domestic

[304] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[305] *Regina v. Bow Street Metropolitan Stipendiary Magistrate,* ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, 24 March 1999, *International Law Reports*, vol. 119 (2002), p. 135.

[306] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 88–89, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85.

[307] *Yearbook … 2006*, vol. II (Part Two), annex I.

court of another State passes such judgment. In *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice had recognized that such a claim of immunity for a government official was, in essence, a claim of immunity for the State, from which the official benefited.[308]

106. Echoing the sentiments of the Special Rapporteur in her report, it was stressed that, when addressing the substance of the topic, it might be useful to draw upon recent developments, including the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*, together with separate and dissenting opinions, while recognizing that it dealt with immunity of the State from civil jurisdiction.

107. In their comments, members also considered it useful to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*. Nevertheless, some members pointed to the Special Rapporteur's assertion in the preliminary report that immunity *ratione personae* and immunity *ratione materiae* had the same purpose, which was "to preserve principles, values and interests of the international community as a whole", and had as their cornerstone their "functional nature" and sought clarification on the practical significance of these propositions for the topic,[309] it being pointed out, in particular, that there was no exclusivity to the functional nature of immunity. Moreover, it was important that the functional basis be seen in the light of other principles of international law, such as sovereign equality of States and non-intervention. Some other members suggested that the two types of immunity were premised on a common rationale, notably to assure stability in inter-State relations and to facilitate continued performance of representative or other governmental functions. It was also pointed out that the rationale for the two types of immunity might not be exactly the same, and it was suggested that it might be useful to examine the issue further in order to determine whether any differences in possible rationales were so fundamental as to occasion different consequences. However, some members of the Commission pointed out that both immunity *ratione personae* and immunity *ratione materiae* had a clear functional character. Some other members questioned whether the term "functional" was sufficiently clear to help resolve underlying substantive issues.

(i) Scope of the topic

108. It was recognized that the Commission had already dealt with certain aspects of immunity in respect of diplomatic and consular relations, special missions, the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the representation of States in their relations with international organizations, and the jurisdictional immunity of States and their property. Accordingly, those codification efforts had to be taken into account in order to ensure coherence and harmony in the principles and consistency in the international legal order. Moreover, the point was made that the Commission should not seek to expand or reduce the immunities to which persons were already entitled as members of diplomatic missions, consular posts or special missions, or as official visitors or representatives to international organizations, or as military personnel.

109. It was also recalled that the scope of the topic, which had to be maintained as such, was immunity of State officials from foreign criminal jurisdiction. Accordingly, it was not concerned with the immunity of the State official from the jurisdiction of international criminal tribunals, nor from the jurisdiction of his or her own State, nor from civil jurisdiction. Moreover, it was not intended necessarily to address the question whether international law required a State to exercise criminal jurisdiction in certain circumstances, but rather whether a State in exercising criminal jurisdiction would have to bear in mind certain questions of immunity under international law and accord a State official such immunity, as appropriate.

110. Some members considered it useful for the Special Rapporteur to undertake an analysis of jurisdictional aspects, in particular the extent to which universal jurisdiction and international criminal jurisdiction and their development bear on the topic, drawing attention to prior work of the Commission on the draft Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[310] the draft Code of Crimes against the Peace and Security of Mankind[311] and the establishment of the International Criminal Court.[312] Some other members, however, recalled that, even though jurisdiction and immunity, as observed in the *Arrest Warrant of 11 April 2000* case,[313] were related, they were different concepts and there was probably not much to be gained from any extended treatment of jurisdictional considerations for purposes of the present topic.

111. The suggestion was also made that, since inviolability of the person was closely related to immunity, had immediate practical significance and non-compliance with it entailed the potential risk of causing damage to the relations between States, the treatment of inviolability within the topic merited consideration.

(ii) Use of certain terms

112. Some members noted that the use of certain terminology to describe particular relationships, such as immunity being "absolute" or the perception of immunity in terms of an "exception", might not be helpful in elucidating the topic, when the essential question to be addressed was whether immunity existed in a given case and how far it was or should be restricted. It was stressed by some members that it was important that the Commission take a "restrictive approach" in addressing

[308] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at p. 242, para. 188.

[309] A/CN.4/654, paras. 57–58.

[310] *Yearbook ... 1950*, vol. II, document A/1316, part III, p. 374. For the Charter of the Nürnberg Tribunal, see the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

[311] *Yearbook ... 1996*, vol. II (Part Two), para. 50. The text of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1954 is reproduced in *Yearbook ... 1985*, vol. II (Part Two), para. 18.

[312] See *Yearbook ... 1994*, vol. II (Part Two), paras. 90–91.

[313] *Arrest Warrant of 11 April 2000, Judgment* (see footnote 306 above), para. 59.

the topic and refrain from giving the impression that immunity was "absolute". It was also underlined that there was need to eschew any suggestion that the functional theory to justify immunity was in any way more inherently restrictive than the representative or other theories. It was pointed out by some members that, if there had been any movement to limit immunity, such movement was "vertical" in character, a tendency that revealed itself in the establishment of the international criminal justice system. At the "horizontal" level, in relations between States, the tendency was a reaffirmation of immunity.

113. It was also noted that terms like "State official" needed to be defined and that there had to be concordance in the language versions, thus assuring conveyance of the same intended meaning. It was also stated by some members that, in defining an official for purposes of immunity *ratione materiae*, a restrictive approach should be pursued.

(iii) Immunity *ratione personae*

114. It was noted that immunity *ratione personae*, which was status based, was attached to the person concerned and expired once the term of office ended, and was enjoyed by a limited number of persons. While the nature of immunity was broad in scope, it was limited *ratione temporis*.

115. It was suggested by some members that the assertion by the Special Rapporteur that State practice, doctrine and jurisprudence appeared to point to an emerging consensus on immunity *ratione personae* accruing to the troika, with the inclusion, in particular, of the minister for foreign affairs, needed to be further explored, as should the question whether other officials beyond the troika had immunity *ratione personae*. Although the International Court of Justice in the *Arrest Warrant of 11 April 2000* case[314] addressed both aspects by finding as firmly established in international law that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and minister for foreign affairs, enjoyed immunities from jurisdiction in other States, both civil and criminal, that aspect of the judgment had not been without criticism from other members of the Court, in the doctrine, and, from previous debates, also from members of the Commission.

116. Some members, however, viewed the matter as settled. While some members were amenable to accepting immunity *ratione personae* for the troika, and maintaining a restriction on the troika, some other members pointed to the possibility of broadening the scope beyond the troika, on account of the dicta in the *Arrest Warrant of 11 April 2000* case,[315] to a narrow circle of high-ranking holders of office in a State. Given the differences in the designation of officials in various States and the contemporary complexity in the organization of government, the difficulty of elaborating a list of such other high-ranking officials was also recognized. In that connection, it was suggested by some members that, while also acknowledging the need to be cautious about elaborating an expanded pool, it would be appropriate for the Commission to establish the necessary criteria, which would for instance cover the troika and, on the basis of the guidance of the *Arrest Warrant of 11 April 2000* case,[316] other holders of high-ranking office when such immunity was necessary to ensure the effective performance of their functions on behalf of their respective States. Another possible alternative suggested was the elaboration of a modified second tier regime of immunity *ratione personae* for persons other than the troika.

117. The occasional mention that there may be exceptions to immunity from foreign criminal jurisdiction for persons enjoying immunity *ratione personae* was questioned by some members as having no basis in customary international law. It was equally doubted that it would be useful to take such an approach even as a matter of progressive development.

118. Some other members viewed the matter from the perspective that the full scope of immunity *ratione personae* was enjoyed without prejudice to the development of international criminal law.

(iv) Immunity *ratione materiae*

119. It was recognized that immunity *ratione materiae*, which was conduct based, continued to subsist and could be invoked even after the expiry of the term of office of an official. Unlike immunity *ratione personae*, it encompassed a wider range of officials. It was suggested, however, that instead of attempting to establish a list of officials for the purposes of immunity *ratione materiae*, attention should be given to the act itself.

120. The importance of defining an official act was generally acknowledged as key. Some members agreed with the Special Rapporteur that it was important to study carefully the relationship between the rules on attribution for State responsibility and the rules on the immunity of State officials in determining whether or not a State official was acting in an official capacity. It was viewed that there was a link between the assertion by a State of immunity and its responsibility for the conduct.[317]

121. According to some members, an act attributable to the State for the purposes of its responsibility for an internationally wrongful act, including an act which was unlawful or *ultra vires*, was to be regarded as an official act for the purposes of immunity.

122. However, the point was also made that it may be useful to reflect further upon whether immunity *ratione materiae* extended to "official acts" that were unlawful or *ultra vires*. It was suggested that, for the purposes of the present topic, the focus should be on individual criminal responsibility, based on the principle of personal guilt. This approach, however, was perceived as untenable by some members since by definition immunity assumed that the person may enjoy immunity for such acts. A point was made that the Commission would be in a position to contribute positively with regard to the definition of an "official act", noting that, if there was no agreement on the

[314] *Ibid.*, paras. 52–55.

[315] *Ibid.*, para. 51.

[316] *Ibid.*, paras. 51 and 53.

[317] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 308 above), para. 196.

existence of immunity in relation to a specific crime, then the default position should be the lack of immunity.

123. According to another view, the rules of attribution for State responsibility seemed to be of limited value, as such rules were intended to serve a purpose that was conceivably different from that of immunity. Since the distinction between *acta jure imperii* and *acta jure gestionis* was already well established in the law of State immunity, it was suggested, instead, that such distinction could be inspirational in the development of a definition of official acts for purposes of immunity of State officials from criminal jurisdiction. Such a course of action might evince a tendency towards a more restrictive approach than the broad notion of attribution under State responsibility.

124. It was also pointed out that it was important to bear in mind that, although the international responsibility of the State and the international responsibility of individuals were linked, the two notions implicated two different questions, which should be treated as such.

125. The Special Rapporteur was generally encouraged to undertake a further detailed analysis of all possibilities. It was suggested that, if the question whether an allegedly criminal conduct could be attributed to the State of the official as a matter of State responsibility could plausibly be answered in the negative, it necessarily followed that such conduct by an official could not be an "official act" for which a claim of immunity *ratione materiae* could be sustained. If, however, such conduct could affirmatively be attributed to the State it could well be (*a*) that the conduct was *per se* an "official act" and therefore the official in all circumstances enjoyed immunity *ratione materiae*; (*b*) that the conduct still constituted an "official act", but there were some exceptional circumstances where immunity *ratione materiae* could be denied, such as when the conduct alleged was a serious international crime; or (*c*) that the fact that the conduct could be attributed to a State did not by itself reveal whether it was an "official act" for purposes of immunity *ratione materiae*; which meant reliance, instead, on some other standard, perhaps one derived from other areas of international law on immunity.

(v) Possible exceptions to immunity

126. It was also recognized that the question of possible exceptions to immunity *ratione materiae* was a difficult issue, which deserved utmost attention. Some members doubted that there existed in customary international law a human rights or international criminal law exception to immunity *ratione materiae*.

127. Some other members observed that there were certain peculiarities that the Commission had to grapple with in addressing the matter, which revolved around the definition of the expression "official acts" or "acting in an official capacity". There was a choice either to consider international crimes as not "official acts" or to recognize that international crimes were actually committed in the context of implementation of State policy and should as such be characterized "official" acts for which immunity would be denied. In both cases, it would be necessary to analyse State practice and jurisprudence. In that regard, it was stressed that, although the International Court of Justice, in *Jurisdictional Immunities of the State*, was seized of a matter concerning State immunity, the basic reasoning of the Court seemed relevant in the consideration of the present topic. The point was made, however, that the Court had emphasized, in that case, that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States and that the question whether and, if so, to what extent immunity might apply in criminal proceedings against an official of the State was not at issue in that case.

128. The judgment elicited different perspectives from members in terms of areas that needed further assessment.

129. Some members found it useful, when addressing the substance of the topic, that the Commission draw analogical value from the totality of the judgment, including the separate and dissenting opinions. Thus, distinct attention was drawn, and importance attached, to (*a*) the need to accentuate the distinction between *acta jure imperii* and *acta jure gestionis*, which for immunity of State officials from criminal jurisdiction would imply a comparable restrictive development over the corresponding years beginning at the turn of the twentieth century; (*b*) the need to acknowledge the difficulty of conceiving modern international law that, on the one hand, took an absolute view of sovereignty when it comes to responding to serious crimes of concern to the international community, while, on the other hand, is permissive of restrictions to sovereignty for commercial interests; (*c*) drawing from the survey of State practice in the "tort exception" to State immunity a corresponding restrictive development towards the immunity of foreign officials from criminal jurisdiction, particularly in the absence of firm State practice in one direction or the other.

130. It was pointed out by some other members that the case involving the alleged violation of *jus cogens* norms as a possible exception should be treated separately and in a differentiated fashion from the case concerning the commission of international crimes, here too giving a separate treatment to each crime, and defining precisely terms like "international crimes", "crimes under international law", "grave crimes under international law" or crimes that are breaches of *jus cogens* or *erga omnes* obligations. It was also noted that the basic methodology of the Court was useful for the topic in that it surveyed practice before national courts and found no sufficient support for the proposition that there was a limitation on State immunity based on the gravity of the violation, pointing to the need to assume the existence of immunity *ratione materiae*, unless there was widespread State practice showing a limitation based solely on the gravity of the alleged violation.

131. As regards *jus cogens*, it was recalled that, in *Jurisdictional Immunities of the State*, the International Court of Justice had stated that there was no conflict between a rule of *jus cogens* and a rule of customary law that required one State to accord immunity to another. The two sets of rules addressed separate matters; the rules of State immunity, being procedural in character and confined to determining whether the courts of one State may exercise jurisdiction in respect of another State, had

no bearing on the question of the substantive rules, which might possess *jus cogens* status, or on the question of whether the conduct in respect of which the proceedings were brought was lawful or unlawful.[318] Other members of the Commission, however, pointed out that some dissenting and separate opinions of judges did in fact find that *jus cogens* affected the rules relating to immunities.

132. It was also suggested that, even where State practice was not settled, it was possible, as a matter of progressive development, after weighing the potential for disruption of friendly relations among States with the desire to avoid impunity for heinous crimes, to consider the feasibility of (*a*) only allowing the State where the crime was committed or the State whose nationals were harmed by the crime to deny an assertion of immunity; (*b*) only allowing a State to deny a claim of immunity in cases where the offender was physically present in the territory of the State; and/or (*c*) only allowing a State to deny a claim of immunity when the prosecution has been authorized by the Minister of Justice or a comparable official of that State.

133. Recognizing that matters of substance were linked to procedural guarantees, the suggestion was also made that it might be useful for the Commission to look, in the context of the topic, at the exercise of prosecutorial discretion and the possibility of requiring the prosecutor, at an early stage in the proceeding, to make a *prima facie* showing that the official was not entitled to immunity. A consideration of such aspects would allow a court exercising criminal jurisdiction to screen out baseless accusations.

### (d) *Procedural aspects*

134. It was considered by some members that substantive and procedural aspects of the topic were closely related and it may well be that the chances of reaching consensus on certain aspects may lie in addressing the procedural aspects beforehand. However, some members stated that the focus should be on the substantive aspects of immunity first, before proceeding to consider its procedural aspects. Another possibility was to deal with both substance and procedure when dealing with immunity *ratione personae* and immunity *ratione materiae*.

135. It was also suggested that the Commission might also address the question concerning prosecutorial discretion to ensure adequate safeguards to avoid potential abuse. Indeed, it was observed that if certain procedural elements—such as the degree of discretion granted to a prosecutor—were resolved early, it might be easier to make progress on the substantive issues.

### (e) *Final form*

136. Some members viewed it essential that the Commission proceed on the basis that a binding instrument would eventually be elaborated. Some other members considered that it was premature to decide on the final form of the work of the Commission on the present topic. There was nevertheless general support for the Special Rapporteur's intention to prepare and submit draft articles on the topic, which would be completed on first reading during the present quinquennium. While it was recognized that it was too early to indicate the number of draft articles to be presented, a suggestion was made that the focus should be on addressing the core issues rather than providing detailed rules on all aspects of the topic.

## 3. Concluding remarks of the Special Rapporteur

137. The Special Rapporteur expressed her appreciation for the useful and constructive comments made by members, stressing that the Commission worked as a collegial body, and the comments made enriched the discussion and would be taken fully into account in her future work. She restated her will to take into consideration the work undertaken by the former Special Rapporteur and by the Secretariat in its study,[319] as well as the previous work of the Commission on related topics, while providing a new approach that would facilitate consensus in the Commission on the controversial aspects of the topic.

138. The Special Rapporteur also welcomed the general receptiveness, in the comments made, and the broad support given, to the methodology and approaches that she intended to pursue, including, in particular, the distinction between immunity *ratione personae* and *ratione materiae*, which was sought in the development of the topic, the proposed systematic approach and the treatment of the various blocks of questions in a successive fashion. In that connection, she stated that no methodological approach could be absolutely neutral in the work of the Commission. She confirmed that she planned to proceed on the basis of a thorough review of the State practice, doctrine and jurisprudence, both national and international. She also stated that taking values and principles into account was necessary, the need being to focus on those that were widely held and reflected international consensus. The overall objective would be to take a balanced approach in addressing immunity that would not contradict efforts undertaken by the international community to combat impunity regarding the most serious international crimes. She also noted that the question of possible exceptions to immunity was going to be extremely important in the discussion of the Commission. It was noted that, although notions like "absolute" or "relative" immunity had limitations analytically, they could however be useful in explaining and offering a clear distinction when the regime of possible exceptions was taken up by the Commission. In her view, only those crimes that are of concern to the international community as a whole, are egregious and are widely accepted as such on the basis of a broad consensus, including genocide, crimes against humanity and war crimes, could merit consideration in any discussion of possible exceptions. Also in that context, it would be crucial to examine State practice and the prior work of the Commission.

139. The Special Rapporteur concluded that, in the light of the debate, she was of the view that the workplan contained in paragraph 72 of her preliminary report (A/CN.4/654) continued to be entirely valid. She therefore expressed her intention to take up, in a systematic and

[318] *Jurisdictional Immunities of the State* (see footnote 304 above), paras. 92–95.

[319] See footnote 299 above.

structured manner, the consideration and analysis of the four blocks of questions identified in the proposed workplan, namely, general issues of a methodological and conceptual nature, immunity *ratione personae*, immunity *ratione materiae* and procedural aspects of immunity, in a concrete and practical way, by including in each of her substantive reports the corresponding draft articles. She indicated that, tentatively, her intention for next year was to address the general issues of a methodological and conceptual nature that are mentioned in section 1 of her workplan as well as the various aspects concerning immunity *ratione personae*. She also expressed the hope that it would be possible to conclude the first reading of the draft articles during the present quinquennium.