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Chapter VII
Immunity of State officials from foreign criminal jurisdiction

Contents

1. Introduction of the third report by the Special Rapporteur

1. While in his preliminary and second reports, the Special Rapporteur considered the substantive aspects of the immunity of the State official from 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.

2. As regards the timing, namely when and at what stage immunity should be raised in criminal proceedings, the Special Rapporteur, recalling in particular the advisory opinion of the International Court of Justice *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that questions of immunity were preliminary issues, which must be expeditiously decided *in limine litis*, 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 pre-trial 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 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 pre-trial stage of the exercise of criminal jurisdiction at the time when the question of the adoption of measures precluded by immunity was addressed.

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

4. On invocation of immunity, meaning, *inter alia*, who was in a position to legally 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 himself, constituted a legally relevant invocation or declaration capable of having legal consequences.

5. 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 concerning whom the invocation related. Accordingly, the State that was planning on 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 the immunity *ratione personae* and immunity *ratione materiae*.

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 appropriate perhaps to request 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.

Secondly, 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.

Thirdly, there was also the possibility of an official who enjoyed immunity *ratione personae* other than the troika, 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 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.

6. 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.

7. As regards 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 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.

8. 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 may 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.

9. Concerning waiver of immunity, the Special Rapporteur noted that right to waive the immunity of an official was vested in the State, not in the official himself. When a Head of State or Government or a minister for foreign affairs waived immunity with respect to himself, 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.

10. 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.

11. A waiver of immunity for officials other than the troika but who enjoyed immunity *ratione personae*, of officials who had immunity *ratione materiae*, as well as of former officials who also had immunity *ratione materiae*, immunity 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.

12. 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 may in some cases pertain only to immunity with regard to specific measures.

13. 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, it would seem 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 which 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 as a violation of a wrongful act.

14. 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.

15. 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, underscoring 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 may be in place making it amenable for a claim to be instituted against it.

2. Summary of the debate

(a) General comments

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

17. 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 contestable than the previous 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 *ratione personae* of immunity in the case where grave international crimes had been committed — there were certain aspects in the third report, particularly some of the conclusions drawn, which were substantively problematic.

18. 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, including the seemingly absolutist and expansive approach to immunity, remained.

19. 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 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 or, as some others preferred, a balance of legitimate sovereign interests involving sovereign States. On the contrary, some other members noted that the Commission had no cause to be concerned about risking its reputation since it was part of its functioning to always balance different legitimate considerations and not let itself to 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

20. There was general agreement that immunity ought to be considered at the early stage of the proceedings or indeed earlier during the pre-trial 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 engage 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 may 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

21. 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 the official himself constituted 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 enjoyed immunity; such notification could then trigger the process by which the State exercising jurisdiction informed the State of the official about the predicament of the official.

22. 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.

23. On the issue 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.

24. 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 official capacity. Such a standard would protect the smooth conduct of international relations and would prevent mutual recriminations on account for example that 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.

25. Another related view was expressed that there was no clear distinction between invocation in relation to the troika and as it concerned such other high-level officials as 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.

26. 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 those 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 foreign minister 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 conclusions of the Special Rapporteur 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.

27. 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.

28. 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 foreign minister 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 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 or Government, ministers of 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".[1] The view was also expressed that there

[1] *Yearbook* ..., 1989 Vol. II, Part II, paras. 443–450.

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.

29. 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*, 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 the 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 will have to deal with these matters in greater detail at a later stage.

30. 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.

31. 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, the use of terms like "prerogative", (although some members did not see anything untoward in its use,) and suggesting that there was a "presumption" arising out of mere appointment of an official was going too far. In the *Advisory Opinion on the immunity of the Special Rapporteur of the Commission of Human Rights*, on which the Special Rapporteur relied, the Secretary-General in fact claimed that the individual concerned was acting as an official. The *Advisory Opinion* was a confirmation of the general proposition that if the official capacity of the person and the official nature of his acts were manifest in a specific situation the burden to demonstrate that he 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.

32. It was also pointed out that State invoking immunity should at least be encouraged to provide the grounds for its invocation. Some fears were expressed that if a State could invoke the 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 possibility of immunity for acts in fact committed in a private capacity. In order to avoid such 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

33. 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 and that waiver for immunity *ratione personae* must be express.

34. It was however observed that two situations concerning waiver of immunity needed 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.

35. 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 State's 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 Vienna Convention on the Law of Treaties. In the *Pinochet case* (No. 3), the House of Lords reached its conclusion in respect of the United Nations Convention against Torture, after a detailed analysis of the terms of that convention. It was asserted that in 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.

36. 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.

37. 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 against one of its officials, or had not yet had sufficient time to consider its response, the non-invocation of immunity cannot be taken as a waiver. However, once the State concerned has been fully informed and given an appropriate time for reflection (which must not be very long), non-invocation of immunity would usually have to be considered as constituting an implied waiver.

38. 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 should not be put into question. In this regard, some members doubted that non-invocation of the immunity of *ratione materiae* of an official or immunity *ratione personae* of an official other than the troika, immunity may be invoked when the proceedings were in the appeal stage.

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

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

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

41. It was noted however that it had to be recognized there were times when immunity may 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 may wish to invoke immunity quickly, in order to avoid undue embarrassment or suffering on the part of its official.

42. Looking forward, it was suggested that at the next 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 conclusions reached in such a working group a decision could then be made on how the Commission would move forward on the topic.

3. Concluding remarks of the Special Rapporteur

43. 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.

44. 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 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 being how had the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular been affected.

45. 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 in respect of 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 the same Statute.

46. 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. Such 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 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.

47. He stressed that the 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.

48. 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.

49. 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 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.

50. 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 Justice and this 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.

51. 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.

52. 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 however noted 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.

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

54. 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.

55. The Special Rapporter also notes that to juxtaposition immunity and combating impunity was incorrect, 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 was 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 whole operated. He also noted that the institution of universal criminal jurisdiction was itself not popular among States not because of immunity but there was a reluctance to employ it in relation to the interaction *vis-a-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 extra-territorial jurisdiction was undertaken mostly in developed countries with respect to serving or former officials of developing States.

56. 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.

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

58. 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.

59. 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.

60. 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.