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Draft report of the International Law Commission on the work of its sixty-fourth session

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Chapter VI
Immunity of State officials from foreign criminal jurisdiction

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A. Introduction

1. 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.[1] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available before the Commission at its sixtieth session.[2]

2. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[3] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[4]

B. Consideration of the topic at the present session

3. 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.

4. The Commission had before it the preliminary report of the 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

5. The preliminary report analyzed the Commission's work thus far, *inter alia*, providing 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 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 individuals and their implications for immunity, the scope of immunity *ratione personae* and immunity *ratione materiae*, and the procedural issues related to immunity. The report also offered a suggested workplan.

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[1] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[2] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[3] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[4] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

6. 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, which would continue to inform the work of the Commission, and the Secretariat in its study, the progress in the debates of the Commission and the Sixth Committee, while seeking to identify issues for further consideration in a way that would foster a structured debate and provide an effective response to the myriad of issues implicated 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. Secondly, it was stressed more generally that the mandate of the Commission covered the object of both the promotion of 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 the *lex lata* and *lex ferenda*. The topic was a classical topic in international law, which, however, had to be considered in light of new challenges and developments. Thirdly, 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 overall 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 that protect the international community, including those seeking to protect human rights and combat impunity. In this regard, there was a need to take into account a balancing of interests, while also investigating the various techniques and relationships at both the national and international levels. Fourthly, 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 that the substantive issues appertaining to the topic were cross-cutting and interrelated. It was pointed out that the proposed work plan contained in the preliminary report was suggested with this goal in mind.

7. The Special Rapporteur also highlighted a number of substantive questions which it was 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, if any. Secondly, it was necessary to figure out the actual scope of the functional nature of immunity to ensure that it did not conflict unnecessarily with other principles and values of the international community. Thirdly, it would be necessary to determine the beneficiaries of immunity of *ratione personae* and whether it would be appropriate to establish a list, open or closed. Fourthly, it would be appropriate to determine the scope of "official act" for purposes of immunity, including the implications therefor in relation to the responsibility of the State for an internationally wrongful act and the international criminal responsibility of the individual. Fifthly, it would be necessary to analyze whether there were any possible exceptions to immunity and the applicable rules in relation thereto. Sixthly, it would be of vital importance to consider the question of international crimes in 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 recognised that each of these aspects had been addressed by the previous Special Rapporteur. It would nevertheless be useful for the Commission to consider the issues from a fresh perspective.

2. Summary of the debate

(a) General remarks

8. 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 roadmap of future work of the Commission. Members joined the Special Rapporteur in acknowledging the scholarly and outstanding contribution of Mr. Roman A. Kolodkin, as previous Special Rapporteur, and whose work, together with the memorandum by the Secretariat, would continue to be useful in the efforts of the Commission.

9. Members also recalled the complexity of the topic and the political sensitivities that it engendered for States. In this connection, it was cautioned by some members 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.

10. 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

(1) Progressive development of international law and its codification

11. 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 proposals to States for progressive development of the law; this was especially the case because this area of the law was applied chiefly by domestic courts, in cases which were politically sensitive. Such differentiated specification would help to provide guidance to such courts.

12. 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 the *lex lata* from proposals *de lege ferenda*.

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

14. Some other members, on the other hand, underlined that it was essential that the difference between codification and progressive development should not be transformed into a contrived opposition between a law that was conservative and a law that was progressive, or to conflate the *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 identifying 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 sufficiently been developed or is unclear, or the matter remains unregulated. Progressive development of international law was as much the mandate of the Commission as codification. The entire process was more subtle and seamless than marked by a clear divide.

15. In this 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 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.

16. What was considered critical for the Special Rapporteur was to undertake an objective analysis of the relevant evidence of practice, the doctrine and any emerging trends, in light of relevant values and principles of contemporary international law and, on that basis, propose as appropriate draft articles for the topic.

(2) Systemic approach

17. 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 the *lex lata* or proposing developments *de lege ferenda*. It was emphasized that even abstract categorizations had empirical foundations and must be justified as such.

18. It was also pointed out that there was a risk that the systemic approach which emphasized a tendency to limit immunities and their scope could be used to make a "trend" argument. Indeed, it was recalled that in the *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*),[5] the International Court of Justice had rejected the contention in relation to the practice 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. It was recalled that the Court, in that case, stated that State practice in the form of judicial decisions supported the proposition that State immunity for *acta jure imperii* continued to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts took place on the territory of the forum State.[6] Moreover, it was noted that the *Pinochet* decision, since it was rendered in 1999, had not been widely followed.

19. On the other hand, 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.

(3) Values of the international community

20. On the related question of values of the international community, some members drew attention to the possible difficulty of translating the "values" argument into

[5] Judgment of 3 February 2012, http://www.icj-cij.org/docket/files/143/16883.pdf.

[6] *Ibid.*, para.77.

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 condign question of how such values may be given effect. It was in this regard 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 a solid foundation if undertaken and scrutinized within the framework of the general rules on the formation and evidence of customary international law.

21. An element of caution was also expressed regarding the use of terms like "system of values" as these may be construed as euphemisms intended to privilege certain values over others.

22. 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 has 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 highlights these aspects and possible approaches.[7] The central issue at the core 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.

(4) Identification of basic questions

23. 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 may sought to be drawn, even if it were for analytical purposes only. This 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 may bear on the other.

(c) Substantive considerations

24. Some members considered that while State immunity and the immunity of the State official 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, of another State or its officials; both the official and its State are implicated when a domestic court of another State passes such judgment. In the *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice 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 benefitted.[8]

25. Echoing the sentiments of the Special Rapporteur in her report, it was stressed that when addressing the substance of the topic, it may be useful to draw upon recent developments, including the rendering of the International Court of Justice in *Jurisdictional*

[7] *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), annex A.

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

Immunities of the State (*Germany v. Italy: Greece intervening*), together with separate and dissenting opinions, while recognizing that it dealt with immunity of the State from civil jurisdiction.

26. 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,[9] it being pointed out, in particular, that there was no exclusivity to the functional nature of immunity. Moreover, it was important that the element of functionality be perceived against the prism 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 the 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.

(1) Scope of the topic

27. 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 jurisdictional immunity of States and their property. Accordingly, these 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, representatives to international organizations, or as military personnel.

28. 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 the State of his or her own nationality, 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.

29. 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 Nuremberg Tribunal, the draft Code of Offences against the Peace and Security of Mankind, and the establishment of the International Criminal Court. Some other members, however, recalled that even though jurisdiction and immunity,

[9] Paras. 57 and 58 of the Preliminary report.

as observed in the *Arrest Warrant* case, 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.

30. The suggestion was also made that since aspects of inviolability were closely related to immunity and had immediate practical significance and the potential risk of causing damage to relations between States, their treatment within the topic merited consideration.

(2) Use of certain terms

31. 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 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 which revealed itself in the establishment of international criminal justice system. At the "horizontal" level, in relations between States, the tendency was a reaffirmation of immunity.

32. It was also noted that terms like "State official" needed to be defined and 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.

(3) Immunity *ratione personae*

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

34. 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 canvassed, as should the question whether other officials beyond the *troika* had immunity *ratione personae*. Although the International Court of Justice in the *Arrest Warrant* case[10] addressed both aspects 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 by other members of the Court, in the doctrine, and, from previous debates, also among members of the Commission.

35. 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 the broadening

[10] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at paras. 52–55.

the scope, in a limited fashion, beyond the *troika*, on account of the *dicta* in the *Arrest Warrant* case,[11] to other high ranking holders of office in a State, including, it was suggested, members of the parliament. 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 this connection, it was suggested by some members, while also acknowledging the need to be cautious about elaborating an expanded pool, that 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* case,[12] 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*.

36. 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.

37. 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.

(4) Immunity *ratione materiae*

38. It was recognised that immunity *ratione materiae*, which was conduct based, continued to subsist and may 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, though, 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.

39. The importance of defining an official act was generally acknowledged as key. Some members agreed with the Special Rapporteur that it was important to carefully study the relationship between the rules on attribution for State responsibility and 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.[13]

40. 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.

41. However, the point was also made that it may be useful to reflect further upon whether immunity *ratione materiae* extended to "official acts" which 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 enjoying such immunity was capable of committing unlawful acts subject to criminal prosecution.

[11] *Ibid.*, para. 51.
[12] *Ibid.*, paras. 51 and 53.
[13] *Certain Questions of Mutual Assistance in Criminal Matters*, para. 196.

42. 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 it 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.

43. 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, two different questions were implicated by the two notions and should be treated as such.

44. The Special Rapporteur was generally encouraged to undertake a further detailed analysis into 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, on the other hand, 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 was entitled to immunity *ratione materiae*; (b) that the conduct still constituted an "official act", however, 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 or not 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.

(5) Possible exceptions to immunity

45. 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*.

46. 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 analyze State practice and jurisprudence. In this regard, it was stressed that although the International Court of Justice, in the *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), was seized with a matter concerning State immunity, the basic reasoning of the Court seemed relevant in the consideration of the present topic.

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

48. 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 for State officials from criminal jurisdiction, would imply a

comparable restrictive development over the corresponding years beginning at the turn of the 20th Century; (b) the need to acknowledge the difficulty of conceiving of the modern international law which, 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.

49. It was pointed out by some other members that the case involving *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 individualized 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 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 consistent State practice showing a limitation based solely on the gravity of the alleged violation.

50. As regards the *jus cogens*, it was recalled that in the *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), the International Court of Justice stated that there was no conflict between a rule of *jus cogens* and a rule of customary law which 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 or not 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 or not the conduct in respect of which the proceedings were brought was lawful or unlawful.[14]

51. 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.

52. Recognising 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.

[14] Judgment of 3 February 2012, paras. 92–95.

(d) Procedural aspects

53. 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 before hand. 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*.

54. 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

55. 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 during the present quinquennium. While recognizing that it was 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

…