Competing Narratives of Sovereignty and Impunity – The Discursive Evolution of State Official Immunity in the International Law Commission

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Frederik Schmidinger
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Selbständigkeitserklärung

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Berlin, den 30. November 2022 Frederik Schmidinger

Erstgutachterin:	Professor Dr. Heike Krieger
Zweitgutachterin:	Professor Dr. Yael Ronen
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a P.P.

I've got a magic charm
That I keep up my sleeve
I can walk the ocean floor
And never have to breathe.

(Life Doesn't Frighten Me)
Maya Angelou, 1993

Abstract

The House of Lords' landmark case *Pinochet* triggered an extraordinary political and academic interest in the issue of immunities of State officials from foreign criminal jurisdiction. Do domestic law enforcement mechanisms have jurisdiction to investigate and adjudicate purported crimes committed by foreign officials, including the (former) holders of the highest offices in the State?

Among contrasting calls to "end impunity" while safeguarding the stability of international relations, the United Nations International Law Commission (ILC) put the topic on its agenda, with the aim of codifying and progressively developing the rules of customary international law in this field. 15 years later, the Commission approaches a contentious conclusions of its efforts: in a highly unusual non-unanimous decision, the ILC adopted a set of draft articles, containing most prominently an explicit exception to the protections granted by immunity if the most severe international crimes are at stake.

This study approaches the ILC's struggle over State official immunity through a discourse-analytical lens. The theoretical perspective on the identification and progressive development of rules of customary international law as a performative linguistic practice embedded in the dynamics of the "invisible college of international lawyers" is sketched in Part 1.

Part 2 investigates the actors performing the discursive practices looked at, the legal experts elected to serve on the ILC since 2006. The profiles of these individuals are analysed through a set of personal features emerging from their CVs, such as nationality, length of tenure, professional background, expertise, education, age, sex and language skills. On this basis, the shifting characteristics of the ILC's composition and correlations between specific features and successful election to the Commission are highlighted.

Part 3 and 4 elaborate in detail on the salient issues of State official immunities as they emerge from the records of the Commission's discursive practices, first and foremost the special rapporteurs' reports and the minutes of the ILC's controversial plenary debates on the topic. One main goal consists in identifying evolving positions and in tracing argumentative patterns and strategies, as the ILC members struggled over authoritative interpretations of the "accurate" meaning of terms, rules and concepts over the years.

Part 5 finally analyses the discursive interaction between the ILC and its principal allies and institutional counterparts, the ICJ and the States represented in the General Assembly's 6th Committee. Besides an analysis of these institutions' respective views on each others' prerogatives, a special focus is put on the patterns of positions and argumentations expressed by specific States on the topic over time.

The conclusions summarise the main achievements and obstacles emerging from the analysis of the ILC's efforts, and give an outlook on the Commission's crucial future challenges and opportunities both within and beyond the boundaries of the topic of State official immunities.

Acknowledgments

Just like the drafting of this dissertation, the ILC's efforts in the field of State official immunities have been a protracted affair, characterised by high hopes, struggle for the right direction, engagement, moments of frustration and ultimately, a worthwhile output.

Whether one agrees or not with the views backed by a majority of ILC members on the issue of exceptions to immunity, the Commission has not shied away from a legally and politically explosive topic. For the standards of a "technical" institution of experts generally deliberating by unanimity on the shores of peaceful Lake Geneva, debates have been ferocious and their outcome divisive. The second special rapporteur in charge of the topic, Ms. Concepción Escobar Hernández, has not been re-elected to the ILC in 2021, despite works on the topic are not formally concluded. It remains unclear to what extent this missed re-election of a current special rapporteur – an unusual event, as the analysis of past ILC elections undertaken in this study suggests – is connected to the disagreement of numerous States in the General Assembly's 6th Committee with Ms. Escobar Hernández' openness towards exceptions to immunity.

The future will reveal whether the contrasts within the Commission have broader implications – inter alia, whether the ILC's output on State official immunities will be considered less authoritative than previous results, and whether similar antagonistic confrontations with all their both disruptive and vitalising potential will be seen more frequently. Certainly, issues like impunity, (non-)interference and the potentially destabilising consequences of (exceptions to) State official immunities will continue to keep national and international actors busy. Lawyers and lawmakers would be well-advised to recur to the Commission's rich and differentiated elaborations when looking for answers to the pressing questions arising in this context. Whether they will do so is a different matter.

Investigating the ILC's efforts on State official immunities has been (most of the time) a pleasant and privileged journey. Without the generous financial support of the Deutsche Forschungsgemeinschaft, the Einstein Stiftung Berlin and the Ernst-Reuter-Gesellschaft, this journey would not have been possible. I thank my supervisors, Professor Heike Krieger and Professor Yael Ronen, for their support and their guidance towards the successful completion of this dissertation.

The opportunity to travel repeatedly to Geneva and New York to observe the ILC and the General Assembly's 6th Committee at work gave me precious insights, shaping my views on the issues discussed in this study. I particularly thank Professor Escobar Hernández and Professor Georg Nolte for assisting me in the logistics of my field research. Furthermore, I want to express my gratitude towards them and their many ILC colleagues ready to share with me their views on the topic of State official immunity, as well as on their role as Commission members and on the ILC's present, past and future during background interviews.

My PhD journey would not have been the same without my great colleagues in the "Human Rights Under Pressure" doctoral study and research program and at the chair of public international and constitutional law at Freie Universität Berlin. The inspiring academic environments in Berlin and at the Hebrew University Jerusalem (thank you to everyone at the Minerva Center for Human Rights, especially Professor Moshe Hirsch for the thought-provoking conversations!) have been crucial inputs. Without the many friends in Berlin and Tel Aviv, this dissertation would eventually have been concluded earlier, but its elaboration would surely have been a less enjoyable experience. I want to deeply thank my mother and my family for their loving endorsement.

Finally and most importantly, I want to express my infinite gratefulness towards Joshua Curtis and to my companion, Francesca Goll. Without your critical hints, your moral support, your dedication and your belief in my skills, this work would not exist.

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Introduction
The ILC's Work on State Official Immunity – Evolving International Law in Difficult Times

Arguably, the immunity States grant each other's officials is one of the most ancient rules of international law, intended to safeguard the lines of communication preceding any type of interaction between States.[1] Despite, or, possibly, because of the primary significance of State official immunity, the international legal order has met difficulties in determining unambiguously the content of the customary rules regulating this issue under international law. Reflecting the topic's legal complexity and practical relevance, the immunity of State officials, in particular from foreign criminal jurisdiction, has given rise to myriad controversial debates in post-war practice and scholarship. This study investigates the efforts of the International Law Commission (ILC) to channel these debates into a draft of the rules on State official immunity from foreign criminal jurisdiction, in line with the Commission's mandate of progressive development and codification of international law.

In that respect, two major questions, verging on the relevance of the debate, need to be addressed. Firstly, to which extent can State official immunity[2] be identified as a poignant example of current difficulties in developing international law? Secondly, which are the critical aspects prominently emerging from the assessment of the ILC's activities on this topic?

F. The Issue - Immunity of State Officials from Foreign Criminal Jurisdiction

The recurring controversies over State official immunity mirror the progression of the international legal order, which has been far from steady and linear over the past decades. In the assessment of international law's ability to identify and adequately respond to the fluctuant needs of the international community, international lawyers oscillate between widespread optimism and marked scepticism. In order to meet these needs, a two-stage procedure is necessary: the identification of rules and the clarification of their content precedes the subsequent, dynamic adaptation of these rules to a developing context. This very interplay of analytical clarification and gradual change, which are both divergent and complementary, constitutes the core dynamic of what is, in the following, called the evolution of international law. An evolution which, over the last seventy years has encountered a number of discontinuities and not always produced optimal results.

Not long after the forward-looking relaunch of the international legal order in the aftermath of World War II, the complexities of developing universal legal tools in a divided world during the Cold War lead to significant doubts on international law's potential to play a substantial role in the

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1 Describing immunity as a founding rule of international law, A. D'Amato, 'A Few Steps Toward an Explanatory Theory of International Law', *Northwestern University School of Law Scholarly Commons* (2010), p. 11.

2 In the following, if not otherwise specified, the terms "State official immunity" or "immunities" refer to "State official immunity from foreign criminal jurisdiction".

regulation of international affairs.[3] After the fall of the Iron Curtain, instead, the reinvigorated international cooperation in the 1990s resulted in an optimistic sentiment that international law would not have to prove its utility any more.[4] Recently, due to the struggle of the international legal order to impose its prescriptions in a multipolar world, the perception of its efficacy, again, swung sharply into a more pessimistic corner. Recent State action is frequently perceived to disregard international legal obligations, thereby undermining the authority of international law and its institutions. Talk of the crisis or stagnation of international law is common.[5]

After the atrocities committed during the Holocaust and World War II, international law was faced with the crucial expectation of engaging with the topic of individual criminal accountability. The issue was fairly new; suffice it to say, that an international legal framework proscribing the crime of genocide did not exist until 1948.[6] The specific historical context called for a new legal framework which, in turn, institutionalised new sets of questions: in the light of the unprecedented scale and systematic ferocity of their acts, were the accused officials only accountable to the authorities of their home States? What if the applicable national rules did not provide adequate punishment for the concerned acts? These issues emerged vehemently in front of the war criminal tribunals in Nürnberg and Tokyo, where these officials were held accountable according to the nascent rules of international criminal law, irrespective of their official status or (potential) superior orders.

The fragile political equilibria of the Cold War constituted, with few exceptions, a serious obstacle to the prosecution of foreign State officials in the following years.[7] Only in the 1990s, the issue of international criminal accountability returned effectively on the international agenda. This regained dynamism became visible in the growing engagement in what was labelled the "fight against impunity". Prosecuting the perpetrators of the most heinous crimes was increasingly prioritised. One expression of this phenomenon was the rise of international criminal adjudication, most prominently in the International Criminal Tribunals for the former Yugoslavia and Rwanda and in the International Criminal Court.

However, the jurisdiction and reach of these international fora remained limited. In the light of these shortcomings, the role of national authorities came increasingly under scrutiny. Particularly, worries revolved around those cases, in which both the authorities of the official's home State and international institutions were unable or unwilling to prosecute. Here, again, previously ignored questions, suddenly came to the fore: should other States be entitled to intervene in the fight against impunity, by proceeding against the alleged perpetrators of the most serious crimes, even if prosecution was based on claims of extraterritorial or universal jurisdiction?

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3 See for instance the views of R. A. Falk, 'The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View' in K. W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law* (1968), pp. 133–52, p. 142, considering international law a mere reflection of political power, a "*repository of legal rationalizations*".

4 Famously invoking the post-ontological era of international law: T. M. Franck, *Fairness in international law and institutions*, First issued new as paperback (Oxford: Clarendon Press, 1997), p. 6.

5 See for instance J. Pauwelyn, R. A. Wessel and J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law* 25 (2014), 733–63.

6 The *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) entered into force on 12 January 1951.

7 One such exceptional prosecution, was the Eichmann case in 1961-62, see *Attorney General of Israel v. Adolf Eichmann* 36 ILR 18 (District Court of Jerusalem, Israel, 11 December 1961); *Attorney General of Israel v. Adolf Eichmann* 36 ILR 277 (Supreme Court, Israel, 29 May 1962).

Increasingly, the exclusive competence of the office holder's State to prosecute the latter's acts was challenged. The issue received global attention in 1998. The British House of Lords ruled that Augusto Pinochet could have been extradited to Spain and prosecuted by a Spanish court, as he was not shielded by immunity against accusations of torture during his previous tenure as the Chilean President.[8] Due to his alleged illness, Mr. Pinochet was ultimately never extradited and prosecuted. Nevertheless, the case sparked an extensive debate, further fuelled in 2002 by the *Arrest Warrant* decision of the International Court of Justice. According to the ICY, by issuing and circulating an arrest warrant, Belgium had violated the immunity of Abdoulaye Yerodia Ndombasi, at the time incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo. Mr. Yerodia was supposed to stand trial in Belgium for having incited racial hatred, which had contributed to spark attacks against ethnic minorities in the DRC.[9] The Court thereby expressed a position countering the view voiced by the majority of the Law Lords in the *Pinochet* case. These diametrically opposed positions of two prominent judicial institutions triggered a vivid debate in the international legal community still ongoing today.

G. The Institutional Setting - The International Law Commission

Since those landmark decisions, the uncertainties around the accountability of State officials before foreign authorities have continued to cause concern, resulting in a multitude of diverse views voiced in practice and academia. When, if at all, does international law allow to prosecute foreign officials, and are these rules evolving? In this context, both clarification of the pertinent rules, as well as the engagement with eventually emerging new legal standards reducing the scope of State official immunity became a necessity. A central institution seeking to determine the content of international legal rules while incorporating legal change into positive law is the ILC, legitimised by acting at the behest of and in cooperation with the General Assembly of the United Nations. In practice-relevant fields, this institution of elected experts aspires to identify the *status quo* and the advancements to be pursued, fulfilling its mandate of codification and progressive development.[10]

Given the underdeveloped nature of the individual criminal accountability under international law, the Commission dealt with several aspects of the field in the past decades. The level of activity of the ILC reflected the general upturns and downturns of international criminal law, with the hopeful beginning in the early 1950s being followed by a period of standstill, before a new heyday in the last years of the previous century.[11]

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8 The *Pinochet* case gave rise to three decisions of the House of Lords, see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 1)* (House of Lords, United Kingdom, 25 November 1998); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 2)* (House of Lords, United Kingdom, 17 December 1998); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 3)* (House of Lords, United Kingdom, 24 March 1999).

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

10 See the Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

11 After the formulation of the *Draft Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, vol. II, para. 97 (1950) and

The ILC has played a crucial role in the drafting of influential tools of international law in the field of accountability and jurisdiction, elaborating the scope of the immunity of specific categories of officials.[12] These projects did however not determine the general regime applicable to all other officeholders, including Heads of State Heads of Government and Ministers for Foreign Affairs. Given the uncertainty over the *status quo* of positive customary law and emerging norms in the field, the General Assembly approved the inclusion of the topic of immunity of State officials from foreign criminal jurisdiction on the Commission's agenda in 2007.[13] The efforts of the ILC on this topic have since then been ongoing.

Despite the successful undertakings in the field of immunity and elsewhere, the ILC and its methods of work have periodically been targeted by criticism.[14] Recently, the activities of the ILC were affected by symptoms of stagnation curbing the evolution of international law. In order to fulfil its mission of stabilising international legal rules whilst dynamically adapting them to new developments, the Commission is asked to perform a delicate balance. On the one hand, the mandate of the ILC implies the possibility of introducing some elements of legal change into positive law; on the other hand, States claim the political prerogative to set new law.

The community of States has however often been hesitant to negotiate and ratify international treaties transforming the rules identified by the ILC into binding law. The most recent convention proposed by the ILC was adopted by the General Assembly in 2004 but has yet to come into force fifteen years later.[15] In the last years, the Commission has therefore frequently chosen to recur to the alternative tool of draft articles, allowing the ILC to formulate its views on existing and emerging norms of customary international law in relative autonomy.

Although draft articles lack the formal recognition as positive law, they can be highly influential[16], triggering fears that the ILC is partly bypassing the reluctant community of States. The elaboration of a set of draft articles containing the Commission's views on State official immunity bring to the light underlying issues touching upon the legitimacy of the ILC's efforts. How far can the Commission go in suggesting legal change, in particular, if numerous States are opposed to the suggested

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the *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1954, vol. II (1954), the Commission again turned to international criminal law in the 1990s, playing a crucial role in the drafting of the Rome Statute of the International Criminal Court contained in the *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1996, vol. II, Part Two (1996). In the new millennium, the Commission engaged with *The obligation to extradite or prosecute (aut dedere aut judicare): Final Report of the International Law Commission*, Yearbook of the International Law Commission, 2014, vol. II (Part Two) (2014). Furthermore, a draft convention on crimes against humanity is currently under preparation, see S. D. Murphy, *First report on crimes against humanity*, doc. A/CN.4/680 (2015), pp. 6-8.

12 These instruments include the *Vienna Convention on Diplomatic Relations* (1961), *Vienna Convention on Consular Relations* (1963) and the *Vienna Convention on Special Missions* (1969).

13 Resolution 62/66 of 6 December 2007, para. 7 (A/RES/62/66). Reiterating the topic's urgency: Resolution 66/98 of 9 December 2011, para. 8 (A/RES/66/98); Resolution 67/92 of 14 December 2012, para. 8 (A/RES/67/92); Resolution 68/112 of 16 December 2013, para. 7 (A/RES/68/112).

14 For an example of an explicit critique dating from 1981, see M. El Baradei, T. M. Franck and R. Trachtenberg, *The International Law Commission: The need for new direction*, Policy and efficacy studies, no. 1. (New York: United Nations Institute for Training and Research, 1981).

15 The *Convention on Jurisdictional Immunities of States and Their Property* (2004) was ratified by 22 States, further 28 States are signatories; entry into force requires 30 ratifications, article 30.

16 One frequently cited instrument of this kind, relevant for the attributability of acts of officials to States, are the *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, 2001, vol. II, Part Two (2001).

developments? Every so often, the ILC's proposals reflect the determination to implement overdue legal innovations difficult to achieve otherwise. Still, the discreet introduction of legal change through the back door can at times prove to be a hazardous aspiration.

H. Divergences - Evolving Paradigms of International Law(-Making)

The ILC's progress on State official immunity has been slow, partly due to the intricate issues raised by the topic, lying at the heart of some highly sensitive disputes about fundamental paradigms of international law. The debates on State official immunity reveal two seemingly irreconcilable claims: the quest for accountability is countered by the exigences of inter-state relations. National law-enforcement is a necessary corollary in the pursuit of justice, especially since international criminal adjudication experiences significant obstacles. Conversely, domestic criminal jurisdiction over the acts of foreign officials is perceived as an interference in internal affairs, and hence as a threat to the stability of international relations.

The points of contention emerging from the opposition of these two paradigms are far-reaching, as they verge on the very foundations of inter-State relationships. What is at issue, are the rights and duties that States claim to have and owe each other in the context of national law enforcement. Or, in other words, under scrutiny is the degree of interference States are both willing to tolerate and to exert. The stakes are high – they revolve around the question of how much friction States are willing to tolerate in order to fight impunity, and how much immunity they feel is necessary to safeguard international relations. Is the foreign prosecution of officials considered (un)lawful, (un)desirable or (im)practicable by States? Conflicting views on sovereignty lie at the core of these questions. What does the refusal or the rejection of the domestic prosecution of foreign officials reveal about contemporary concepts of sovereignty?

The ILC is confronted with an ongoing internal battle over the direction to take with regard to these issues. Whilst some members demand to affirm or extend State official immunity, others push for limiting the latter's scope. Handling this scission characterises the Commission's works on State official immunity. The discord within the Commission is echoed by deep trenches in the General Assembly's 6th Committee, as States are divided both about the legal *status quo* in the field of State official immunity, and about desirable developments. Reconciling these heterogeneous views both in the Commission and in the 6th Committee is crucial, if the final output of works is intended to find resonance in practice.

The divergences on immunity-related aspects are closely connected to contrasting views on the role to be played by the ILC. Is the Commission principally a forum for the codification of well-established rules through affirmed doctrinal techniques? Or else, is the Commission entitled to heavily engage in progressive development, aspiring to exercise a programmatic influence on international law's future[17], even if intricate value-based policy calculations were unavoidable to that end? The topic of State official immunity illustrates the crossroads the ILC is facing, by highlighting

[17] Critically describing similar programmatic approaches, widespread in particular among international legal scholars: J. d'Aspremont, *Formalism and the sources of international law*, Oxford monographs in international law (Oxford: University Press, 2011), pp. 130-131.

its double role of both clarifying where the law stands while, simultaneously, doing justice to new developments. How does the ILC balance these expectations? Will the ILC give up its consensus-based decision-making, in order to embrace the views on immunity internally prevailing? Or else, will the divisions be overcome?

On the spectrum of possible approaches to the topic, two poles can be identified: minimalist restraint to stating the obvious and overambitious elaborations detached from legal practice. Both carry the risk of a loss of relevance. More than a risk, the topic of State official immunity represents an opportunity for the ILC: while meeting all expectations might be arduous, finding a satisfactory answer to the contrasting demands would strengthen its reputation as a dynamic forum for the determination of forward-looking rules, solidly based in practice.

I. The Analytical Endeavour - Assessing Discursive and Institutional Dynamics

Investigating the discussion of State official immunity from foreign criminal jurisdiction in the ILC allows a close-up examination of current tendencies in the determination and development of international law from multiple viewpoints.

Firstly, the topic of State official immunity sheds light on the tensions between two main conceptual fields, emphasizing, on the one side, sovereignty and non-interference and, on the other side, the fight against impunity. How does the ILC balance the contrasting calls for either extensive or limited State official immunity implicit in the approaches to the topic of States, courts, prosecutors, legislators and scholars?

Secondly, the analysis of the interactions within the Commission, as well as between the ILC and the 6th Committee, brings to the fore a multi-faceted picture of the strategies, achievements, shortcomings and prospects of evolving international law through codification and progressive development. How does the institutional mechanism involving the ILC and the 6th Committee balance the contradictory priorities the international legal order is confronted with?

The perspective adopted to investigate these issues focuses on the discursive practices underlying the clarification and development of the rules on State official immunity. The centrality of discourse pays tribute to the fundamental importance this study attaches to the emergence of meaning from language. Terms have no intrinsic meaning: to better understand the evolving meaning of concepts and rules, it is fruitful to investigate how the actors – in the first place, the individual ILC members, and in response to their efforts, the State delegates in the 6th Committee - shape the latter during ongoing negotiations in the course of their interaction.

Hence, one core endeavour of the present study lies in the analysis of the argumentations and narratives on the basis of which the viewpoints on State official immunity are weighed, thereby revealing the clashing priorities of different factions in the ILC and in the 6th Committee. Broad and narrow conceptions of State official immunity are based on contrasting understandings of sovereignty, substantive and procedural justice and the role of foreign authorities in fostering ac-

countability for crimes of international concern. Divergent conceptualisations of codification, progressive development and their respective priority and appropriateness in the context of State official immunity result in differing assessments of the ILC's mandate.

The discursive practices assessed are recorded in the reports of ILC members on the topic of State official immunity, as well as in the minutes of debates on the pertinent issues in the ILC's plenary meetings and in the 6th Committee sessions, covering the years from 2007, when the ILC commenced works on the topic of immunity of State officials from foreign criminal jurisdiction, to 2018. The assessment of these materials was complemented by several research stays: during which, in 2016 and 2017, I visited the ILC sessions in Geneva, and in 2018 I attended the meetings of the 6th Committee in New York, observing the institutions at work and having background conversations with the involved actors on their perspectives.

For a contextualised reading of the discursive processes in the Commission, it is essential to examine the evolving composition of the ILC. Based on the candidates' statements of qualifications and the electoral records of the General Assembly, this study explores patterns in elections and the profiles of (un)successful candidates. The examined features include nationality, length of service, educational and professional background, fields of expertise, age and sex. Who are the individuals operating at this hotspot of international law, determining its development? And: how did they get there?

One aspect pervades numerous facets of the ILC's efforts on State official immunity – power, both as the power of ideas and as the power of individual actors. The power of ideas is at work in any normative expectation towards international law, as well as in any persuasive argument corroborating or critiquing it, crucially influencing the discussions' outcomes. The power of actors in the ILC plays out on different levels; through the prestige and authority of individual actors, and through the power positions of States in the global order. Equally, the members' leverage in the ILC is heavily affected by a wide array of power-related aspects, ranging from access to research infrastructure to argumentative dominance. In other words, the Commission's and its members' struggle for authority is a struggle for influence.

Ergo, it could not be otherwise: the examination of discursive practices is simultaneously an investigation into the impact of power on the development of international law.

J. Agenda

Part 1 outlines the theoretical reflections and the key concepts underlying this study. The progressive development and codification of State official immunity is affected by the intrinsic ambiguity involved in identifying norms of customary international law; the role performed by the ILC is necessarily juriscreative, affected by contrasting claims on how to define and preserve the status quo whilst integrating legal innovation. The practices of the ILC, embedded in community-centred dynamics, translate into semantic struggles and result in ongoing negotiations over the meaning of concepts. These argumentative practices constitute the discursive material analysed in this study through an eclectic combination of various approaches to discourse analysis.

The discursive participants are assessed in Part 2. The ILC members dealing and having dealt with State official immunity in the years since 2007 are examined on the basis of their statements of qualifications issued by the General Assembly in the run-up to the elections of the ILC. How are the ILC members embedded in the community of international law, and which typologies of profiles met the preferences of States on the basis of the electoral records?

Part 3 introduces the topic of State official immunity. Where does the law stand, and what trends are discernible? Based on international and domestic jurisprudence, national legislation and treaty practice, this section evaluates which rules constitute positive international law, and which aspects are to be considered emerging norms.

Part 4 analyses the discursive practices in the Commission regarding State official immunity on the one hand and the appropriate fulfilment of the ILC's mandate on the other. Which developments can be observed in the discourse, what argumentative patterns emerged, which strategies were used by ILC members, and which approaches prevailed? The works on the topic brought about a clear schism, resulting in the ILC being as yet unable to consensually approve its proposal.

Finally, part 5 evaluates the relationship between the ILC and other central institutions of the international legal order such as the ICJ. In particular, the reactions of the delegates of States in the 6th Committee to the trajectories of the debates in the ILC are reviewed. The community of States was equally divided, mirroring the deep trenches characterising the Commission's efforts on the topic. This situation raises questions about the upcoming developments in the field of State official immunity and the future role of the ILC, evaluated in the concluding remarks.

Part 1
Shaping Meaning through Discursive Practices - Premises, Theoretical Contextualisation and Key Concepts

Based on the crucial premise that the ILC's works on State official immunity are an expression of the semantic evolution of international law through community-centred dynamics (A.), the following sections contextualise the Commission's efforts in broader theoretical debates (B.) and elaborate key concepts underlying this study, first and foremost the notions of practice and discourse (C.).

D. Premises – International Law's Semantic and Community-Centred Evolution

Between the opposite pulls towards the defence of the *status quo* on the one hand and towards legal change on the other, between doctrines asserting the prerogatives of States and doctrines invoking their reduction for the sake of cooperation, international law is seemingly subject to irreconcilable tensions.[18] In fortifying these contrasting pulls, different theorisations of international law play an essential role.[19] The immunity of State officials illustrates some of these tensions, fuelled by divergent theoretical core assumptions about international law and its evolution.

These tensions are examined in this study on the basis of a two-fold premise. First, the meaning of international legal rules is determined and developed through linguistic operations. Second, this process of social construction takes place within communities of international lawyers, at which these linguistic operations are geared. The interplay of language, narrators and audiences constitutes what in the following is called the discourse of international law.

Turning to the first of these premises, since the "linguistic turn"[20], language has been recognized as decisively shaping the world and our understanding of it. International law centrally unfolds through language, and has been described as being conversational and communicative in nature.[21] Discursive practices such as the ILC's activities are essentially performed to convince given audiences.[22] The indeterminacy of language is, from this perspective, both a gateway to the impact of

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18 For an description of this "contradiction" or even "dilemma", see D. W. Kennedy, 'Theses about international law discourse', *German Yearbook of International Law* 23 (1980), 353–91, at 361-362.

19 J. Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', *Harvard International Law Journal* 26 (1985), 327–59, 356.

20 Developing the central role of language, L. Wittgenstein, *Tractatus logico-philosophicus: Logisch-philosophische Abhandlung*, Edition Suhrkamp, 12 ([Frankfurt am Main]: Suhrkamp, 1963).

21 International law is frequently described as from a similar perspective: see D. Kennedy's famous characterization of the "conversation without content" (Kennedy, 'Theses about international law discourse', at 376) or the many descriptions of law as an argumentative practice, see e. g. M. Koskenniemi, 'Methodology of International Law' in *Max Planck Encyclopedia of Public International Law [MPEPIL]* pp. 124–30, at 124, para 1; I. Venzke, 'International law as an argumentative practice: On Wohlrapp's The Concept of Argument', *Transnational Legal Theory* 7 (2016), 9–19.

22 Koskenniemi, 'Methodology of International Law', at 129, para. 25; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP Oxford, 2012), at 10.

power, and a necessary feature enabling discussion, negotiation and compromise.[23] Concepts are translated into the language of international law; in turn, the international law's doctrines and principles affect re-conceptualisations.[24]

This study takes the linguistic dimension of international law as a starting point to investigate the ILC's efforts as an argumentative practice. How are specific arguments used to purport different proposals of rules, *lex lata* or *lex ferenda*? What strategies do the ILC members pursue, what patterns are discernible in the confrontation of ideas? The linguistic operations through which these efforts take place are approached as semantic processes of meaning creation, as the identification and progressive development of customary international are characterised by an intrinsic performative dimension: practice creates the law it finds.

Second, the evolution of international law takes place in communities. The processes within the ILC, as well as the Commission's interaction with the international legal order, are in this study conceptualised as illustrations of these community-centred dynamics. The ILC is inserted in the community of international law, a heterogenous group of individuals bound by the common enterprise of international law, famously dubbed the "invisible college of international lawyers."[25]

From the ranks of this community, the ILC members are selected; equally, it is this community the Commission aspires to persuade of its proposals, which should thereby foster the ILC's relevance. These acts of persuasion are geared parallelly at the lawyers operating at the international level – first and foremost, the representatives of States in the 6th Committee – and at national law-appliers. Convincing national law-appliers of a specific view on immunities can be considered a strategy to circumvent the unwillingness of reluctant States to accept the Commission's propositions. A similar strategy might accelerate the development of international law, but the question of the legitimacy of a similar approach would raise controversy.

In turn, the ILC itself constitutes a community, characterised by a common mission and specific features shaping its internal functioning. One key angle from which the ILC as a community is approached is socialisation.[26] The members of the ILC are shaped by their origin, learned knowledge and professional background. These socialising factors, allowing to retrace the typologies of international lawyers composing the Commission, represent a key feature for this study to assess the ILC and its members as actors in the international legal order. Different socialisations

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23 The indeterminacy of language is a central trope of powerful challenges to mainstream understandings of international law. For a contextualising account, see A. Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning' in P. H. F. Bekker, R. Dolzer and M. Waibel (eds.), *Making transnational law work in the global economy: Essays in honour of Detlev Vagts* (Cambridge: Cambridge Univ. Press, 2010), pp. 34–55.

24 Following Wittgenstein, theorizing society's structure as its "grammar", which delimits the freedom of expression that language creates: Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 11, referring to M. Koskenniemi, *From apology to Utopia: The structure of international legal argument*, Reissue with a new epilogue (Cambridge, UK, New York: Cambridge University Press, 2005), at 568.

25 This famous formulation was coined by O. Schachter, 'The Invisible College of International Lawyers', *Northwestern University Law Review* 72 (1977), 217–26.

26 On the centrality of socialisation for the constitution of the community of international lawyers, J. d'Aspremont, *Epistemic forces in international law: Foundational doctrines and techniques of international legal argumentation*, Elgar international law (Northampton, MA: Edward Elgar Publishing, 2015), 9-10.

might affect the chances of election to the ILC, the leverage of members within the Commission and the attitude towards the topics at stake.

The following sections embed these analytical approaches to discursive practices, actors and communities in broader theoretical and conceptual debates.

E. Theoretical Contextualisation – The Performative Identification of Customary International Law

Among the multitude of theoretical issues raised by State official immunity and the efforts of the ILC on this topic, this study pursues two distinct core interests.

First, the operations the ILC is undertaking when performing the mandate of progressive development and codification deserves a closer look: what is the actual nature of these activities? The identification of customary international law by the ILC appears, in this perspective, as an intrinsically juris-creative process (I.).

Second, divergent approaches to State official immunity fuel these dynamics: which approaches, characterised by contrasting views on the priority of preserving immunity or fostering accountability, shape the Commission's efforts (II.)?

I. Codification and Progressive Development – Between Law-Finding and Law-Making

The production of international law is based on complex processes, illustrated in particular by the naissance and the proof of customary international law. The distinction between *law* from *non-law* is an operation that has caused heated debate.[27] Moreover, in view of the multiple venues where international law is happening, the international legal order's pluralisation has moved to the centre of interest.[28] One of these venues is the ILC. The functions this institution performs in the context of State official immunity reveal three characterising features. The task of the ILC is affected by the underlying complexity of identifying rules of customary international law, resulting in the strategic bargaining over rules of at times unclear legal validity (1.). As a consequence, the ILC's mandate consists in shaping the meaning of legal concepts, on the edge between legal technicality and legal policy (2.).

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27 Giving an overview of these debates, see J. d'Aspremont, *Formalism and the sources of international law*, Oxford monographs in international law (Oxford: University Press, 2011), at 1-5.

28 Cfr. research projects on transnational regulatory frameworks (A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004)); on global administrative law (B. Kingsbury, N. Krisch and R. B. Stewart, 'The Emergence of Global Administrative Law', *SSRN Electronic Journal* (2005); B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law', *European Journal of International Law* 20 (2009), 23–57; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', *European Journal of International Law* 17 (2006), 187–214); or on the international exercise of public authority (Bogdandy A., Bernstorff J., Dann P., Goldmann M. and Wolfrum R. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Berlin, Heidelberg: Springer-Verlag Berlin Heidelberg, 2010)).

3. The Ambiguous Ascertainment of Customary Legal Rules

The ILC's efforts on State official immunity exemplify the discussions over the existence and the content of customary legal rules. A significant part of the difficulties met during works on the topic were the consequence of divergent assumptions on whether a rule of customary international law could be considered ascertained. The emerging picture of competing interpretations and contrasting evidence underscores the complexity of identifying rules of customary international law.[29]

Generally, neat criteria of law-identification are considered an indispensable prerequisite for the substitution of arbitrary power and political opportunity with decision-making based on law, fortifying international legal norms against political manipulation.[30] Unambiguously identifying customary international law is a precondition for the systematization of *lex lata* through codification, as well as the starting point of progressive development. Convictions about the inappropriateness of formal law identification continue, however, to be widespread.[31] Given the significance of these methodical issues, the ILC has put the topic of the identification of customary international law on its agenda.[32]

As a general phenomenon, the ambiguity of identifying the existence and the content of international legal rules favours the emergence of rules with unclear legal validity. In a constellation of deadlock often met in the context of human rights-related issues, actors hoping to accelerate the emergence of rules they deem desirable are opposed by actors resisting the emergence of those same rules.[33] As no one can impose its will, both resign themselves to partial solutions. Whilst the proponents of legal change claim the rule's gradual emergence, its opponents deny that the evolving claims constitute binding law.[34]

These adversarial dynamics give rise to pronounced strategies; claims are made or rebutted with clear goals in mind.[35] Especially in cases of perceived deficits in accountability for the exercise of public authority, promoting legal change by formulating aspirational rules is seen as a valid strategy to improve accountability.[36]

In line with these premises, the complexity of unequivocally establishing the rules of customary international law regulating State official immunity allowed for significantly divergent elaborations

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29 Law's identification based on *a priori* criteria is interwoven with giving evidence of law, of law-making and of determining law's content through interpretation, d'Aspremont, *Formalism and the sources of international law*, 13. The ILC's works give proof of the difficulty of neatly distinguishing these operations, d'Aspremont, *Formalism and the sources of international law*, 208-209.

30 F. Schauer, 'Formalism', *Yale Law Journal* 97 (1998), 509, 509; N. Onuf, 'The Constitution of International Society', *European Journal of International Law* 5 (1994), 1–19, 13; G. M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993), 16-17.

31 F. Megret, 'International Law as Law' in J. Crawford and M. Koskenniemi (eds.), *The Cambridge companion to international law*, Cambridge companions to law (Cambridge: Cambridge Univ. Press, 2012), at 20.

32 General Assembly resolution 67/92 of 14 December 2012, para. 7. The topic is called „Identification of customary international law"; the special Rapporteur is Sir Michael Wood, United Kingdom.

33 A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', *Australian Yearbook of International Law* 12 (1988), 22, at 46.

34 Ibid., at 47. On the difficulties of law-making in contexts characterised by power disparities, see W. M. Reisman, 'The Cult of Custom in the Late 20th Century', *California W. International Law Journal* 17 (1987), 133, 136-138.

35 On semantic processes in international law as a strategic game: A. Bianchi, D. Peat and M. Windsor, *Interpretation in international law*, First edition (Oxford, United Kingdom: Oxford University Press, 2015).

36 Taking up the issue of accountability, see e.g. A.-M. Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', *Government and Opposition* 39 (2004), 159–90.

of these very rules to be postulated respectively as *lex lata* by ILC members. The contrast in the ILC between those pushing for an accelerated legal evolution of accountability and those advocating a preservation of immunity, mirrored the strategic dimension underlying the mandate of codification and progressive development.

4. The Role of the ILC – (Re-)Shaping Meaning

Reflecting this strategic dimension, the ILC is confronted with seemingly irreconcilable expectations of technical restraint and political progressiveness. By determining and developing regulations, the Commission contributes to the international rule of law. Besides technocratic features, this role is intrinsically political, as within the ILC, different convictions about the best conceptualisation of State official immunity compete.[37]

Whilst the codification of *lex lata* on the basis of standardised law ascertainment comes with an appearance of legal technicality, progressive development through suggested improvements to the existing law has a clearer connotation of legal policy. The authority of the ILC depends on its capacity to strike an adequate balance between these two dimensions of its mandate. This endeavour implies, amongst others, identifying issues where codification is adequate, or *vice versa*, aspects where expanding the scope of rules through progressive development is preferable.

Mastering this role on the edge of legal technique and legal policy is not an easy task for the ILC. Despite the political sensitivity of the issues addressed, the ILC is expected to give proof of neutrality and objectivity. Critics claim that contradictions of this kind, characteristic of international law, are covered by repetitive narratives and highly technical language.[38] Between "technique and politics", international law is accused of resembling an elitist set of vocabularies mastered by few experts.[39]

In this respect, the ILC walks a thin line between law-finding and law-making. The ILC understood itself as contributing to the certainty of the law through a primary focus on codification, stabilising consent among the subjects of international law.[40] Based on the idea of an objective and true meaning of international law, this understanding expresses only a partial truth: it overlooks how international law, beyond its formal sources, is made and changed through communicative practice.[41] Any statement of law can be considered performative.[42] The categorical distinction between the making and the finding of international law is untenable.[43]

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37 For a similar understanding of the term "political", see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 60.

38 D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', *Transnational Law and Contemporary Problems* 4 (1994), 329–75, 370; D. Kennedy, 'A New Stream of International Legal Scholarship', *Wisconsin International Law Journal* 7 (1988), 1.

39 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *The Modern Law Review* 70 (2007), 1–30.

40 For an expression of a similar self-understanding, see Ago 1964, ILC Yearbook, at 23, para. 34.

41 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 3.

42 J. L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1979), at 139.

43 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 19.

From this perspective, the ILC plays a hybrid role between law-making[44] and creative interpretation[45]. In the context of the topic State official immunity, the Commission shapes the pertinent rules in a semantic process of meaning construction, conditioned by the preferences of ILC members and deliberative justifications.[46]

This process consists principally in argumentations, leading to evidence-production and the interpretation of legal rules. Following this dialectic argumentative exchange, the actors need to agree on the meaning and definition of a specific term. Within the process of identifying customary international law, the ILC hence constructs the content of the identified rules.

II. State Official Immunity – Preserving Stability and the Request for Legal Change

Fundamental dynamics characterising the evolution of international law can be observed at work in connection to the topic of State official immunity. First and foremost, the topic is exemplar of how international law struggles to reconcile the contradictory pulls it is subject to. One request is to protect the *status quo* – the preservation of the existing rules, perceived to favour stable international relations between equally sovereign States. This concern is countered by the pressure to change – the adaption of the existing rules to counter the widespread impunity for the perpetrators of the most heinous crimes (1.). These different viewpoints are corroborated by recurring, *inter alia*, to either normative or factual argumentations (2.).

3. Contradictory Pulls

State official immunity lies on the line of fracture between the doctrine of preserving the equal sovereignty of States on the one hand, and calls for legal innovation to foster accountability, advanced in the name of human rights, on the other. Human rights are a lens increasingly used to reconsider State official immunities[47], a perspective that also the ILC was confronted with[48]. In this respect, State official immunity can be seen as either an obstacle to the prosecution of severe violations of these rights or as a stability-producing precondition for their enjoyment. Do State official immunity and human rights drift in different directions, constituting an example of international law's fragmentation?[49]

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44 For an early voice describing codification in the ILC as a legislative matter, see H. Lauterpacht, 'Codification and Development of International Law', *American Journal of International Law* 49 (1955), 16–43.

45 Conceiving the efforts of the ILC as creative interpretation, see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 66.

46 On meaning production through semantic processes, see ibid., 10.

47 M. Koskenniemi, 'International Legal Theory and Doctrine' in *Max Planck Encyclopedia of Public International Law [MPEPIL]* V, pp. 976–86, at 984, para 31.

48 For an external input from a human rights perspective voiced in the course of the ILC debates on the topic, see the visit of Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, to the Commission, ILC, *Provisional summary record of the 3272nd meeting, A/CN.4/SR.3272: 67th session* (2015).

49 The narrative of fragmentation has been investigated by the ILC, see: M. Koskenniemi, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law, A/CN.4/L.682: Report of the Study Group of the International Law Commission* (2006).

Criticism of State official immunity is commonly voiced on the basis of value-oriented considerations. The "values of the international community" are an argumentative basis used to purport controversial understandings of how justice and sovereignty relate. Is it compatible with the values of the international community to recognise the immunity of the perpetrators of the most horrendous crimes, or should this immunity be limited, regardless of the will of States?

The contours of the concept of "values of the international community remain nebulous. Moreover, a similar approach is at odds with the doctrine of the voluntarist origin of positivist international law in State consent.[50] The ongoing importance of State consent, and the hesitation of States to limit State official immunity are among the main causes for the resilience of the rules in the field. The topic raises the question whether legal change can legitimately be advanced even if States do not embrace proposals of allegedly emerging norms of international law.

The positivism of international law is crucial to ensure the recognition of rules by States as the main actors. Nevertheless, the concept of *jus cogens*, overruling ordinary international law, fundamentally challenges the centrality of State will.[51] The thereby created hierarchy between rules results in what has famously been called "relative normativity", a concept with a considerable destabilizing potential.[52] The uncertainty resulting from the coexistence of rules perceived as obeying to contradictory principles, State official immunity on the one hand and human rights on the other, is characteristic of the debates in the ILC on the topic.

The positivist focus on State consent can produce scepticism towards the viability of reform proposals. However, where positive law does not allow to satisfactorily solve fundamental issues, considerations of natural law can serve as a counterweight, functioning as engines of legal change.[53] The recourse to principles of natural law[54] can fill gaps and provide guidance to promote interpretations conducive to justice, reason, logic or fairness.[55] Through this lens, the development of international criminal law as well as the powerful affirmation of human rights are considered products of naturalist aspirations of justice.[56]

The topic of State official immunity in the ILC is a prime example of the interaction between the opposite forces pushing for either stabilisation of the *status quo* or legal change. The idea of ending impunity is a striking example of a quest for justice, suspended in the grey area between moral and

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50 Famously on international law's positivism: H. Kelsen, *Reine Rechtslehre* (Leipzig, Wien, 1934); H. Kelsen, *General theory of norms* (Oxford [England], New York: Clarendon Press; Oxford University Press, 1991); H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958), 593–629; J. Raz, *The authority of law: Essays on law and morality* (Oxford: Clarendon Press, 1979).

51 P. Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law* 77 (1983), 413–42, at 426, seeing the problem shifted to the definition of the international community.

52 Ibid., at 421.

53 F. Lachenmann, 'Legal Positivism' in *Max Planck Encyclopedia of Public International Law [MPEPIL]* VI, pp. 785–97, at 794-795, para 54-60; critical of this idea: A. Orakhelashvili, 'Natural Law and Justice' in *Max Planck Encyclopedia of Public International Law [MPEPIL]* VII, pp. 523–35, at 528, para. 30.

54 For recent neo-naturalist research, see A. E. Buchanan, *Justice, legitimacy, and self-determination: Moral foundations for international law*, Oxford political theory, Pbk. ed. (Oxford, New York: Oxford University Press, 2007).

55 Orakhelashvili, 'Natural Law and Justice', VII, 529, para. 33

56 Ibid. 530, para. 37; See in general on human rights and natural law, J. Porter, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters', *Journal of Law and Religion* 14 (1999), 77–96.

legal obligations. Calls for an adjustment of positive law to match purportedly indisputable expectations of justice[57] were omnipresent in the ILC debates on State official immunity. However, if these claims are not to bound to fail, they must acknowledge State practice. Suggesting the right amount of reasonable change whilst staying close enough to positive law, is the arduous task the ILC is called to perform.

4. The Complementarity of Normative and Factual Argumentations

The topic of State official immunity hence reveals the complex balancing of reconciling legitimate but contradictory expectations of stability and change. This balance is performed through an argumentative dualism: the argumentations advanced in the ILC draw their persuasiveness either from normative constructions or from the recurrence to factual observations. The categorisation of the arguments shaping international law into normative and factual arguments reflects the relationship between law and power they rest upon.[58]

Normative arguments require a convincing external viewpoint, allowing for the critical evaluation of power and the formulation of aspirational expectations. This external angle is constructed through references to justice, universal values, a purported "constitutionalization" of the international community or other hierarchically superior factors, eventually in the rank of *jus cogens*.

If normative proposals ignore relevant factual circumstances, they risk being ineffective and hence detrimental to international law's authority.[59] Normative perspectives are critically evaluated by views focusing on international law's objectives and effects.[60] The focus lies on international law's responsiveness to its context, as well as to its instrumental contribution to the realisation of political goals. Rather than reviewing power from outside, international law is, from this angle, conceived within the limits erected by power.[61]

If this kind of arguments persuade through their realist appreciation of the factual, normative views allow for a critical evaluation of these facts, delivering the tools to discriminate between desirable and undesirable trends.[62] Any exclusive argumentative take is incomplete; to persuade the targeted audiences, the normative and the factual perspective need to be integrated, accommodating both worries connected to justice and to stability.[63]

The ILC's mandate reflects this twin-track approach. Whilst codification in principle appears as an apologetic description of what the law is, progressive development indicates the utopian normative prescription of how international law should be. The members' efforts to persuade the plenary

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57 On ideas of justice in a context of relative normativity, cfr. U. Fastenrath, 'Relative Normativity in International Law', *European Journal of International Law* 4 (1993), 305–40, at 330: according to him, international law is not a direct reflection of justice, but undeniably committed to this value.

58 Koskenniemi, 'International Legal Theory and Doctrine', V, para. 32.

59 Koskenniemi, 'Methodology of International Law', paras. 4-5; 14.

60 Such views have been promoted *inter alia* by the "New Haven School", informed by the impact of realist international relations scholarship. However, the "Critical Legal Studies" movement also favours a perspective focusing on the contradictory factual reality underlying international law. Cfr. Koskenniemi, 'International Legal Theory and Doctrine', V, para. 28.

61 Koskenniemi, 'Methodology of International Law', para. 15-20.

62 Ibid., para 23-25.

63 Koskenniemi, 'International Legal Theory and Doctrine', V 2011, para. 33.

depend on their capacity to convincingly combine description and prescription. An adequate conjunction of the two factors is furthermore crucial for the ILC's ability to constitute an authoritative voice. Such authority is in turn the basis of the institution's relevance.[64]

F. Key Concepts – Discursive Practices within the Community of International Lawyers

A central undertaking of this study is to investigate how the content of the rules governing State official immunity is shaped through the discursive practices taking place within the Commission, as well as between the ILC and other actors on the international stage. In the following, I will first outline how key concepts of practice and discourse shape the processes of meaning construction in the ILC (I.). A gateway to assessing these processes is a discourse-analytical approach, combining the contextual analysis of actors and the textual analysis of their statements (II.).

I. State Official Immunity in the ILC as *Practice* and *Discourse*

The emphasis of this study lies in the scrutiny of the ILC's efforts on State official immunity as processes of meaning construction carried out through communicative practices. The ILC's task translates into a struggle to both establish the *status quo* and pursue developments in specific areas of international law. This struggle takes the shape of debates in which participants discuss the validity and correct understanding of principles of law. It is a struggle over meaning.[65] The process of meaning-production is in essence an exercise of interpretation.[66] This process is cyclical: communicative practices are both the product and the source of the context and the rules they interrelate with. The ILC's works on State official immunity are an expression of international law as a practice (1.). This practice consists in a series of discursive interactions (2.).

3. The Notion of *Practice* – The Juridical Field and its Habitus

Communicative acts contemporarily reflect and affect[67] the rules and the international legal order they are produced by and they (re)produce. Actors and norms are co-constitutive.[68] International

64 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 63.

65 I. Johnstone, *The power of deliberation: International law, politics and organizations* (Oxford, New York: Oxford University Press, 2011), at 29.

66 Interpretation and its "creative role" has gained considerable attention; foundational: R. Dworkin, 'Law as Interpretation', *Critical Inquiry* 9 (1982), 179–200; F. Kratochwil, 'How do Norms Matter?' in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2001), pp. 35–68. Critical of the idea of interpretive universalism: D. M. Patterson, 'The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory', *Texas Law Review* 72 (1993); for a notable recent study, see Bianchi, Peat and Windsor, *Interpretation in international law*.

67 M. Hirsch, *Invitation to the sociology of international law*, First edition (Oxford, United Kingdom: Oxford University Press, 2015), at 1.

68 See in general, among many, A. Giddens, *Central problems in social theory: Action, structure, and contradiction in social analysis* (Berkeley: University of California Press, 1979), at 69; A. Wendt, *Social theory of international politics*, Cambridge studies in international relations (Cambridge: Cambridge Univ. Press, 1999), vol. 67;

lawyers constantly shape and are shaped by the international legal order through a logic of "internalization of externality and externalization of internality"[69]. Both the actors and their contexts are hence crucial in the evolution of legal rules. For the sake of a better understanding of State official immunity and their characterising trends, both factors need to be considered.

In this study, the key concept to integrate the relevant context and actors is the idea of *practice*.[70] The characterization of international law as a practice is increasingly common.[71] Concepts of practice outline how actors transform their context while, simultaneously, being themselves transformed by it.[72] As Hans Kelsen put it, there can be "*no imperative without an imperator*".[73] The paradigm of practice manages to capture and give operability to the idea that the members of the ILC as individuals, with their intentions, their motives and their preferences, contribute to shaping the law of State official immunity. Whilst the international legal order has constraining effects on the ILC and the rules on State official immunity, these rules and this institution have conversely an impact on that order.

The many issues raised by the practices of progressive development and codification of State official immunity in the ILC resonate in particular with the concepts of the "juridical field" and its characteristic "habitus", elaborated by Pierre Bourdieu.[74] The idea of the juridical field describes the social reality of law and law-making through relatively independent practices, subject to specific legal logics.[75] The juridical field describes the structures, behaviours and self-sustaining values – the "legal culture" - shaping the world of law.[76]

Consequently, the symbolic order of law *stricto sensu* is to be differentiated from the practices producing it.[77] The rules on State official immunity might set directions and contain opportunities for development, but the dynamics of transformation are determined in the underlying practices of codification and progressive development, shaped by "*objective relations between actors and institutions in competition with each other for control of the right to determine the law*".[78] An exclusive group of authorised

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69 This dichotomy was coined by P. Bourdieu, *The logic of practice* (Stanford, Calif.: Stanford University Press, 1990); see in particular at 55.

70 For an influential conceptualisation of the notion of practice: Anthony Giddens' idea of "structuration", A. Giddens, *the constitution of society* (Berkley: University of California Press, 1984).

71 Frequently cited: "International law is an argumentative practice.", Koskenniemi, 'Methodology of International Law', at 124, para. 1.

72 T. J. Berard, 'Rethinking Practices and Structures', *Philosophy of the Social Sciences* 35 (2005), 196–230.

73 Kelsen, *General theory of norms*, at 29.

74 On the idea of "field" as an analytical approach to social practices in general, see P. Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977) and Bourdieu, *The logic of practice*; the concept of the juridical field was developed in particular in P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', *Hastings Law Journal* 38 (1987), 814–53.

75 Bourdieu 1987, pp. 814-816.

76 On the idea of field in Bourdieu's work, see the introduction to Bourdieu 1987, pp. 805-806.

77 Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 816. This approach distinguishes the concept of "field", from the idea of the "system" of law, developed inter alia by Niklas Luhmann, see N. Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1995), positing the self-referentiality of legal structures.

78 Describing the interactions between the juridical field and the wider social field in terms pertinent to the role of the ILC, see Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 841: "*We can no longer ask whether power comes from above or from below. Nor can we ask if the development and the transformation of the law are products of an evolution of mores toward rules, of collective practices toward juridical codification or, inversely, of juridical forms and formulations toward the practices which they inform. Rather, we must take account of the totality of objective relations between the juridical field and the field of power and, through it, the whole social field. The means, the ends, and the specific effects particular to juridical action are defined within this universe of relations.*" Competition shapes these relations: "[…] *the effects that are created within social*

interpreters engages with a corpus of legal materials regulating juridified issues, such as the immunity of State officials, whose "correct" meaning is to be established through a legitimised process of interpretation. The conflicting interests of States are thereby converted into a regulated debate of professionals acting by proxy.[79] Based on these insights, this study approaches the symbolic order of the rules governing the immunity of State officials from foreign criminal jurisdiction in close connection to the relevant practices.

The functioning of the juridical field is determined by learned yet deep structures specific to law, developing out of features such as tradition, professional usages or education. This patterned approaches to conceiving, communicating and acting constitute the habitus of the legal field. The habitus reinforces the group's understandings of its own identity and of legitimate behaviours.[80] The common habitus of the lawyers constituting the ILC originates in resemblances in their backgrounds. It is reinforced by the responsibility and ambition coming with ILC membership.[81]

Striving for persuasiveness by combining "*the positive logic of science and the normative logic of morality*", interpretative efforts like those of the ILC are restrained by the goal of reducing complexity through clarification. The logic of the juridical field is geared towards reducing, and if possible, excluding the coexistence of competing understandings of norms.[82] In this light, the ILC's mandate contains the mission of expelling readings of State official immunity considered less legitimate.

The aspiration to achieve practical effects limits the autonomy of the Commission's interpretations. This instrumental logic underlying the mandate of progressive development and codification, constraining the range of possible actions and argumentations, further contributes to the habitus of ILC members. The ILC's efforts are geared at the acceptance of its interpretations by other actors, above all States, giving rise to the Commission's authority. The juridical field is hence where the authority of legal actors is created and exercised.[83] The topic of State official immunities confronted the ILC with the question whether either too much activism or too much restraint were putting the authority of the Commission's action at risk.

In the juridical field, exercises of interpretation are carried out from two opposed professional poles. Whilst theorists commit to the elaboration of the law according to priorities of autonomous and self-sufficient systematic coherence, practitioners pragmatically evaluate practical outcomes and justice in individual cases.[84] The argumentations in the ILC reflect these dialectics: arguments usually either claim to be systematic, deductive and principled, or underline their reflection in actual practice as the basis of their legitimacy.

These opposed pulls lead to a productive dynamic. Theorists develop abstract rules, which practitioners then re-interpret to adapt them to the social world. These changes are in turn re-rationalized

fields are neither the purely arithmetical sum of random actions, nor the integrated result of a concerted plan. They are produced by competition occurring within a social space.", p. 852.

79 On this understanding of law in the unfolding of social conflicts, see ibid., p. 831.

80 On Bourdieu's concept of habitus, see the introduction to Bourdieu 1987, pp. 807 and 811-812.

81 "*The closeness of interests, and, above all, the parallelism of habitus, arising from similar […] backgrounds, fosters kindred world-views*", ibid, p. 842.

82 On the adversity of the juridical field towards the coexistence of competing norms, see Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 818.

83 Ibid., p. 816.

84 Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (n 141), p. 821

and integrated into the law by theorists.[85] The common habitus coming with patterned ways of thinking and communicating, resulting from common interests and similarities in backgrounds, limits the risks of excessive divergences and assures commitment to the established order of international law.[86] Still, the interaction of theory and practice, as for instance enshrined in the ILC's statute, gives rise to mechanisms resembling legal creation, despite being dissimulated as mere clarification of the law.[87]

Looking at the ILC within the panorama of the international legal order, the Commission is an institution close to the pole of theory. The ILC is dedicated to formulating abstract rules re-elaborating practice.[88] The Commission's relationship with institutions close to the pole of practice, in particular with the 6th Committee and with the ICJ, is characterised by complementary interdependency. By recurring to the ILC's outputs, practitioners avoid accuses of arbitrariness. Conversely, the reference of practitioners to the ILC's output is foundational for the latter's relevance.

The focus on practice conveys a sociological view on international law. The topic is predestined for the insights approaches of this kind can provide: an understanding of the "*interaction between societal forces, whether of power or legitimacy and the process of formation, content and application of international legal rules*".[89]

4. *Discursive* Practices - Struggles over Inter-Subjective Meaning

The totality of communicative and linguistic practices, the acts contributing to international law's argumentative development, is called international law's discourse.[90] The meaning of international law's language, which is in constant evolution due to its relational nature, is the product of practice, hence of the application of international law. The narrative of international law's origin in the consent of its subjects needs to be complemented: as practice creates meaning, it constructs an integral part of law. The application of law makes hence law itself.[91]

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85 Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 824.

86 "*The closeness of interests, and, above all, the parallelism of habitus, arising from similar […] backgrounds, fosters kindred worldviews*", ibid., p. 842.

87 On this frequent attitude of lawyers in general, see ibid., p. 823.

88 See inter alia the characterisation expressed by Mr. Šturma, ILC, *Provisional summary record of the 3166th meeting, A/CN.4/SR.3166: 65th session* (2013), p. 5.

89 A. Carty, 'Sociological Theories of International Law' in *Max Planck Encyclopedia of Public International Law [MPEPIL]* IX, pp. 252–65, para. 29.

90 On international law as discourse: Kennedy, 'Theses about international law discourse'; see as well L. V. Prott, 'Argumentation in international law', *Argumentation* 5 (1991), 299–310, at 299. Other models underpinned by a discursive concept include F. V. Kratochwil, *Rules, norms, and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge studies in international relations, Reprint (Cambridge: Cambridge Univ. Press, 1989), vol. 2; the "management model of compliance" of A. Chayes and A. H. Chayes, *The new sovereignty: Compliance with international regulatory agreements* (Cambridge, Mass.: Harvard Univ. Press, 1995); the "fairness discourse" of T. M. Franck, *Fairness in international law and institutions*, First issued new as paperback (Oxford: Clarendon Press, 1997); the "interactional model" of J. Brunnée and S. J. Toope, *Legitimacy and legality in international law: An interactional account*, Cambridge studies in international and comparative law, 1. publ (Cambridge: Cambridge Univ. Press, 2010), vol. 67.

91 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 3; 6; 10.

Semantic law-making is particularly pronounced in the international legal order, and its legitimacy is controversial. The lack of central legislation makes it difficult to remedy to undesirable technocratic developments in international law through political redirection. However, because of the difficulties of treaty amendment and the slow pace at which customary international law develops, law-appliers are sometimes the better, often the only, lawmakers.[92] Can international law's development by law-applying international institutions be reconnected to State consent, or can it otherwise be legitimised through the quality of deliberations?[93]

Examining the discursive interaction on which these law-creating practices are founded, allows to assess how international lawyers contribute to international law's evolution. The core of this interaction are the different positions on the meaning of terms, concepts and rules. Legal argument is not about law's objective meaning; it is a search for an inter-subjective meaning common to the parties in the argument.[94] International law, be it treaty law or custom, has no intrinsic meaning for itself, other than the one defined by its practical application. Opposed fractions in a dispute use the same terms ascribing different meanings to them, leading to "semantic struggle"[95] and the "negotiation of the content of legal commitments"[96].

Both struggles and negotiations can be observed in the ILC: members give different meanings to terms like "sovereignty", "impunity" or "jurisdiction"; they attempt to overcome conceptual disagreement through negotiation, in the plenary and in the drafting committee. Overlapping discursive practices, delimiting and defining each other, compete in the ILC to establish which understandings of norms can claim validity as appropriately answering the controversial questions regarding State official immunity at stake. Underlying the confrontation are clashing views on the project of international law, its limits and its potential.

These processes of applying and interpreting international law unfold neither in a neutral nor in a predeterminate manner. ILC members, for instance, pursue individual agendas affected *inter alia* by personal convictions, and act strategically to promote consensus whilst defending their own position. The significance attributed to concepts and terms and the reading of tendencies is not objective, but initially indeterminate: the meaning attributed *in concreto* to a notion or trend depends on pre-conceptions[97] the author of a statement will not necessarily be aware of.

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92 Ibid., 7-9.

93 For an inquiry into legitimization through deliberative discourse, see J. Habermas, 'Drei normative Modelle der Demokratie: Zum Begriff deliberativer Demokratie' in H. Münkler (ed.), *Die Chancen der Freiheit: Grundprobleme der Demokratie* (München, Zürich: Piper, 1992), pp. 11–24; J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1. Aufl. (Frankfurt am Main: Suhrkamp, 1992).

94 Johnstone, *The power of deliberation*, at 22.

95 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 59, referring to D. Busse, 'Semantic Strategies as a Means of Politics: Linguistic Approaches to the Analysis of "semantic struggles"' in P. Ahonen (ed.), *Tracing the semiotic boundaries of politics*, Approaches to semiotics (Berlin, New York: Mouton de Gruyter, 1993), pp. 121–8, at 121.

96 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 57, quoting R. B. Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms', *European Journal of Philosophy* 7 (1999), 164–89, at 173.

97 In general on preconceptions as "*Vorurteile*", see H.-G. Gadamer, *Truth and method* (New York, NY: Continuum, 2004).

This study's approach to the indeterminacy of international law[98] consists in an interest in terms, texts and language, rather than in distrust towards them. Instead of battling the indeterminacy stemming from the openness of ordinary language used to convey legal concepts, indeterminacy is considered an inevitable feature. Indeterminacy fosters the deployment of discursive dominance and power[99], but also creates the opportunity for argumentation and disagreement[100]. Hence, the construction of meaning through language is both problem and solution, curse and blessing: it has both fragmenting and harmonizing effects.[101] The creative area of indeterminacy is where the ILC struggles for consensus and shared understandings.

One feature of legal discourse facilitates this juris-creative dynamics: processes of codification and progressive development of State official immunity in the ILC are expressions of law's power of naming. Legal vocabulary illustrates language's performative power: legal discourse has the power "to do things with words", making things true by saying them. As a "*quintessential form of active discourse",* legal discourse produces its effects by its own operation – in interaction with the needs and interests of the social world, law contributes to the latter's creation.[102]

Indeterminacy's destabilising effects are mitigated by the integration of the ILC and its members into the community of international lawyers. The works on State official immunities in the ILC are embedded into international law as a legitimised discourse, attaining its power from the belief in the neutrality of law and lawyers. The ILC's mission is to channel such controversies over meaning that have proven to be relevant and persistent. Through the ILC's composition and procedure, the aspiration is to achieve a high degree of fairness and representativity, allowing for productive struggles and negotiations. However, as in any legal decision, despite the Commission's claims to adhere to a rational juridical methodology, a degree of subjectivity cannot be excluded. This subjectivity relates *inter alia* to variables such as the composition of the decision-taking body – positions appeared to shift in the ILC over the different quinquennia as its composition changed.[103]

The recognition of an existent or emerging legal rule by the ILC does not necessarily qualify that rule as law, but it constitutes an influential qualification pushing the rule in that direction. Benefitting from the specific power of legal form, the "*movement from statistical regularity to a legal rule*" signals an intrinsic correctness of the achieved determinations. The task the ILC is called to perform, to

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98 Indeterminacy is a concept first stressed by US scholars of legal realism and has subsequently been developed by scholars from the critical legal studies movement. Whilst realist scholars deduce from indeterminacy a distrust of words and text, and focus on observable behaviour as a parameter of law (see K. Lewellyn, 'A Realistic Jurisprudence - the Next Step' in D. M. Patterson (ed.), *Philosophy of Law and Legal Theory: An Anthology* (Oxford: Blackwell, 2003), 22-, at 38), critical scholars took up the concept, dedicating themselves to the study of the conceptual apparatus, reasoning techniques, legal ideals and key images deployed by legal professionals when they make legal arguments (D. Kennedy, *The Rise and Fall of Classical legal Thoughts* (Washington, DC: BeardBooks, 2006), at ix).

99 Conceptualizing linguistic operations like interpretation as a strive for recognition of claims about (il)legality and thereby ultimately as an exercise of power, see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 11.

100 D'Aspremont, *Formalism and the sources of international law*, at 139.

101 Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning', at 35.

102 Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', pp. 838-839. On the performative power of language, see the concept of speech act theory, cfr. Austin, *How to Do Things with Words* and J. R. Searle, *Speech acts: An essay in the philosophy of language* (Cambridge: Cambridge Univ. Press, 1969).

103 On arbitrariness and the faith in neutrality in the legitimised discourse of law, see Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 844.

formalise the tendencies immanent in practice, is geared at introducing a level of clarity and predictability unachievable through custom.[104] In the pursuit of this goal, purported standards of codification and progressive development convey a sensation of logical necessity.[105] The emergence of "the law" and its tendencies through the ILC's efforts is the intended impression. Critically evaluating these discursive processes and the strategies and argumentations deployed to promote specific understandings of State official immunity is one central aim of this study.

II. Discourse Analysis – Actors, Context and the Driving Forces of International Law

Describing *how* State official immunity unfolds in the ILC is not equivalent to explaining *why* it develops in a specific way.[106] Discourse-analytical approaches are descriptive rather than explanatory; they pursue a non-causal epistemology.[107] This study's premise is that discourse-analytical approaches can provide insights into the juris-generative dynamics in the ILC which complement and transcend the perspectives achievable through common causal-investigative approaches.

A wide array of different approaches to discourse analysis, characterised by respective strengths and shortcomings, induce different perspectives on the discursive practices on State official immunity in the ILC (1.). These approaches are affected by convictions on the driving forces underlying the evolution of the international legal order. Considering these forces to be complementarily at work, the perspective of this study is one eclectically combing the insights of different approaches (2.).

3. Divergent Understandings of Actors and Context

A great variety of concepts of discourses and of approaches to analyse them have been developed in social sciences[108] and legal scholarship[109]. The various views on discourse analysis can roughly be

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104 Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', p. 849.

105 Ibid., p. 828.

106 On the limits of the causal explanation of semantic dynamics of change, see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 14

107 F. Kratochwil, 'Regimes, Interpretation and the 'Science' of Politics: A Reappraisal', *Millennium - Journal of International Studies* 17 (1988), 263–84, at 277.

108 Overviews and introductions into this vast field: Milliken, Jennifer, 'The Study of Discourse in International Relations: A Critique of Research and Methods', *European Journal of International Relations* 5 (1999), 225–54; M. Alvesson and D. Karreman, 'Varieties of Discourse: On the Study of Organizations through Discourse Analysis', *Human Relations* 53 (2000), 1125–49; Gee J. P. and Handford M. (eds.), *The Routledge handbook of discourse analysis*, Routledge handbooks in applied linguistics (London, New York: Routledge, 2012); Schiffrin D., Tannen D. and Hamilton H. E. (eds.), *The handbook of discourse analysis*, Blackwell handbooks in linguistics (Oxford: Blackwell, 2003); Schneider K. P. and Barron A. (eds.), *Pragmatics of Discourse*, Handbooks of Pragmatics [HOPS] (Berlin: De Gruyter Mouton, 2014), v.3; J. Renkema, *Discourse, of course: An overview of research in discourse studies* (Amsterdam, Philadelphia: John Benjamins Pub. Co, 2009).

109 Bhatia V. K., Candlin C. and Engberg J. (eds.), *Legal discourse across cultures and systems* (Hong Kong: Hong Kong University Press, 2007); Bhatia V. K., Candlin C. and Gotti M. (eds.), *Discourse and practice in international commercial arbitration: Issues, challenges and prospects*, Law, language and communication (Farnham, Surrey, England, Burlington, VT: Ashgate, 2012); Conley J. M. and O'Barr W. M. (eds.), *Just words: Law, language, and power*, Language and legal discourse, 2nd ed. (Chicago: University of Chicago Press, 2005); for examples of specific sectoral studies, see P. Anesa, *Jury trials and the popularization of legal language: A discourse analytical approach*, Linguistic insights studies in

differentiated according to their conceptualizations of the relationship between language and the social world, on the basis of the well-known dichotomies of structure and agency[110], or context and actors. Different approaches convey different perspectives on the topic of State official immunity in the ILC as a process of meaning construction through discursive practices.

To poststructuralist scholars[111], discourses are the central analytical concept rendering social realities intelligible. Only through language can reality be conceived. Due to this central role of language in the processes of co-constitution of subjects and the social order, poststructuralists deny the duality of structure and agency, claiming that no extra-discursive reality exists.[112] The poststructuralist notion of discourse is a broad one: it considers not only communicative human expressions, but also physical phenomena, whose social meaning is exclusively constituted through the reading made of them.[113] Only within discourse does a devastating earthquake receive a reading as a geological phenomenon, as a social catastrophe or as a divine punishment: outside discourse, the event "earthquake" has no meaning.

From this viewpoint, discourses determine individual identities and locate these identities within the patterns contributing to the individual's socialisation. Post-structuralism's goal is the inquiry into "subtle methods of power"[114] in this process of meaning construction. A crucial cornerstone of poststructuralist thought is the constitutive and mutually re-enforcing relationship between knowledge and power.[115] Through post-structural approaches, it is possible to investigate how the origin, expertise and other personal skills of ILC members enhance their argumentative power, and how their discourse reflects and reproduces the power relations underlying international law.

language and communication (Bern, New York: Peter Lang, 2012), v. 162;. Alvesson and Karreman, 'Varieties of Discourse'.

110 On the structure-agency-debate in sociology, see S. Hays, 'Structure and Agency and the Sticky Problem of Culture', *Sociological Theory* 12 (1994), 57.

111 Foundational for poststructuralism: M. Foucault, *The order of things: An archaeology of the human sciences*, Routledge classics (London: Routledge, 2001). General introductions into poststructuralist discourse analysis give inter alia: R. Diaz-Bone, A. D. Bührmann, E. Gutiérrez Rodríguez, W. Schneider, G. Kendall and F. Tirado, 'The Field of Foucaultian Discourse Analysis: Structures, Developments and Perspectives: Das Feld der Foucaultschen Diskursanalyse: Strukturen, Entwicklungen und Perspektiven', *Historical Social Research* 33 (2008), 7–28; T. Biebricher, *Selbstkritik der Moderne: Foucault und Habermas im Vergleich*, Frankfurter Beiträge zur Soziologie und Sozialphilosophie (Frankfurt am Main, New York: Campus, 2005), Bd. 7; for law, see C. Schauer, *Aufforderung zum Spiel: Foucault und das Recht* (Köln: Böhlau, 2006).

112 For an overview of the main tenets of the poststructuralist concept of discourse: H. Malmvig, *State sovereignty and intervention: A discourse analysis of interventionary and non-interventionary practices in Kosovo and Algeria* (London: Routledge, 2011), at 2; L. Hansen, *Security as practice: Discourse analysis and the Bosnian war*, The new international relations (New York: Routledge, 2006).

113 E. Laclau and C. Mouffe, *Hegemony and socialist strategy: Towards a radical democratic politics* (London: Verso, 1985), 108.

114 J. Joseph, 'The limits of governmentality: Social theory and the international', *European Journal of International Relations* 16 (2010), 223–46, at 226.

115 Foucault M. and Gordon C. (eds.), *Power/knowledge: Selected interviews and other writings, 1972 - 1977* (New York: Vintage Books, 1980).

Unlike poststructuralists, constructivist views on discourse assume structure exists.[116] Through discursive interaction, actors construct reality. The relationship is co-constitutive, as the actors' preferences and identities are determined by their contexts.[117] Constructivism highlights the intersubjective processes at the basis of norms and institutions, emphasizing from an idealist perspective the role played by persuasion and argument, rather than power. According to a juxtaposition described by Jürgen Habermas, strategic action strives for hegemony, whilst communicative action aims at consensus and recognition.[118] From a constructivist viewpoint, central features of the discursive practices in the ILC are the strive for consensus and the argumentative efforts, as well as the productive force of external validation.

Critical approaches[119] agree on some of these assumptions and disagree on others. Unlike poststructuralists, critical views assume the duality of context and actors. Unlike constructivists, they assume the interaction between structure and agency to be driven by the material power of actors, rather than by the force of ideas. Institutions are considered amalgams of ideas and material resources stabilizing a given order.[120] Mainly unquestioned structures of values and understandings underpinning social systems constitute hegemonic discourses, establishing the dominance of the context over actors.[121] Strategies like the framing of discourses and the mitigation or intensification of discursive patterns are at the centre of analytical attention. The level of the context and the level of the text are treated as distinct units of analysis.[122] Critical views focus on contextual features affecting the discursive practice of codification and progressive development, such as the influence of States or the implicit hegemonic understandings of concepts such as "impunity", "sovereignty" or "values of the international community" resonating in discourse.

The central cleavages of the different approaches to discourse are hence the respective understandings of context and actors. These different perspectives have each their blind spots. Approaches highlighting the role of actors tend to underestimate the contextual constraints influencing discourse. In the case of State official immunities in the ILC, among these constraining factors are the standards of legal discourse within the community of international lawyers, limiting the freedom of actors within and around the ILC. Conversely, approaches looking mainly at context are incapable of describing the impact of concrete acts of individuals, equipped with (gradual) freedom.[123] These views have difficulty in describing the impact of the evolving composition of the ILC and of the individual action of its members.

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116 See in general: S. Guzzini, 'A Reconstruction of Constructivism in International Relations', *European Journal of International Relations* 6 (2000), 147–82.

117 See Wendt, *Social theory of international politics*, vol. 67, chapter 2.

118 See J. Habermas, *Handlungsrationalität und gesellschaftliche Rationalisierung* (Frankfurt am Main: Suhrkamp, 1987).

119 See in general on critical approaches to discourse analysis: N. Fairclough, *Critical discourse analysis: The critical study of language*, Language in social life series (London, New York: Longman, 1995); N. Fairclough, 'Peripheral Vision: Discourse Analysis in Organization Studies: The Case for Critical Realism', *Organization Studies* 26 (2005), 915–39; T. Lundborg, Vaughan-Williams and Nick, 'New Materialisms, discourse analysis, and International Relations: A radical intertextual approach', *Review of International Studies* 41 (2015), 3–25.

120 R. W. Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', *Millennium - Journal of International Studies* 10 (1981), 126–55, at 136.

121 In R. W. Cox (ed.), *The New Realism: Perspectives on Multilateralism and World Order*, International Political Economy Series (London, s.l.: Palgrave Macmillan UK, 1997), 517.

122 T. A. van Dijk, 'Principles of Critical Discourse Analysis', *Discourse & Society* 4 (1993), 249–83, 250-251.

123 Describing these respective shortcomings, see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 37.

4. Divergent Views on the Driving Forces of International Law

The shortcomings of the methods deployed to analyse the discursive practice of international law reflect contrasting views on the driving forces underlying the latter's evolution. The various analytical approaches adopt divergent views on a crucial issue regarding the way these forces influence the discursive practices: do the interests of actors make norms, or do the norms produced by the context dominating the actors shape the latter's interests? These different views stand for two distinct analytical logics applied to international law and beyond.[124]

Approaches focusing on actors consider State interests the crux of the matter: the international legal order and its norms do not shape interests; they are themselves the product of the "rationalist" pursuit of interest maximization of States. Views conversely emphasizing the impact of the normative context are "reflexivist": international legal rules affect actors, including States, whose preferences tend to reflect the values generated by the international legal order.[125] Interests are constructed through interaction in that order, crystallizing in international legal norms. As norms and values are re-defined, interests and behaviours change.[126]

Regarding the topic at hand, the dualism of interests and norms, of actors and context, translates into the questions whether the trends characterising immunity are in essence a reflection of convergent or divergent State interests,[127] or whether normative ideals as the "end of impunity" have a decisive impact. Is the ILC in the first place a forum for the elaboration of State interests, or are the normative expectations of the community of international law determinant factors? From the first of these perspectives, the ILC appears as a tool of States to implement their priorities. From the latter angle, the ILC can conversely be seen as a catalyst of change: taking due regard of the

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124 This cleavage is known to different disciplines and has been described with varying vocabulary. In international relations studies, this concept has been described as the opposition between a logic of consequentialism and a logic of appropriateness, see J. G. March and J. P. Olsen, 'The Institutional Dynamics of International Political Orders', *International Organization* 52 (1998), 943–69, 649-652; J. G. March and J. P. Olsen, *Rediscovering institutions: The organizational basis of politics* (New York: The Free Press, 1989), p. 160-162. From a sociological perspective, this dualism of a logic of identity and a logic of efficiency has been invoked, see Moshe Hirsch, Hirsch, *Invitation to the sociology of international law*, at 118. A similar dichotomy finally underlies what has been termed the "realist challenge" to international law's relevance, formulated inter alia by H. J. Morgenthau, *Politics Among Nations The Struggle for Power and Peace: The Struggle for Power and Peace* (New York: A. A. Knopf, 1948); E. H. Carr, *The Twenty Years' Crisis: 1919–1939: An Introduction to the Study of International Relations* (London: macmilian, 1939); G. Schwarzenberger, *Power Politics: A Study of International Society* (F. A. Praeger, 1951); G. F. Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951); for "neorealism", see K. N. Waltz, *Realism and international politics*, Transferred to digital print (New York, NY: Routledge, 2009); J. M. Grieco, 'Anarchy and the limits of cooperation: A realist critique of the newest liberal institutionalism', *International Organization* 42 (1988), 485. Constructivism tried to rebut these views; for some influential formulations, see J. G. Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', *International Organization* 52 (1998), 855–85; A. Wendt, 'Anarchy is what States Make of it: The Social Construction of Power Politics', *International Organization* 46 (1992), 391–425.

125 The dualism "rationalism" and "reflexivism" is owed to P. J. Katzensteiner, R. O. Keohane and S. D. Krasner, 'International Organization and the Study of World Politics', *International Organization* 52 (1998), 645–85.

126 M. Finnemore, *National interests in international society*, Cornell studies in political economy (Ithaca, N.Y.: Cornell University Press, 1996), pp. 14-16; see also pp. 5-6.

127 Describing international law under different premises from an angle of this kind, see the rational choice approach of J. L. Goldsmith and E. A. Posner, *The limits of international law* (Oxford, New York: Oxford University Press, 2005) or the systemic approach of A. D'Amato, 'The Need for a Theory of International Law', *SSRN Electronic Journal* (2006).

will of States without being subordinate to their interests, the ILC could contribute to the conversion of emerging concepts into legal rules.

a. Normative Ideals as Driving Forces

From the viewpoint of this study, norms and normative ideals are crucial. The international legal order, State official immunity and the ILC are about a competition of ideas, about dispute, persuasion and agreement; argumentation matters.[128] From the perspective of an international lawyer, a similar approach comes intuitive. Arguments about how rules influence behaviour even in the absence of enforcement mechanisms, contribute to refute international law's attempted degradation to a mere rationalization of state interests.[129] In line with this premise, the community dynamics in the ILC, as well as their embedment in a wider community of international law, induces a generally constructivist perspective.

Foundational is in this regard the premise that actors and their context are mutually constitutive. Actors are significantly shaped by their context, but actors also influence their context, in a circular dynamic in which actors and context continuously affect and reflect each other.[130] Applied to the topic at hand, contextual factors such as the legal principles and argumentative logics on the one hand and actor-dependent phenomena such as the discourse over State official immunity unfolding *in concreto* within the ILC are mutually constitutive. Foundational principles and argumentative procedures shape the practice of international lawyers as much as these practices impact these same doctrines and techniques of legal argumentation.[131]

b. Power as a Driving Force

Within an institution composed by formally equal individuals, the mechanisms of domination, although far from absent, are less discernible and less defining. ILC members lack the capacity to impose their will on their peers, and the ILC does not have the power to impose observance of its findings. Success depends on arguments, agreement and persuasion.[132] This insight expresses a defining feature of the international system: the identification and development of common norms will usually not rely on top-down-mechanism of power, as a similar process would significantly weaken the sense of obligation created by the rule.[133]

The impact of ILC members and of the Commission itself hence depends on their authority, rather than on their power. In line with that, this study is based on the premise that power falls short of describing exhaustively the dynamics at stake.[134] Within this picture, power remains nevertheless a

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128 Johnstone, *The power of deliberation*, at 1-2.
129 Finnemore, *National interests in international society* at 139; 142-143.
130 Hirsch, *Invitation to the sociology of international law*, p. 3
131 D'Aspremont, *Epistemic forces in international law*, at 2.
132 Amongst others: Prott, 'Argumentation in international law'.
133 Kratochwil, 'Regimes, Interpretation and the 'Science' of Politics', at 276; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 64.
134 Describing the driving forces of "semantic law-making" from this perspective as depending rather on logics of authority than on logics of power: Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 62-64.

yielding analytical category. The interests of actors and their power allowing them to promote their priorities are factors that matter, influencing the discursive practices in the ILC on multiple levels.

The ILC cannot escape the dynamics of power underpinning any production of knowledge: the power of ideas is inextricably linked to the notion of power.[135] The process of codification and progressive development and the topic of State official immunity are deeply entrenched in power structures, as the semantic struggle itself is an expression of power: the establishment of meaning through language, in particular through debate, necessarily involves an exercise of power.[136] Post-structuralist and critical views can crucially contribute to deconstructing the argumentations in the ILC through which the power of actors flow into discourses.

c. Eclectic Convergence of Complementary Perspectives

Ultimately, any aspiration to conclusively establish the causal relationships between context on the one hand and actors on the other, seems overambitious in the context of the present study. The two analytical logics investigate the causal links from different angles[137]; they complement rather than exclude each other.[138]

Based on the view that argument and persuasion matter as State interests and power do, the perspective underlying this study is geared at investigating both kind of factors by combining different views on discourse analysis. Each approach to discursive practices has its own methods of analysis and its own foundational premises. As approaches differ in their research agendas, they are differently apt to persuasively analyse different phenomena in connection to the topic at hand.[139] If the aim is to analyse a variety of facets of the efforts on State official immunity in the ILC, no single method can shed light on all the issues arising. Some methodological eclecticism appears as unavoidable. The approach of this study is hence informed by the insights of different views on the discursive practices of international law.

III. Communities, Argumentations and Strategies - The "Grammar and Language" of Discursive Practices

Underlying this study's conceptualisation of discursive practices is the dualism of "grammar and language": whilst grammar establishes *what can be said*, thereby creating and restricting freedom,

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135 Instructive on the "nexus power/knowledge": M. Foucault, *Discipline and punish: The birth of the prison*, Second Vintage Books edition (New York, NY: Vintage Books, 1995). For law, see Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field'.

136 R. M. Cover, 'Violence and the Word', *The Yale Law Journal* 95 (1986), 1601–30.

137 Hirsch, *Invitation to the sociology of international law*, at 4.

138 Describing these dialectics: Koskenniemi, 'Methodology of International Law', at 129, para. 23

139 On methodical eclecticism and convergence, see A. Peters, 'There is Nothing more Practical than a Good Theory: An Overview of Contemporary Approaches to International Law', *German Yearbook of International Law* 44 (2001), 25–37, in particular at 37. On the advantages of combining different methodologies , see further d'Aspremont, *Epistemic forces in international law*, vii-ix.

language is what individuals make out of this limited freedom, *what they do say*.[140] Community structures are understood as the "grammar" (1.) and the communicative acts of ILC members as the "language" (2.) through which the topic of State official immunity is approached in this study.

3. "Grammar" – The ILC and the Community of International Law

International law is characterised by specific argumentative patterns.[141] The specificity of their arguments shapes the practices and the self-understanding of international lawyers. Conversely, the interaction of international lawyers constructs the international legal order's social reality. The formation of customary international law is a prime example of this insight.

On the basis of these premises, the consensus-oriented internal struggle of the ILC to agree on a shared view of State official immunity, and the equally consensus-oriented struggle to gain the validation of the community of international law for this understanding are investigated through the prism of community dynamics.[142] Descriptions of the "interpretive community"[143] or the "epistemic community"[144] of international law, of the "community of practice"[145] or famously of the "invisible college of international lawyers"[146] highlight the construction of international law through the interaction of lawyers. If the relevant communities are persuaded, the positions at stake are reproduced and have the chance of influencing the future interpretation of international law, or of becoming law themselves. This peculiarity distinguishes international lawyers from other actors in international affairs and informs their professional ethos.[147]

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140 For the image of the dualism of "grammar and language" owed to Wittgenstein's linguistic turn, see Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, at 11; Koskenniemi, *From apology to Utopia*, at 568; 589.

141 Johnstone, *The power of deliberation*, at 1-2.

142 Overviews of the rich scholarly literature: Alvesson and Karreman, 'Varieties of Discourse'; Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning'; d'Aspremont, *Epistemic forces in international law*, 1-30; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, 16-71.

143 This term, developed by Stanley Fish (see S. Fish, *Is there a text in this class?: The authority of interpretive communities* (Cambridge, Mass.: Harvard Univ. Press, 1980); S. E. Fish, *Doing what comes naturally: Change, rhetoric, and the practice of theory in literary and legal studies*, Post-contemporary interventions (Durham, NC: Duke University Press, 1989)) describes the community's function in regulating argumentative practice and restricting the construction of meaning; see Johnstone, *The power of deliberation*, 33 et seq.; Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning'; J. d'Aspremont, 'Wording in International Law', *Leiden Journal of International Law* 25 (2012), 575–602.

144 This concept, characterizing the community of international lawyers through their method of creating truth, dates back to P. M. Haas, 'Introduction: Epistemic communities and international policy coordination', *International Organization* 46 (1992), 1; inter alia, it has been taken up by M. Noortman, 'The International Law Association and Non-state Actors: Professional Network, Public Interest Group or Epistemic Community?' in J. d'Aspremont (ed.), *Participants in the international legal system: Multiple perspectives on non-state actors in international law*, Routledge research in international law, Paperback edition (London, New York: Routledge, 2013), pp. 233–47; D. J. Galbreath and J. McEvoy, 'How Epistemic Communities Drive International Regimes: The Case of Minority Rights in Europe', *Journal of European Integration* 35 (2013), 169–86.

145 For this term, see E. Adler, *Communitarian international relations: The epistemic foundations of international relations*, The new international relations (London: Routledge, 2005).

146 This expression has been coined by Schachter, 'The Invisible College of International Lawyers'.

147 A.-M. Slaughter, 'International Law and International Relations: Twenty Years Later' in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012), pp. 613–25, at 624.

The necessity of ensuring the acceptance of proposals by the community of those participating in the debate de-mystifies the impact of law's indeterminacy as much as of its determinacy.[148] The community's acceptance of the Commission's claims will depend on how far the ILC has conformed with expectations shared by the majority of international lawyers. These expectations regard *inter alia* the standards of legal argument, the procedures underlying codification and progressive development, and other factors limiting of the freedom to make claims, as the requirement to engage with precedents, doctrines and general approaches to international law.[149] Practice creates its own constraints, leading to practice creating the law it finds.

Individuals coalesce into communities through socialisation. The socialisation as an international lawyer shapes the actors' awareness about what can be said within the community. Socialisation determines a shared consciousness, a shared canon of acceptable arguments and a shared language.[150] The socialisation of members affects the ILC's works in manifold ways. Members are pre-socialised by factors such as their origin, education, professional background or legal expertise. Socialisation affects the convictions of ILC members about State official immunity, as well as about the Commission's mandate, legitimacy and interlocutors. Membership in an authoritative institution allowing for powerful collective argumentation like the ILC[151] is in itself is an influential factor affecting the socialisation of members.

Several issues connected to the embedment of the ILC and its members in communities of international lawyers essentially further the analysis of the codification and progressive development of State official immunity. The ILC itself is a community, internally shaped by a multitude of factors affecting the interaction of its members, ranging from collegial solidarity and personal sympathies to differences in backgrounds, world views or the inequal access to research infrastructure.

As a group, the Commission in turn interacts with the wider community of international law: the ultimate goal of the ILC's mission is to persuade States, national law-appliers and their peers from academia and practice of the suggestions formulated by the Commission. To this end, the argumentations of ILC members reconnect to narratives of State official immunities, developed by the community of international lawyers through practice and doctrine. The ILC takes part in the process of extrapolating arguments from these narratives, thereby reconstituting the latter.

Also, the standards of codification and progressive development are not determined by the ILC in total autonomy, but against the background of the yardsticks developed by the international legal order. Aspiring to strengthen the acceptance of ILC proposals, members engage with the question how their mandate is to be understood, and which prerogatives and limits the latter implies. In other words, the ILC and its members develop strategies to meet the at times contradictory expectations of the community of international lawyers. The progressive development and codification of State official immunity in the ILC is hence an illustration of the impact of this community on the development of international law.

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148 Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning', at 35-36.

149 Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 49.

150 D'Aspremont, *Epistemic forces in international law*, pp. 10-11.

151 Characterising ILC membership from that perspective: Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, pp. 65-66.

4. "Language" – Deconstruction of Argumentative Patterns and Strategies

The ILC members live up to their gradual freedom as agents by pursuing their individual agendas on the basis of specific strategies and argumentative techniques. The latter are in turn determined by the embedment of the ILC in the communities of international law. Language is produced within the limits erected by the underlying grammar. Different conceptualisations informing this study shed light on these agendas, strategies and techniques: intertextuality, genealogy and deconstruction are analytical techniques investigating the construction of meaning in texts.

Intertextuality explores how authority is created by reference to other texts.[152] In this study, the concept of intertextuality raises questions about how the ILC members used the statements of other actors to affirm their own positions and enhance their own authority. For instance, what argumentative use was made of specific precedents, how were statements of other actors evaluated? How were doctrinal writings and jurisprudence processed, above all the ICJ decisions on immunity? How did members refer to the ILC's own previous output to justify its activities?

Genealogy indicates a historical reconstruction of concepts from the perspective of their present shape.[153] The aim is an affirmation or a critique of the present by reference to the past, through the production of a narrative of the development over time. The notion draws the attention to how actors argumentatively reconstruct the development of State official immunity and of the ILC's mandate in a timely perspective. Exemplar are the much-invoked trends controversially discussed: which current rules have been brought along by which past events, and which future changes does this present justify or discourage? In what way are the ILC's working methods legitimised on the basis of the Commission's own past efforts?

Deconstruction is based on the idea that language as a system of signs and words has no meaning of its own.[154] The meaning of words can only emerge through the contrast with other words. Crucially, the construction of meaning through contrast is called into question by examining how concepts are understood through their opposites.[155] This concept encourages the investigation of explicit dichotomies emerging in the ILC's works, and the analysis of terms through their unnamed

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152 J. Kristeva, *Desire in language: A semiotic approach to literature and art*, European perspectives (New York: Columbia University Press, 1980), at 66; her work is based on the idea of dialogic dynamics between texts (M. M. Bakhtin, *The dialogic imagination: Four essays*, University of Texas Press Slavic series, 9. print (Austin: Univ. of Texas Press, 1994), vol. 1) and the study of the meaning of signs within textual structures (F. d. Saussure, *Course in general linguistics* (LaSalle, Ill.: Open Court, 1983); M. Eggler, *Argumentationsanalyse textlinguistisch: Argumentative Figuren für und wider den Golfkrieg von 1991*, Reihe Germanistische Linguistik (Tübingen: M. Niemeyer, 2006), vol. 268) and the idea of meaning residing in the reader, see R. Barthes, *S/Z*, 1st American ed. (New York: Hill and Wang, 1974).

153 The concept of genealogy was originally outlined by Friedrich Nietzsche (F. Nietzsche, *Zur Genealogie der Moral. Eine Streitschrift.* (Leipzig: C. G. Naumann, 1887)), and developed by Michel Foucault (M. Foucault, 'Nietzsche, Genealogy, History' in D. F. Bouchard (ed.), *Language, counter-memory, practice: Selected essays and interviews*, Cornell paperbacks (Ithaca, N.Y.: Cornell University Press, 1980), pp. 139–64).

154 The term was centrally developed by J. Derrida, *Of grammatology*, Corrected ed. (Baltimore: Johns Hopkins University Press, 1998), under the influence of de Saussure, *Course in general linguistics*. See further J. Derrida, *Positions*, Pbk. ed. (Chicago: University of Chicago Press, 1981); Laclau and Mouffe, *Hegemony and socialist strategy*.

155 This idea describes Derrida's concept of "différánce", J. Derrida, *Margins of philosophy* (Chicago: University of Chicago Press, 1982), 3-27.

opposites. Dichotomies frequently invoked were besides many others the dualisms of "accountability-impunity", "national jurisdiction-international jurisdiction", "stability-interference" and "codification-progressive development". What meanings emerged from these juxtapositions? What understandings of terms like "immunity", "sovereignty", or "values of the international community" are constructed, from what angles are they argued and criticised?

Deconstructivist approaches have been accused of causing destabilisation.[156] This effect is however not ineluctable. Once the subjectivity of claims has been laid bare, international law's "emptiness" turns into a strength.[157] The impossibility of the universal does not preclude the possibility of universal legal argumentations.[158] The ILC's works on State official immunity are an example of a confrontation between subjective claims against a background of universalist aspiration. All claims voiced have legitimacy in their (eternally approximative) universalist aspiration, as no one subjective claim can arrogate exclusivity and deny the legitimacy of its equally subjective rivals.[159] Thereby, true confrontation becomes possible. Informed by these insights, this study considers the truth claims voiced by the ILC members and in the 6th Committee as ultimately indiscernible, partial and complementary.[160]

156 For some expressions of this type of criticism, see instead of many: R. O. Keohane, *International institutions and state power: Essays in international relations theory* (Boulder: Westview Press, 1989), at 249; S. M. Walt, 'The Renaissance of Security Studies', *International Studies Quarterly* 35 (1991), 211, at 223.

157 The following thoughts, mitigating the effects of deconstruction, have been centrally developed by Martti Koskenniemi. See in particular M. Koskenniemi, *The Gentle Civilizer of nations: The Rise and Fall of International Law 1870 - 1960* (Cambridge: Cambridge Univ. Press, 2010), 500 ff.; see as well A. Orford, 'On international legal method', *London Review of International Law* 1 (2013), 166–97.

158 D'Aspremont, *Formalism and the sources of international law*, at 28

159 A. MacIntyre, *Whose justice? Which rationality?* (Notre Dame, Ind.: Univ. of Notre Dame Press, 1988), at 352-353.

160 On this ideal, see Koskenniemi, *The Gentle Civilizer of nations*, at 500.

Part 2
The ILC, its Members and their Embedment in the International Legal Order

The following sections characterise the current and previous Commission members having served since the year 2007. One crucial question arises in this regard: why should a close-up view on these individuals further the analysis? From one viewpoint, the interests of States appear to have an overriding impact on the events in the ILC and the views promoted by its members. In fact, the impact of any agreement among ILC members would be severely restricted if the compromise achieved were inacceptable to States. Any discourse is affected by these implicit boundaries, restricting the range of possible outputs and influencing the strategies of actors.

Within this picture, the efforts of the ILC are however only partly determined by formalised procedures of law-identification, or by political dynamics reflecting State preferences. The outcome of works is the end of an open process, affected by personal convictions and the interaction of individuals. The individuals interacting can make a difference with regard to the Commission's output. The ILC members themselves, and the world they live in, hence deserve an in-depth examination. As poignantly emphasised by actor-network theory, analysing actors and their interaction is crucial in order to shed light on "*how* […] *size, power or organisation are generated*".[161] In order to analyse the mechanics of power as they emerge in discourse, characterising the ILC members constitutes an essential analytical step.

The identity of members and their viewpoints are influenced by their preferences, skills and experiences. These individual characteristics are intrinsically connected to features of their profiles described in the official statements of qualifications of candidates issued by the General Assembly before the election of ILC members. The information therein regards, among others, nationality, age, sex, educational background, legal expertise, professional experiences and language proficiency of the candidates nominated by States to run for ILC membership.

After a brief introduction of the Commission's roots and structures (A.), the analysis of the ILC members unfolds along three main lines in the following sections: Firstly, their backgrounds are under close scrutiny. How can the ILC as an evolving group of individuals be described, what types of individuals compose the ILC, which traits in terms of origin, length of service, education, age or sex are common or unusual, and how do these features change over time (B.)? Secondly, the members' communities of reference are investigated. In their function as elected experts, the ILC members are embedded in the legitimizing community of international law. They are affiliated to this community in different ways – for instance through their professional experiences or through subcommunities of expertise (C.). The variety of the ILC members' profiles and their recurrence are under this premise assessed. For a comprehensive perspective, the analysis considers not only past and present members, but also candidates not successful in elections.

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[161] J. Law, 'Notes on the theory of the actor-network: Ordering, strategy, and heterogeneity', *Systems Practice* 5 (1992), 379–93.

An investigation of the features characterising the members has the potential to refine the understanding of the processes and interactions shaping events in the ILC. Ultimately, the investigation of the ILC members as a group of lawyers puts the focus on individuals as driving constructors of the international legal order: what kind of individuals are admitted to the construction of this order, and how do their actions and ideas influence international law's evolution?

A. The ILC – Codifier and Developer of International Law within the UN

The endeavour to codify and progressively develop international law, especially its customary rules, is no recent phenomenon. From that angle, the ILC is part of a fairly long-running process. The desire to mitigate the perceived shortcomings of customary international law by clarifying the practical effects of abstract rules and closing the gaps of the in significant parts uncodified system of international law led to several "private" codification enterprises[162], still ongoing today. The inter-war period saw a first attempt at establishing the "public" codification of international law in co-operation with governments in the League of Nations.[163] This project was continued after 1945. Whilst the United Nations were not to have any legislative power of creating rules of international law outside the explicit will of States, a proactive role of the organization in the promotion and improvement of the international legal order was considered desirable[164], resulting in article 13 (1) (a) of the Charter of the United Nations. The General Assembly was given the mandate to "*initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification*". Following the recommendations of the so-called "Committee of the Seventeen"[165], the General Assembly established in 1947 the ILC to fulfil this mandate.

In the intentions of the General Assembly, States were not to be excluded from the United Nation's mechanisms of codification and progressive development of international law, although the task was to be carried out by practitioners and academics of recognized competence, rather than by government envoys. All activities undertaken by the Commission were to be carried out in close cooperation with the States' political authorities and the General Assembly.[166] The ILC's setup reflects these various priorities. During its sessions, a selected group of distinguished international lawyers from all over the world gather to work on some of the most controversial issues of contemporary international law. Unlike other endeavours to codify and develop international law, these efforts are legitimized by a mandate of the General Assembly, and the support of the United Nations member States.[167] The members are however considered to serve in their personal capacity

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162 In particular the *Institut de Droit International* and the *International Law Association* (both founded in 1873) play a significant role in the codification movement.

163 The League of Nations Codification Conference in 1930 was held in The Hague from 13 March to 12 April 1930; the only result of this conference was the *Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930*, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, ; on codification in the League of Nations, see *The work of the International Law Commission*, 8th ed. (New York: United Nations, 2012), pp. 3-4.

164 *The work of the International Law Commission*, p. 4.

165 Committee on the Progressive Development of International Law and its Codification, established by the General Assembly in its first session, GA, *Resolution 94 (I) of 11 December 1946* .

166 See *The work of the International Law Commission*, p. 5; this two principles found expression in articles 2 and 16 to 21 of the General Assembly, *Statute of the International Law Commission* (1947).

167 General Assembly, *Statute of the International Law Commission*, see articles 16 to 21.

as recognised experts, and not as representatives of their States of origin.[168] The tensions between the relative freedom of recommendation and the responsibility of making potentially far-reaching legal elaborations finding their way into practice, between the independence of technical expertise and the legitimising restrictions coming with the involvement of States, is characteristic of the ILC's endeavours.

The ILC is designated through regular elections held according to the provisions contained in articles 2 to 9 of its statute.[169] The candidates are nominated by the governments of the United Nations member States.[170] States can nominate up to four candidates, a maximum of two of their own nationals and up to two nationals of other States – a rule rarely playing a role, as States tend to nominate only one own national.[171] After the communication of the names of candidates[172] and the circulation of their statements of qualifications by the Secretary-General to governments, and the submission of a consolidated list of candidates to the General Assembly[173], the latter elects the ILC members by secret ballot[174]. According to article 10 of the Statute, members are eligible for re-election. The number of members composing the ILC rose over time from 15 to 34, elected for

168 *Yearbook of the International Law Commission*, vol. II (Part (One), doc. A/CN.4/325 (1979, 1979) para. 4. This position, although not unchallenged, prevailed since the first debates on international law's codification and progressive development, *The work of the International Law Commission*, p. 5.

169 In the not infrequent cases of so-called "casual vacancies" in the membership of the Commission occurring between the regular elections due to death, illness, resignation or appointment of members to a new position, the ILC itself elects new members, with due regard of the provisions in articles 2 and 8, see article 11, General Assembly, *Statute of the International Law Commission*.

170 Articles 3 to 5, ibid..

171 Article 4, ibid. Only occasionally did States depart from that rule. The Nordic States (Denmark, Finland, Iceland, Norway and Sweden) nominated at each election assessed one common candidate (Ms. Jacobsson in 2006 and 2011; Ms. Lehto in 2016). Australia, Canada and New Zealand also nominated common candidates (Mr. McRae in 2006 and 2011; Mr. Brown in 2016). In 2006, France and Germany supported each other's nominations, as both Mr. Nolte and Mr. Pellet were nominated by both States. In a similar way, the United Kingdom, Canada and India strengthened their respective candidates, Mr. Brownlie, Mr. McRae and Mr. Singh. In 2011, similar alliances could be observed between Thailand and Japan, as well as between Japan and Kenya. In 2016, Mr. Kohen was nominated by Argentina and Switzerland.

172 Article 6, General Assembly, *Statute of the International Law Commission*. 2006: see 61st session, doc. A/61/92 (2006); 61st session, doc. A/61/92/Corr.1 (2006); 61st session, doc. A/61/92/Add.1 (2006); 61st session, doc. A/61/92/Add.2 (2006); 61st session, A/61/92/Add.3 (2006); 2011: see 66th Session, doc. A/66/88 (2011); 66th Session, doc. A/66/88/Add.1 (2011); 66th Session, doc. A/66/88/Add.2 (2011); 66th Session, doc. A/66/88/Add.3 (2011); 2016: Concerning the candidates, see 71st Session, doc. A/71/90 (2016); 71st Session, doc. A/71/90/Add.1 (2016); 71st Session, doc. A/71/90/Add.2 (2016); 71st Session, doc. A/71/90/Add.3 (2016); 71st Session, doc. A/71/90/Add.4 (2016); 71st Session, doc. A/71/90/Add.5 (2016); 71st Session, doc. A/71/90/Add.6 (2016).

173 Article 7, General Assembly, *Statute of the International Law Commission*. 2006: 61st session, doc. A/61/539 (2006) doc. A/61/539; 2011: 66th Session, doc. A/66/514 (2011); 2016: 71st Session, doc. A/71/437 (2016); 71st Session, doc. A/71/437/Corr.1 (2016).

174 For the procedure of votes by secret ballot, see article 92, *Rules of Procedure of the General Assembly* . According to article 88, there are no declarations of vote before or after voting.

terms of five years.[175] The members composing the Commission as the latter dealt with the topic of State official immunity were voted into office in the elections held in 2006[176], 2011[177] and 2016[178].

Article 8 demands, beyond the expertise of ILC members, that the "*representation of the main forms of civilization and of the principal legal systems of the world*" is assured. To comply with this goal, it was decided to elect the ILC based on a quota system allocating seats to regional groups. The scheme assigns a constant number of 8 seats to the group of Western European and other States (WEOG), whilst the number of seats of the other regional groups is determined on the basis of regular rotations.[179] Up to the number of seats allocated to the various groups, the candidates with the highest number of votes get elected. To achieve election, candidates need to receive the majority of votes of the States present and voting.[180]

175 See *The work of the International Law Commission*, p. 17, Section c). The current number of 34 members is stated in Article 2, para. 1 of the General Assembly, *Statute of the International Law Commission*.

176 For the official records of the elections, held on 16 November 2006, and their outcome, see *41st Plenary Meeting*, 61st Session, doc. A/61/PV.41 (2006) and *54th Plenary Meeting*, 61st Session, doc. A/61/PV.54 (2006).

177 For the official records of the elections, held on 17 November 2011, and their outcome, see *59th Plenary Meeting*, 66st Session, doc. A/66/PV.59 (2011).

178 For the official records of the elections, held on 3 November 2016, and their outcome, see *40th Plenary Meeting*,, 71st Session, doc. A/71/PV.40 (2016).

179 In 1981, the General Assembly decided *"that the 34 members of the International Law Commission shall be elected according to the following pattern:*
(a) Eight nationals from African States;
(b) Seven nationals from Asia-Pacific States;
(c) Three nationals from Eastern European States;
(d) Six nationals from Latin American and Caribbean States;
(e) Eight nationals from Western European and other States;
(f) One national from African States or Eastern European States in rotation […]
(g) One national from Asia-Pacific States or Latin American and Caribbean States in rotation […] *Resolution 36/39 of 18 November 1981* .

180 Otherwise, additional ballots are needed to fill the remaining places – a rare event. Considering that every voting member State can vote as many candidates as seats have been allocated to a given regional group (e.g., an African State can vote up to 8 WEOG-candidates), most candidates get elected in the first round with solid majorities. The States present and voting usually oscillate between 190 and 193. Only in 2011 was a second ballot needed, as Mr. Niehaus (Costa Rica) and Mr. Ferrero Costa (Peru) had tied in the first round with 95 votes each; Mr. Niehaus was elected in the second round with 98 votes compared to the 94 received by Mr. Ferrero Costa.

In 2006, 8 nationals of African States[181], 7 of Asia-Pacific States[182], 4 of Eastern European States (EEG)[183], 7 of Latin American and Caribbean States (GRULAC)[184] and 8 of WEOG-States[185] were elected. A total of 45 candidates competed, of which 11 were not elected.[186]

In the 2011 elections, the allocation of the rotating seats led to the election of 9 nationals of African States[187], 8 of Asia-Pacific States[188], 3 of EEG-States[189], 6 nationals of GRULAC-States[190] and 8 of WEOG-States[191]. 16 of the 50 candidates did not achieve election.[192]

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181 Secretary-General, 'Statement of qualifications (2006), A/61/111' (2006), Mr. Pedro Comissário Afonso (Mozambique), pp. 26-29; Mr. Christopher John Robert Dugard (South Africa), pp. 34-38; Mr. Salifou Fomba (Mali), pp. 53-56; Mr. Hussein A. Hassouna (Egypt), pp. 66-69; Mr. Maurice Kamto (Cameroon) pp. 83-88; Mr. Fathi Kemicha (Tunisia), pp. 89-90; Mr. Bayo Ojo (Nigeria), pp. 131-133; Mr. Amos S. Wako (Kenya), pp. 205-209. See also Secretary-General, *Statement of qualifications (2006), A/61/111/Corr.2* (2006), Mr. Fathi Kemicha (Tunisia), pp. 1-5.

182 Secretary-General, *Statement of qualifications (2006), A/61/111*, Mr. Mahmoud Daifallah Hmoud (Jordan), pp. 70-72; Mr. Amrith Rohan Perera (Sri Lanka), pp. 160-164; Mr. Narinder Singh (India), pp. 171-175; Ms. Hanqin Xue (China), pp. 210-215; Mr. Chusei Yamada (Japan), pp. 216-219; Secretary-General, *Statement of qualifications (2006), A/61/111/Add.1* (2006): Mr. Ali Mohsen Fetais Al-Marri (Qatar), pp. 2-4; Mr. Nugroho Wisnumurti (Indonesia), pp. 5-6. See further Secretary-General, *Statement of qualifications (2006), A/61/111/Corr.1* (2006), Mr. Amrith Rohan Perera (Sri Lanka), pp. 1-6.

183 Secretary-General, *Statement of qualifications (2006), A/61/111*, Mr. Zdzislaw W. Galicki (Poland), pp. 61-65; Mr. Roman Anatolyevitch Kolodkin (Russian Federation) pp. 91-94; Mr. Teodor Viorel Melescanu (Romania), pp. 110-112; Mr. Ernest Petrič (Slovenia), pp. 165-168.

184 Secretary-General, *Statement of qualifications (2006), A/61/111*, Mr. Enrique J. A. Candioti (Argentina) pp. 22-25; Mr. Bernd H. Niehaus (Costa Rica), pp. 121-122; Mr. Gilberto Vergne Saboia (Brazil), pp. 169-170; Mr. Eduardo Valencia-Ospina (Colombia), pp. 178-186; Mr. Edmundo Vargas Carreño (Chile), pp. 187-193; Mr. Stephen C. Vasciannie (Jamaica), pp. 194-198; Mr. Marcelo Vázquez-Bermúdez (Ecuador), pp. 199-202.

185 Secretary-General, *Statement of qualifications (2006), A/61/111*, Mr. Ian Brownlie (United Kingdom of Great Britain and Northern Ireland), pp. 4-8; Mr. Lucius Caflisch (Switzerland) pp. 11-21; Ms. Paula Ventura De Carvalho Escarameia (Portugal), pp. 47-52; Mr. Giorgio Gaja (Italy), pp. 57-60; Ms. Marie Gotton Jacobsson (Sweden) pp. 73-82; Mr. Donald M. McRae (Canada) pp. 101-109; Mr. Georg Nolte (Germany), pp. 123-130; Mr. Alain Pellet (France), pp. 140-159.

186 Secretary-General, *Statement of qualifications (2006), A/61/111*, Mr. Arturo B. Buena (Philippines), pp. 9-10; Mr. Riad Daoudi (Syrian Arab Republic), pp.30-33; Mr. Constantine P. Economides (Greece), pp. 39-44; Mr. Abdelrazeg El-Murtadi Suleiman (Libyan Arab Jamahiriya), pp. 45-46; Mr. Carlos López Contreras (Honduras), pp. 95-98; Mr. Michael J. Matheson (United States of America), pp. 99-100; Mr. Djamchid Momtaz (Islamic Republic of Iran), pp. 113-120; Mr. Guillaume Pambou Tchivounda (Gabon), pp. 134-139; Mr. Luis Solari Tudela (Peru), pp. 176-177; Mr. Rauf Versan (Turkey), pp. 203-204; Mr. Nassib G. Ziadé (Lebanon), pp. 220-227.

187 Secretary-General, 'Statement of qualifications (2011), A/66/90' (2011), Mr. Mohammed Bello Adoke (Nigeria), pp. 5-11; Mr. Pedro Comissário Afonso (Mozambique), pp. 44-51; Mr. Abdelrazeg El-Murtadi Suleiman (Libyan Arab Jamahiriya), pp. 67-72; Mr. Hussein A. Hassouna (Egypt), pp. 119-124; Mr. Maurice Kamto (Cameroon), pp. 146-154; Mr. Ahmed Laraba (Algeria), pp. 162-165; Mr. Chris M. Peter (Tanzania), pp. 231-235; Mr. Dire D. Tladi (South Africa), pp. 263-269; Mr. Amos S. Wako (Kenya), pp. 295-304.

188 Secretary-General, *Statement of qualifications (2011), A/66/90*, Mr. Ali Mohsen Fetais Al-Marri (Qatar), pp. 12-13; Mr. Mahmoud D. Hmoud (Jordan), pp. 125-127; Mr. Huang Huikang (China), pp. 128-132; Mr. Kriangsak Kittichaisaree (Thailand), pp. 155-162; Mr. Shinya Murase (Japan), pp. 193-196; Mr. Ki Gab Park (Republic of Korea), pp. 210-217; Mr. Narinder Singh (India), pp. 245-249; Mr. Nugroho Wisnumurti (Indonesia), pp. 305-310.

189 Secretary-General, *Statement of qualifications (2011), A/66/90*, Mr. Kirill Gevorgian (Russian Federation), pp. 106-111; Mr. Ernest Petrič (Slovenia), pp. 236-238; Mr. Pavel Šturma (Czech Republic), pp. 250-255.

190 Secretary-General, *Statement of qualifications (2011), A/66/90*, Mr. Enrique J. A. Candioti (Argentina), pp. 35-37; Mr. Juan Manuel Gómez-Robledo (Mexico), pp. 112-118; Mr. Bernd H. Niehaus (Costa Rica), pp. 206-207; Mr. Gilberto Vergne Saboia (Brazil), pp. 239-244; Mr. Eduardo Valencia-Ospina (Colombia), pp. 275-282; Mr. Stephen C. Vasciannie (Jamaica), pp. 283-289.

191 Secretary-General, *Statement of qualifications (2011), A/66/90*, Mr. Lucius Caflisch (Switzerland), pp. 21-34; Ms. Concepción Escobar Hernández (Spain), pp. 73-79; Mr. Mathias Forteau (France), pp. 92-99; Ms. Marie G. Jacobsson (Sweden), pp. 133-145; Mr. Donald M. McRae (Canada), pp. 189-192; Mr. Sean D. Murphy (United States of America), pp. 197-205; Mr. Georg Nolte (Germany), pp. 208-209; Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland), pp. 311-313.

192 Secretary-General, *Statement of qualifications (2011), A/66/90*, Ms. Noor Farida Ariffin (Malaysia), pp. 14-20; Mr. Yacouba Cissé (Côte d'Ivoire), pp. 38-43; Mr. Riad Daoudi (Syrian Arab Republic), pp. 52-56; Ms. María del Luján

In the 2016 elections 2016, the rotating seats resulted in an ILC composed by 8 nationals of African States[193], 7 of Asia-Pacific States[194], 4 of EEG-States[195], 7 of GRULAC-States[196] and 8 of WEOG-States.[197] 18 of the total 52 candidates did not get elected.[198]

The total number of candidates in the elections was hence in growth over the elections assessed in this study. Not all of these candidates competed however in the actual elections, as some candidates withdrew prior to elections.[199] Competition varied over time within the different regional groups, and achieving election was at times more competitive in some groups than in others.[200] The number

Flores (Uruguay), pp. 57-63; Mr. James C. Droushiotis (Cyprus), pp. 64-66; Mr. Eduardo Ferrero Costa (Peru), pp. 80-85; Mr. Salifou Fomba (Mali), pp. 86-91; Mr. Zdzislaw W. Galicki (Poland), pp. 100-105; Mr. Ewald W. Limon (Suriname), pp. 166-169; Mr. Tiyanjana Maluwa (Malawi), pp. 170-188; Mr. A. Rohan Perera (Sri Lanka), pp. 218-230; Mr. Surya P. Subedi (Nepal), pp. 256-262; Mr. Muaz Ahmed Mohamed Tungo (Sudan), pp. 270-274; Mr. Marcelo Vázquez-Bermúdez (Ecuador), pp. 290-294; Mr. Jan M. F. Wouters (Belgium), pp. 314-327; Secretary-General, *Statement of qualifications (2011), A/66/90/Add.1* (2011), Mr. Carlos Argüello Gómez (Nicaragua), pp. 2-3; and Secretary-General, *Statement of qualifications (2011), A/66/90/Add.2* (2011), Carlos Oswaldo Salgado Espinoza (Ecuador), pp. 2-8.

193 Secretary-General, 'Statement of qualifications (2016), A/71/83' (2016), Mr. Yacouba Cissé (Côte d'Ivoire), pp. 53-57; Mr. Hussein A. Hassouna (Egypt), pp. 104-108; Mr. Charles C. Jalloh (Sierra Leone), pp. 119-136; Mr. Ahmed Laraba (Algeria), pp. 153-155; Mr. Hassan Ouazzani Chahdi (Morocco), pp. 230-233; Mr. Chris Maina Peter (Tanzania), pp. 244-246; Mr. Dire D. Tladi (South Africa), pp. 281-285; Mr. S. Amos Wako (Kenya), pp. 313-315.

194 Secretary-General, *Statement of qualifications (2016), A/71/83*, Mr. Mahmoud Daifallah Hmoud (Jordan), pp. 109-112; Mr. Huang Huikang (China), pp. 113-118; Mr. Shinya Murase (Japan), pp. 190-193; Mr. Nguyen Hong Thao (Viet Nam), pp. 211-218; Mr. Ki Gab Park (Republic of Korea), pp. 234-243; Mr. Aniruddha Rajput (India), pp. 250-254; and Secretary-General, 'Statement of qualifications (2016), A/71/83/Add.1' (2016), Mr. Ali bin Fetais Al-Marri (Qatar), pp. 3-5.

195 Secretary-General, *Statement of qualifications (2016), A/71/83*, Mr. Bogdan Aurescu (Romania), pp. 19-30; Mr. Roman Kolodkin (Russian Federation), pp. 147-152; Mr. Ernest Petrič (Slovenia), pp. 247-249; Mr. Pavel Šturma (Czech Republic), pp. 269-271.

196 Secretary-General, *Statement of qualifications (2016), A/71/83*, Mr. Carlos J. Argüello Gómez (Nicaragua), pp. 17-18; Mr. Juan Manuel Gómez-Robledo (Mexico, pp. 82-89; Mr. Claudio Grossman Guiloff (Chile), pp. 95-97; Mr. Juan José Ruda Santolaria (Peru), pp. 260-266; Mr. Gilberto Vergne Saboia (Brazil), pp. 267-268; Mr. Eduardo Valencia-Ospina (Colombia), pp. 296-305; Mr. Marcelo Vázquez-Bermúdez (Ecuador), pp. 306-312.

197 Secretary-General, *Statement of qualifications (2016), A/71/83*, Ms. Concepción Escobar Hernández (Spain), pp. 63-71; Ms. Marja Lehto (Finland), pp. 156-162; Mr. Sean David Murphy (United States of America), pp. 194-205; Mr. Georg Nolte (Germany), pp. 219-220; Ms. Nilüfer Oral (Turkey), pp. 221-229; Mr. August Reinisch (Austria), pp. 255-259; Ms. Patrícia Galvão Teles (Portugal), pp. 272-280; Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland), pp. 320-322.

198 Secretary-General, *Statement of qualifications (2016), A/71/83*, Mr Koffi Kumelio A. Afande (Togo), pp. 4-11; Mr. Ebenezer Appreku (Ghana), pp. 12-16; Mr. Carmelo Eduardo Borrego Pérez (Bolivarian Republic of Venezuela), pp. 31-42; Mr. Chester W. Brown (Australia), pp. 43-52; Mr. Gélin Imanès Collot (Haiti), pp. 58-62; Mr. Mathias Forteau (France), pp. 72-81; Mr. Abdelrazeg El-Murtadi Suleiman Gouider, pp. 90-94; Mr. Révérien Habarugira (Burundi), pp. 98-103; Mr. Marcelo Gustavo Kohen, pp. 137-146; Mr. Tiyanjana Maluwa (Malawi), pp. 163-168; Mr. Rahmat Mohamad (Malaysia), pp. 169-179; Mr. Djamchid Momtaz (Islamic Republic of Iran), pp. 180-189; Mr. Simon William M'viboudoulou (Congo), pp. 206-210; Mr. Muaz Ahmed Tungo (Sudan), pp. 286-294; Mr. Emmanuel Ugirashebuja (Rwanda), p. 295; Mr. Nugroho Wisnumurti (Indonesia), pp. 316-319; and Secretary-General, *Statement of qualifications (2016), A/71/83/Add.1*, Mr. Manuel E. Ventura Robles (Costa Rica), pp. 6-31; Mr. Gentian Zyberi (Albania), pp. 32-40.

199 Mr. Solari Tudela (Peru) from the GRULAC-group did not run in the 2006 election. In 2011, Mr. Subedi (Nepal) from the group of Asia-Pacific States and Mr. Salgado Espinoza (Ecuador) from the GRULAC-group renounced prior to the election. In 2016, 6 candidates, Mr. Tungo (Sudan), Mr. Appreku, (Ghana), Mr. El-Murtadi Suleiman Gouider, (Libya) Mr. Habarugira, (Burundi) and Mr. M'viboudoulou (Congo) from the group of African States, as well as Mr. Borrego Pérez (Venezuela) from the GRULAC-group renounced prior to the election.

200 The competition was above-average for membership in the Asian-Pacific contingent in 2006 (11 candidates for 7 seats) and 2011 (13 candidates, out of which one withdrew prior to the elections, for 8 seats), in the GRULAC-Contingent in 2011 (11 candidates for 6 seats) and 2016 (11 candidates, out of which one withdrew before the elections, for 7 seats) and in the African contingent in 2011 (13 candidates for 9 seats) and 2016 (16 candidates, out of which 5 withdrew prior to the elections, for 8 seats). The competition was generally below-average in the

of votes that the candidates received and the threshold to achieve election fluctuated, depending significantly on the number of candidates competing within a regional group.[201]

Since 2007, the year when State official immunity entered the Commission's agenda, a total of 64 Commission members elected from a total of 96 candidates running in ILC elections dealt with the topic. The following assessment of elected and unsuccessful candidates is performed through the analysis of the documentation containing the qualifications of candidates – extensive *curricula vitae* - issued by the General Assembly in the run-up to the elections held in 2006, 2011 and 2016.[202]

B. Actors – Features of the International Lawyers Composing the ILC

The ILC's past record, its current activities and its prospects depend to a significant extent on its former, current and future members. With a rather arithmetic expression, the Commission could be conceptualised as a sum of its unit fractions. Still, influence of this actors spans beyond the time of their permanence in the ILC: they contribute to shape and influence the Commission, whose institutional form and legal discursive production can be regarded as an outcome of precedent practices.

Although the ILC does in this respect not differ from other institutions, its members serve in their individual capacity as recognized experts of international law, and not as delegates operating on behalf of governments. Placing the distinctive qualities of these individuals at the centre of attention, the following sections examine some of their features emerging from their statements of qualifications. The focus lies on their States of origin and length of service (I.), the socio-cultural background emerging from the records of their university education and their language skills (II.), and the member's age and sex (III.).

Two necessary acknowledgments coming with the decision to rely on the *curricula vitae* of the candidates shall not go untold. Firstly, the study of individual actors on the basis of their *curricula vitae* does not seek to make causal claims connecting their backgrounds to their behaviour and positions. For instance, it would be speculative to establish a causal chain between certain qualifications of

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EEG-Contingent (At each election, 4 candidates for either 4 or 3 seats). Regarding the contingent of WEOG-States including the USA, Canada, New Zealand and Australia, between 9 and 11 candidates ran for 8 seats. Compare the election records, *54th Plenary Meeting* (2006); *59th Plenary Meeting* (2011); *40th Plenary Meeting*,, (2016). On the risks of poorly qualified candidates getting elected through too little competition within regional groups, see R. Mackenzie, *Selecting International Judges: Principle, Process, and Politics* (OUP Oxford, 2010), p. 35.

201 Looking at the highest and lowest number of votes recorded, in 2006, as 4 candidates were nominated for 4 seats in the Group of Eastern European States, Mr. Kolodkin (Russian Federation) received 185 votes; conversely, in 2011, as 13 candidates (one renounced prior to the election) competed in the Asia-Pacific Group, Mr. Daoudi (Syrian Arab Republic) received only 49 votes. Putting into relation the number of candidates and the threshold for election, it can be observed how the threshold is lower if the number of candidates is higher. Mr. Valencia-Ospina (Colombia) was the member elected with the lowest number of votes in the first round, achieving election with only 102 votes in 2011 as 11 candidates competed for 6 seats in the GRULAC-Group. Conversely, in the same group in the previous elections in 2006, as 8 candidates competed for 7 seats, the 141 votes of Mr. López Contreras (Honduras) were insufficient to be successful.

202 Mr. Zagaynov (Russian Federation) was elected by the Commission in 2018 to fill the casual vacancy due to the resignation of Mr. Kolodkin, who assumed office as a judge at the International Tribunal for the Law of the Sea, see ILC, *Provisional summary record of the 3391st meeting, A/CN.4/SR.3391: 70th session* (2018), p.3. The qualifications of Mr. Zagaynov are listed in Secretary-General, *Filling of casual vacancies in the International Law Commission, A/CN.4/721/Add.1* (2018), pp. 2-5. In the following, Mr. Zagaynov is considered for analytical reasons a "successful candidate", although technically he has so far never been elected by the General Assembly.

candidates and their successful election. Equally, the causal link between views voiced by members about State official immunity and their nationality, age, sex, expertise or professional background would be difficult to prove. Consequently, this section intends primarily to contextualise and describe the setting within which the Commission's discourse on State official immunity is shaped. As will be seen, there are patterns increasing the likeliness of successful election of candidates with determinate characteristics. Moreover, as examined in other parts of this study, there seem to be correlations between attitudes of members towards issues of State official immunity and specific aspects of their backgrounds. As these correlations are investigated, the accounts given do not aspire to be universal or exhaustive. A multitude of factors, including those of political or personal nature eventually influencing the election and interaction of members, were not taken into consideration here, as they would transcend the discourse-analytical method applied in this study.

Secondly, describing the members of the ILC through their *curricula vitae* is characterized by a significant degree of subjectivity, affecting the analysis in several dimensions. The *curricula vitae* depicted the diversity of the individuals described therein. They contained a wide range of information, extending from personal data (date of birth, marital status etc.), academic qualifications and assignments, professional achievements, tasks carried out for governments as counsels in international litigation or as members of varying delegations, to publications, awards, honours and membership in professional institutions and associations. This information was conveyed in a markedly subjective way. The qualifications were not depicted through standardised forms and tables listing relevant qualities and achievements. The candidates (eventually assisted by the nominating delegations[203]) chose their own approach to the task of introducing themselves. This personal touch, determining how these public self-portraits were composed, contributed to the emergence of the candidates in their individuality. Varying in length from one to twenty-six pages[204], the *curricula vitae* showed differing degrees of effort, conciseness and detail. Whilst some tried to impress with the quantity of qualifications, assignments and publications[205], others opted for a minimalist focus on the most relevant features of the candidate's profile, often suggesting the high self-esteem of candidates[206]. As in any *curriculum vitae*, candidates might choose to tell their personal success story by highlighting some aspects and downplaying or concealing others.[207] The *curricula vitae* also revealed how candidates perceive the Commission and the process of election. The emphasis of some competences and traits over others sheds light on what candidates expected to be

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203 Some of the statements of qualifications are accompanied by *note verbales* of their respective national delegations, highlighting the merits qualifying the candidate for membership in the Commission, compare instead of many the note verbales introducing Mr. Aurescu (Romania), see Secretary-General, *Statement of qualifications (2016), A/71/83*, pp. 19–20; Ms. Escobar Hernández (Spain), Secretary-General, *Statement of qualifications (2016), A/71/83*, p. 63 and Mr. Nguyen Hong Thao, Secretary-General, *Statement of qualifications (2016), A/71/83*, p. 211. Sometimes, these note verbales contain as well statements highlighting the nominating State's interest in the Commission's efforts, and the reason why the State considers to deserve "representation" in the Commission; compare inter alia the note verbales introducing Mr. Jalloh (Sierra Leone), Secretary-General, *Statement of qualifications (2016), A/71/83*, p. 119, and Mr. M'viboudoulou, Secretary-General, *Statement of qualifications (2016), A/71/83*, pp. 206–7.

204 The longest statement of qualification was the one of Mr. Manuel E. Ventura Robles, followed by the statement regarding Mr. Pellet with 20 pages. The shortest statement was the one introducing Mr. Ugirashebuja with 1 page.

205 See among many in particular the curricula of Mr. Jalloh, Mr. Kittichaisaree, and Mr. Caflisch.

206 See *inter alia* the statements of Mr. Saboia, and Mr. Wood. See also the statements regarding Mr. Nolte, decreasing in length from eight (Secretary-General, *Statement of qualifications (2006), A/61/111*, pp. 123–30) to two pages (Secretary-General, *Statement of qualifications (2016), A/71/83*, pp. 219–20).

207 Questioning these narratives, revealing the subjective and arbitrary nature of *curricula vitae*, J. Haushofer, *CV of Failures*. http://www.princeton.edu/haushofer/Johannes_Haushofer_CV_of_Failures.pdf (11 April 2018).

essential qualities for membership or the priorities of the States electing the Commission. The pictures of candidates crystallizing in their *curricula* are hence not objective, but expressions of subjective processes.

This is however not the only level on which subjectivity plays a role in the study of ILC candidates through their *curricula*. The judgment of recipients of the statements of qualifications is crucially affected by individual preconceptions and preferences. Other recipients than the author of this study would have read the statements of qualifications differently, their attention would have been attracted by different factors, and their deductions would have been different. The analytical criteria in the following adopted to describe commonalities and differences are deliberate choices, sometimes based on my subjective deciphering of ambiguous information (e.g., what is the centre of gravity of the candidates' professional activities, what the emphasis of their legal expertise). The individuals' traits are hence approximated through my subjective reading of their subjective accounts. Rather than a delegitimizing factor, from a discourse-analytical perspective this subjectivity is precious: basing the account of the actors' profiles on their self-descriptions, emphasises how they justify their aspiration to become, as ILC members, privileged participants in the discursive practices of international law. My processing of these self-descriptions indicates how these legitimizing efforts can possibly be received.

I. Features Related to Origin – Nationality and Length of Service

One distinctive feature of the ILC is its continuity. Since its beginnings in 1949, the Commission built up considerable bodies of knowledge, customs, strategies and self-perceptions. These patterns structure, limit, direct and empower. They underlie the Commission's works, they are passed on from one generation of members to the next, and they evolve slowly over time. Reforming the institutional architecture of the Commission[208] or departing from a well-established method of work is not an easy task, requiring extensive justification[209]. Beyond the members' commitment to the specific ethos characterising the ILC as an institution, this continuity is facilitated by two factors analysed in depth in the following paragraphs: the dominance of a core of States (and their legal cultures and traditions) succeeding in having their nationals constantly elected to the ILC, and the opportunity given to members to increase the impact of their ideas through the duration and stability of their terms of service. The electoral system might significantly favour the election of the nationals of some States (1.). The inertia of the same system appears to favour re-election in relative independence of nationality, allowing to exercise influence over considerable time through renewed ILC membership (2.).

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208 For instance, proposals by the ILC to extend the duration of the mandate to 6 or 7 years (see *Yearbook of the International Law Commission*, vol. II, doc. A/7209/Rev.1 (1968) para. 98 (a)) or to transform membership from part-time to a full-time appointment (see *Yearbook of the International Law Commission*, vol. II, doc. A/1858 (1951), paras. 60–71) were unsuccessful.

209 The ILC periodically reviews its methods of works, although the Commission itself acknowledges it is a slow process ("[…] *whatever improvements it may be possible to make in the methods of work of the Commission, it is clear that there is an inbuilt periodicity at work that places certain limits on the Commission's ability to respond promptly to urgent requests* […]", see *Yearbook of the International Law Commission*, vol. II, doc. A/9010/Rev.1 (1973), para. 166.

1. Nationalities – Patterns of Steady Presences in the Commission

Although the system of regional quota of membership achieves stable representation *of* the different regions of the world, it does not foresee any mechanisms assuring equality of representation *within* these regional groups.[210] Whilst the candidates nominated by some States will be virtually always elected to the Commission, those of other States from the same regional group will only occasionally join the ILC, a constellation apparently due to power disparities within the respective regions. The system allows for a noteworthy steadiness of the nationalities of the individuals composing the ILC. Looking at the three quinquennia from 2007 to 2021, 14 nationalities will have been present throughout.[211] Whilst in some cases this fact seems to result from the tendency to confirm members in office[212], in other cases it is rather an expression of the habitual presence of certain nationalities.

Some States have managed to assure the election of one of their nationals to the ILC throughout the institution's history.[213] The Russian Federation, and the USSR as its predecessor, have since 1949 always had one of their nationals serving on the ILC. Nationals of the other permanent members of the Security Council have as well usually been part of the ILC.[214] The elections of ILC members take place in the General Assembly, by majority and without veto rights. As the occasional non-election of their nationals prove, the success of the nationals of the permanent members of the Security Council within their regional groups is hence not ensured.[215] The proposal of a conjunct election of the ILC members by the General Assembly and the Security Council parallel to the procedure for the election of ICJ judges was evaluated but did not prevail.[216] Nevertheless, at any time at least four nationals of the permanent Security Council members have been serving on the Commission.[217]

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210 Describing the principle of "rotation" informally agreed on within regional groups with regard to the nomination of ICJ judges and the difficulties this principle meets in practice, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, pp. 33–4.

211 These nationalities are Brazil, China, the United Kingdom, Germany, Japan, India, South Africa, Egypt, Qatar, Jordan, Kenya, Colombia and Slovenia and the "Nordic Countries".

212 This seems to apply to the nationals of Qatar, Jordan, Kenya, Colombia and Slovenia; on this tendency, see infra, Section 2.

213 The following data on present and past membership records was taken from the relevant section on the Commission's webpage, to be found at: http://legal.un.org/ilc/guide/annex2.shtml (last access: 13 March 2019).

214 On the so-called "P5 convention" informally favouring the assignment of key positions to the nationals of the permanent members of the United Nations Security Council (China, France, Russia, United Kingdom, United States), see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, pp. 37-40.

215 These exceptional events are usually not considered as related to the quality of the candidates nominated by P5 States; on the contrary, their candidates are considered as qualified above average and valuable contributors because of their language skills. Challenges to the P5 convention seem rather to be due to political reasons; for instance, when Ian Sinclair (United Kingdom) was not re-elected in 1986, there were rumours of Asian and African States being "angry" at Margaret Thatcher. In a similar vein, the non-confirmation of Michael Matheson (United States) in 2006 was speculated to be connected to the US policies regarding Iraq. In general, there is a widespread feeling that P5 representation is no more automatic, and that the permanent members of the Security council need to lobby for the election of their candidates like anyone else; see ibid., pp. 38–40.

216 *Sixth Committee, Report of the Committee on the Progressive Development of International Law and its Codification, A/C.6/193* (1947), para. 7.

217 There was always a national of the United Kingdom, except for the years 1987 to 1991; the United States failed to get their candidate elected for the quinquennium 2007 to 2011; there was no Chinese member in the years 1967 to 1981, whilst France will not have one of its nationals for the first time in the quinquennium 2017-2021.

Other States as well managed to relatively steadily ensure the election of their nationals to the ILC, including India[218], Mexico[219] and Brazil[220]. Further mention deserves the group of the Nordic Countries, usually nominating one common candidate who is a national of one these countries. This group has constantly managed to have one of their nationals in the ILC since 1949, except the year 1978.[221] Further regular presences in recent times where nationals of Japan[222], Germany[223] and South Africa[224]. Other habitual presences regard Egypt[225], Italy[226], Argentina[227] and Nigeria[228]. Despite membership is not guaranteed to specific States through the Statute, these patters emerged anyway – regional players managed to develop informal mechanisms improving the chances of election of their nationals.[229]

Within the system of regional contingents of membership, each regional group is dominated by few States, which usually achieve the election of their candidates to the ILC.[230] Besides the Permanent Members of the Security Council, the BRICS-States and other regional powers are a steady presence.[231] Within the African Group, sub-Saharan francophone States had at times more difficulties to get their candidates elected than anglophone or North African States.[232]

Although the members of the ILC sit in their personal capacity and not as representatives of their governments and States of origin, their nationality is of importance.[233] Those influential States regularly achieving the election of their candidates improve their potential of influencing the processes

218 Continuous membership since 1949 except for the years 1973 to 1976.

219 Continuous membership since 1949 except for the years 1964 to 1966 and 2007 to 2011.

220 Continuous membership except for the years 1979 to 1981.

221 This group of countries is composed by Sweden, Norway, Finland, Denmark and Iceland.

222 Continuous membership since 1957.

223 Including the German Democratic Republic; continuous membership since 1985, except for 2003-2006.

224 Continuous membership since 1997.

225 With a total of 50 years of membership of Egyptian nationals as of the end of 2016.

226 With a total of 49 years of membership of Italian nationals as of the end of 2016.

227 With a total of 47 years of membership of Argentina nationals as of the end of 2016.

228 With a total of 50 years of membership of Nigerian nationals as of the end of 2016.

229 Describing similar informal mechanisms for the election of ICJ judges, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, p. 34..

230 For an account of similar traditions with regard to the composition of the ICJ bench, see ibid., p. 33, referring to C. F. Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications', *Leiden Journal of International Law* 14 (1999), 335–48.

231 If the presence of nationals of the P5-States is considered politically advantageous and necessary, it is nevertheless frustrating for other States having difficulties in getting their nationals elected to positions in influential UN institutions like the ICJ and the ILC. This is particularly true for the other States from the WEOG-group. For instance, regarding the ILC, 3 out of the 8 seats allocated to this group are usually "reserved" for nationals of France, the United Kingdom and the United States, decreasing the likelihood of successful election for the nationals of other States from the regional group. See Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, pp. 38-39.

232 In 2006, 2 candidates from francophone States (Mr. Fomba, Mali; and Mr. Kamto, Cameroon, a country recognizing both French and English as its official languages) got elected, compared to 3 anglophone candidates (Mr. Dugard, South Africa; Mr. Ojo, Nigeria and Mr. Wako, Kenya), 2 Arabic-speaking ones (Mr. Hassouna, Egypt; Mr. Kemicha, Tunisia) and one native speaker of Portuguese (Mr. Comissário Afonso, Mozambique). In 2011, Mr. Kamto was the only candidate from a francophone country elected, compared to four anglophone (Mr. Adoke, Nigeria; Mr. Peter, Tanzania; Mr. Tladi, South Africa; and Mr. Wako) three Arabic-speaking candidates (Mr. El-Murtadi Suleiman Gouider, Libya; Mr. Hassouna, and Mr. Laraba, Algeria) and Mr. Comissário Afonso. In 2016, once again only one francophone African member got elected (Mr. Cissé, Côte d'Ivoire), compared again to four anglophone (Mr. Jalloh, Sierra Leone; Mr. Peter, Mr. Tladi and Mr. Wako) and three Arabic-speaking members (Mr. Hassouna, Mr. Laraba and Mr. Ouazzani, Morocco).

233 This is underlined by the rule that no two members of the ILC may be nationals of the same State, article 2 para. 2 Statute of the ILC. In case of dual nationality, a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

of codification and progressive development over time, as members are usually embedded in the cultural, social and political context of their States of origin. Notwithstanding justifications referring to the increased responsibility resulting from the greater influence of global and regional powers, the other side of the coin is the difficulty of other States to make their visions of international law emerge, and to challenge the *status quo*.[234]

Similar patterns can be observed with regard to the nationality of the Special Rapporteurs nominated over time.[235] In the history of the ILC, 61 of the total 229 members have at some point in time been appointed as Special Rapporteurs for one or more topics. Analysing the origin of those nominated to hold this influential but also burdensome office, the dominance of WEOG-nationals becomes visible, constituting in total more than half the Special Rapporteurs.[236] The percentage of members elected in this regional group who were subsequently nominated Special Rapporteurs was far higher than the percentage of members from other groups.[237]

This finding does not change much by looking at the years since 2007. In the three quinquennia assessed, almost half the Special Rapporteurs were nationals of WEOG-States.[238] In the quinquennium 2017-2021, 10 topics have so far been presented by respectively 1 Special Rapporteur from

234 Looking at the 2016 elections, 12 out of the States forming the *G20* have managed to get one of their nationals elected to the ILC. Including those EU member States which are not members of the G20 as such, but indirectly represented in this organization through the EU itself, the number of nationals of States represented in the G20 rises to 18 out of the 34 ILC members. Similar numbers emerged from the elections in 2006 and 2011, when respectively 18 and 20 nationals of States represented in the G20 were to the ILC. Regarding the EU overrepresentation through members of both the WEOG and the Eastern European Group, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, p. 32.

235 The following data regarding present and past special rapporteurs was taken from the relevant section on the Commission's webpage, to be found at: http://legal.un.org/ilc/guide/annex3.shtml (last access: 13 March 2019)

236 More than half the total number of special rapporteurs (30 out of 58, 51,7%) were nationals of States from the WEOG, encompassing, as permanent European members, Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey and the United Kingdom; as permanent non-European members Australia, Canada, Israel and New Zealand; and as an observer, the United States.

237 Throughout the history of the ILC, 42 members were elected in the African regional group; 7 of them, one sixth (16,7%), became special rapporteurs. In the Asian-pacific regional group, 46 members were elected over time; only 5 of them, a bit more than one tenth (10,9%), were nominated special rapporteurs. The numbers are not much higher when it comes to the Latin American-Caribbean regional group; 9 out of the 42 nationals elected in this group became special rapporteurs, still less than one fifth (21,4%). In the Eastern European regional group, the ratio starts to rise: 9 out of 26 members from these group became special rapporteurs, about one third (34,6%). 72 members were elected over time in the group of Western European and other States, and 31 of them were nominated special rapporteurs, making the ratio of members of this group being nominated special rapporteurs by far the highest, beyond four tenth (43,1%).

238 A total of 20 of the 64 members looked at served at some point of their membership (not necessarily in the years from 2007 onwards) as special rapporteurs; two were nationals from the Asian-pacific group (Mr. Yamada and Mr. Murase, both Japan), three from the Latin American and Caribbean group (Mr. Valencia-Ospina, Colombia, Mr. Vázquez-Bermúdez, Ecuador, and Mr. Gómez-Robledo, Mexico), three from the African group (Mr. Kamto, Cameroon; Mr. Dugard and Mr. Tladi, both South Africa) and three from the Eastern European group (Mr. Galicki, Poland, Mr. Kolodkin, Russian Federation, and Mr. Šturma, Czech Republic); the remaining 9 were nationals of the WEOG (Mr Brownlie, United Kingdom; Ms. Escobar-Hérnandez, Spain; Mr. Gaja, Italy; Ms. Jacobsson, Sweden; Ms. Lehto, Finland; Mr. Murphy, United States; Mr. Nolte, Germany; Mr. Pellet, France; Mr. Wood, United Kingdom).

African[239], Asian[240] and East European States[241], 2 from GRULAC-States[242], and 5 nationals of WEOG-States[243].

If several States could steadily assure the election of their nationals to the ILC, fewer nationalities were outstandingly common among special rapporteurs. The most successful nations were in this regard the United Kingdom and the United States, with 7 special rapporteurs each.[244] Whilst 4 Special Rapporteurs were nationals of the Nordic Countries[245], respectively 3 Special Rapporteurs were nationals of the USSR/Russian Federation, France, Japan and Italy[246]. Both nationals of South Africa elected since 1997 have been nominated special rapporteurs.[247] The numbers decrease when it comes to the nationals of other States regularly elected, like Mexico, India, Germany, Egypt and Argentina.[248] Nationals of Brazil and Nigeria, and most noteworthily, of China, have never served as Special Rapporteurs.[249]

The interconnections between the nationality of candidates and their success or failure in elections suggests that political power affects the dynamics underlying elections, regardless of who the individuals involved are. Within this preliminary picture, the following sections investigate what role the individual qualities of candidates play, *inter alia* by enhancing their chances in elections.

2. Individual Length of Tenure: Experience and Re-election

The ILC is an entity characterized by the frequent re-election of members, eventually on several occasions, leading to significantly long periods of tenure.[250] This picture of is confirmed by an in-depth look at the three quinquennia relevant to the topic of State official immunity. By the end of 2021, 40 of the of the 64 members who at some point worked on the issue will have had at least 10 years of service in the Commission.[251] 8 members will have served the entire three quinquennia

239 Mr. Tladi, topic "Peremptory norms of general international law (*Jus cogens*)".
240 Mr. Murase, topic "Protection of the atmosphere".
241 Mr. Šturma, topic "Succession of States in respect of State responsibility".
242 Mr. Gómez-Robledo, topic "Provisional applications of treaties" and Mr. Vázquez-Bermúdez, "General principles of law".
243 Ms. Escobar-Hernández, "Immunity of State officials from foreign criminal jurisdiction"; Ms. Lehto, "Protection of the environment in relation to armed conflicts"; Mr. Murphy, "Crimes against humanity"; Mr. Nolte, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; and Mr. Wood, "Identification of customary international law".
244 The UK and the US had respectively 9 and 11 of their nationals elected to the ILC.
245 Out of 8 nationals of the Nordic countries ever elected to the ILC.
246 The USSR/Russian Federation had 11 of their nationals elected; France and Japan 5; Italy 4.
247 These members were Mr. Dugard and Mr. Tladi.
248 Whilst 2 out of the 7 Mexican ILC members became Special Rapporteurs, only 1 Special Rapporteur respectively were nationals of India (7 members), Federal Republic of Germany/Democratic Republic of Germany (4 members), Egypt (4 members) and Argentina (3 members).
249 8 nationals of China, and respectively 5 nationals of Brazil and Nigeria were elected to the ILC.
250 Between 1949 and 2021, if the members elected in 2016 will serve the full term, 42 out of the total 229 members elected in the history of the ILC will have served 15 or more years; out of these, 14 will have served 20 or more years, the longest terms of service having been those of Doudou Thiam (Senegal, 30 years, 1970-1999) and Paul Reuter (France, 26 years, 1964-1989).
251 If all the members elected in 2016 serve until 2021, 16 of the 64 members who at some points have worked on immunities will have served for 15 or more years, and further 24 members will have had 10 or more years of tenure. This numbers refer to the total years of service of members, which do not have to entirely fall into the three quinquennia (2007-2021) here investigated.

of works on the topic performed by the ILC.[252] Members elected for the first time in 2016 aside, only 7 of the members assessed served 5 or less years on the ILC.[253]

When assessing this steadiness, the relatively limited numbers of competitors need to be taken into account: the 34 members get elected out of around 45 to 50 candidates. Being nominated constitutes half the job: once this hurdle is overcome, the chances of election are relatively high.

In line with this assumption, the non-confirmation of members running for re-election is rather unusual.[254] The last elections showed a high degree of re-nominations and re-elections.[255] A total of 21 members (61,8%) serving after the 2016 elections was not part of the ILC for the first time.[256] Non-confirmation of active special rapporteurs running for re-election is highly unlikely: in the elections from 2006 to 2016, all serving special rapporteurs that were re-nominated were also re-elected.[257]

The tendency to re-elect members is a pattern affecting most nationalities. The occasional non-confirmation regarded the candidates of States usually succeeding in achieving the election of their nationals, as well as candidates not coming from a State of that kind.[258] The two categories of States might react differently to the tendency towards re-election. For the States not having a high probability of achieving their nationals' elections, having one of their nationals in the ILC is an asset, potentially assuring these States a role in the codification and progressive development of international law for an extended period of time. From their perspective, the confirmation of current members, who eventually gained a good reputation, might seem a more promising way to achieve

252 Mr. Al-Marri (Qatar), Mr. Hassouna (Egypt), Mr. Hmoud (Jordan), Mr. Nolte (Germany), Mr. Petrič (Slovenia), Mr. Saboia (Brazil), Mr. Valencia-Ospina (Colombia) and Mr. Wako (Kenya).

253 These members are Mr. Perera (Sri Lanka, 2007-2011), Mr. Ojo (Nigeria, 2007-2011), Mr. Adoke (Nigeria, 2012-2016), Mr. El-Murtadi Suleiman Gouider (Libya, 2012-2016), Mr. Forteau (France, 2012-2016), Mr. Gevorgian (Russian Federation, 2012-14) and Mr. Kittichaisaree (Thailand, 2012-2016). Of these, only Mr. Forteau, Mr. Perera and Mr. El-Murtadi Suleiman Gouider (who withdrew prior to the actual elections in 2016) were re-nominated but not re-elected.

254 In the three elections looked at in the present study, the number of outgoing members re-nominated but not re-elected oscillated between three and five: in 2006, Mr. Daoudi (Syrian Arab Republic), Mr. Economides, Mr. Matheson (United States), Mr. Momtaz (Islamic Republic of Iran) and Mr. Pambou-Tchivounda, (Gabon), in 2011, Mr. Fomba (Mali), Mr. Galicki (Poland) and Mr. Perera (Sri Lanka), in 2016, Mr. El-Murtadi Suleiman Gouider, (Libya; withdrew prior to the elections), Mr. Forteau (France) and Mr. Wisnumurti (Indonesia.

255 In 2006, 23 members were re-nominated; 18 of them were re-elected (Mr. Economides, Mr. Kolodkin, Mr. Matheson, Mr Melescanu and Mr. Valencia-Ospina had been elected to the Commission during the quinquennium due to vacancies). This numbers further increased in the following election. In 2011, 26 members stood up for re-election; 23 of them were confirmed (Mr. Wood, Mr. Murase, Ms. Escobar Hernández, Mr. Huikang and Mr. Adoke had been elected to the Commission during the quinquennium due to vacancies). In 2016, 24 members raced for re-election, and 21 of them were confirmed (Mr. Vázquez-Bermúdez and Mr. Kolodkin had been elected to the Commission during the quinquennium due to vacancies).

256 Out of these, 19 had successfully run for election in the 2011 elections. Mr. Kolodkin (Russian Federation, 2003-2011) and Mr. Vázquez-Bermúdez (2007-2011) had served the Commission during previous periods but were not nominated for re-election by their governments in the 2011 elections. They however returned to the ILC during the quinquennium 2012-2016 (respectively in 2015 and 2013) to fill the casual vacancies arising from the resignations of Mr. Gevorgian (Russian Federation) and Mr. Vasciannie (Jamaica).

257 Active special rapporteurs running for re-election in 2006 were Mr. Galicki, Mr. Gaja, Mr. Kamto and Mr. Pellet; in 2011, Ms. Escobar-Hernández, Mr. Kamto and Mr. Valencia-Ospina; in 2016, Ms. Escobar-Hernández, Mr. Gómez-Robledo, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Tladi and Mr. Wood. Mr. Jacobsson was despite her uncompleted activity as a special rapporteur not re-nominated; in 2017, Ms. Lehto was chosen to be her successor for the topic "Protection of the environment in relation to armed conflicts".

258 For instance, all three nationals of permanent members of the Security Council not elected (Mr. Sinclair, United Kingdom, 1986; Mr. Matheson, United States, 2006; Mr. Forteau, France, 2016) had been part of the previous Commissions and were re-nominated by their governments.

the ongoing presence of their nationals in the ILC, than the nomination of new candidates. Consequently, some of the longest-serving members are candidates of States that managed to get only few of their nationals elected.[259]

Hence, there seems to be a correlation between the likeliness for States to obtain the election of their nationals and length of office. Influential States within their regional group, whose candidates are fairly likely to obtain election, can afford to change candidates more frequently. The absolute numbers of their nationals being elected over time are comparatively high, and the respective duration of service of these individuals on average relatively short.[260]

The frequency of re-election, especially of nationals of less influential States, can be read as indicating that the ILC members are more than exchangeable representatives of their States of origin. Individuals that already gathered relevant experiences are frequently preferred over individuals without this asset. Among the candidates nominated by comparably influential States, beyond political power, individual features such as experience seem capable of having an impact in elections.

II. Education – Centres and Peripheries of International Law

The ILC members are characterised by a great variety of factors dependent on the cultural-social environments they were socialized in.[261] The following analysis is limited to two basic features of their learned knowledge, decisively contributing to their abilities, their identity and their interaction: secondary education (1.) and language proficiency (2.). Candidates have to meet the expectations of the community of international lawyers to access the ILC. From that angle, exhibiting the education and languages skills common in the alleged – western[262] - centre of the international legal order, seems to positively affect the candidate's chances of election.

3. University Education: The Epicentres of the International Legal Order

The membership of the ILC pursues the goal of representing the different legal cultures of the world. The primary tool to ensure this representation are the regional quota according to which the members are elected. At first sight, representativeness is successfully achieved: beyond being

259 Some of the currently most senior members come from Qatar (Mr. Al-Marri), Jordan (Mr. Hmoud), Slovenia (Mr. Petrič), Kenia (Mr. Wako) and Colombia (Mr. Valencia-Ospina).

260 This is in particular true for the permanent members of the Security Council, see for instance the United States and the United Kingdom with respectively 11 and 9 different members. 4 of the 5 Nigerian members of the ILC served for not more than 5 years. A notable exception to this rule is France, having its nationals uninterruptedly elected to membership for the years 1949 to 2016, with a total of not more than 5 individuals. Compare the information on the terms of services on the ILC webpage, to be found under http://legal.un.org/ilc/guide/annex2.shtml. The advantages of short terms might be the frequency of fresh inputs; potential strategic disadvantages include the loss of the experience and charisma coming with length of tenure.

261 Despite the explicit nomination in the statute of the Commission, a categorization according to the members' roots in the "*principal legal systems of the world*" was deliberately refrained from. Classifying the legal systems of States according to the "families of law" they belong to (civil law, common law, Islamic law etc., or combinations of them) comes with as much difficulty and controversy as the identification of these families and sub-families themselves. The question of the role played by families of legal systems is however to some degree reflected in the issues regarding the legal education and language skills of members discussed in this section.

262 Acknowledging its contested and ambiguous connotations, the term "west" or "western" to describe specific states is employed in order to remain faithful to the Commission's own classification of regional groups.

connected to their States of origin through nationality, most members have strong links to their national legal systems. As the statements of qualifications show, States tend to nominate candidates well-known to their respective governments.[263] The members can hence be expected to be generally firmly rooted in their respective legal cultures and traditions. However, an analysis of their educational backgrounds significantly nuances this perception.[264]

Looking at the university education enjoyed by members, two characteristic features emerge. First, the members of the ILC are, in terms of their education, a highly cosmopolitan group. Only 17 of the 64 members assessed obtained their entire legal education in their States of origin.[265] 41 members enjoyed parts of their university education outside their home countries. A further 6 members obtained all their degrees outside their States of origin. The growing share of members who obtained their legal education entirely abroad reflects the increased educational mobility of ambitious international lawyers in the globalized world.[266]

Secondly, the members' cosmopolitan educational background did however not translate into a roughly proportionate representation of educational systems from different regional groups.[267] The number of members assessed who obtained at least one degree in any WEOG-State was disproportionately higher compared to any other regional group. All the 16 WEOG-nationals assessed in this study graduated from one or several universities in WEOG-States. Strikingly, a further 36 of the 48 members who were not WEOG-nationals were holders of one or several degrees obtained in WEOG-States. Hence a total of 52 of the 64 members assessed, a percentage in excess of 80%, received a significant part of their legal education in the universities of not more than 14 of the WEOG-States.[268]

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263 This issue is discussed in more depth in the sections regarding the professional background; in the current Commission, only one practitioner was primarily a professional with the UN and not with national institutions (Mr. Valencia-Ospina, Colombia); only two academics hold their principal position outside their home countries (Mr. Grossman Guiloff, Chile, professor in Washington, DC; and Mr. Jalloh, Sierra Leone, professor in Miami).

264 By university education, this study intends degrees in law (including, according to the varying terminologies, undergraduate, graduate, postgraduate education; bachelor, master and PhD level).

265 13 of these were nationals of global or regional powers, like France, the United Kingdom, Russia, China, Brazil, India, Japan, Italy or Argentina. These 13 members were Mr. Pellet and Mr. Forteau (France), Mr. Brownlie and Mr. Wood (United Kingdom); Mr. Kolodkin, Mr. Gevorgian and Mr. Zagaynov (Russian Federation); Mr. Huikang (China), Mr. Murase (Japan), Mr. Saboia (Brazil), Mr. Singh (India), Mr. Gaja (Italy) and Mr. Candioti (Argentina). The other 4 members having enjoyed their entire education in their home countries are Mr. Argüello Gómez (Nicaragua), Mr. Laraba (Algeria), Ms. Lehto (Finland) and Mr. Perera (Sri Lanka).

266 Between 2007 and 2011, only one member with a similar profile served on the ILC (Mr. Al-Marri, Qatar). This number grew to 3 in the years 2012-2016 (Mr. Al-Marri, Qatar; Mr. Gómez-Robledo, Mexico; Mr. Kittichaisaree, Thailand), whilst in the current ILC, 5 members have a background of this kind: (Mr. Al-Marri, Qatar; Mr. Gómez-Robledo, Mexico; Mr. Jalloh, Sierra Leone; Mr. Nguyen Hong Thao, Vietnam; and Ms. Oral, Turkey).

267 A total of 52 of the 64 members looked at (81,3%). The members not having obtained a degree in western universities were Mr. Argüello Gómez (Nicaragua), Mr. Candioti (Argentina), Mr. Gevorgian (Russian Federation), Mr. Huang (China), Mr. Kolodkin (Russian Federation), Mr. Laraba (Algeria), Mr. Murase (Japan), Mr. Perera (Sri Lanka), Mr. Saboia (Brazil), Mr. Singh (India), Mr. Vázquez-Bermúdez (Ecuador) and Mr. Zagaynov (Russian Federation). Except Mr. Vázquez-Bermúdez (who obtained degrees in Ecuador, Peru and Chile), all these members obtained their entire university education exclusively in their home countries.

268 In other words, although only 23,5% (8 out of 34) of the seats are to be held by WEOG-nationals, 81,3% of the members assessed held degrees from WEOG-States. The members not having obtained degrees in WEOG-States were Mr. Argüello Gómez (Nicaragua), Mr. Candioti (Argentina), Mr. Gevorgian (Russian Federation), Mr. Huikang (China), Mr. Kolodkin (Russian Federation), Mr. Laraba (Algeria), Mr. Murase (Japan), Mr. Perera (Sri Lanka), Mr. Saboia (Brazil), Mr. Singh (India), Mr. Vázquez-Bermúdez (Ecuador) and Mr. Zagaynov (Russian Federation). Except Mr. Vázquez-Bermúdez (who obtained degrees in Ecuador, Peru and Chile), all these members obtained their entire legal education exclusively in their home countries.

Vice versa, the education systems of States of other regional groups play a far minor role.[269] In total, 44 members were holders of one or several degrees awarded by universities located in States belonging to any of the other regional groups. These 44 were all part of the 48 members elected within regional groups other than the WEOG. Typically, members elected in these regional groups obtained their first degree in their home countries, to be later awarded an LL.M or PhD degree, or both, at universities of WEOG-States.[270] Conversely, not a single of the 16 WEOG-nationals held a degree awarded by universities located outside the WEOG-States. Whilst WEOG-institutions of knowledge production had a significant ascendancy over ILC members from outside the WEOG, the same could not be said *vice versa* regarding WEOG-nationals and universities outside the WEOG-States.

Another figure underlines the limited influence of the legal education systems of non-WEOG-States. Almost the totality of the 44 members with degrees of non-WEOG universities graduated in their States of origin. Only 2 out of these 44 members held degrees obtained in non-WEOG States other than their home countries.[271] In terms of their education, the members hence enjoyed relatively little cross-fertilization by non-western legal cultures and traditions. It seems that with regard to knowledge production, hardly any non-western traditions managed to exert significant influence over ILC members other than their own nationals.

The picture changes significantly when it comes to the influence of western traditions of international law emerging from the educational records of members. Some of these traditions had a particular noteworthy impact. 41 out of 64, almost two thirds of the total number of members assessed[272], held at least one degree obtained in either France[273], the United States[274], the United

269 15 members (23,4% of 64 members) held at least one degree of African universities (Mr. Adoke; Mr. Cissé; Mr. Comissário Afonso; Mr. Dugard; Mr. El-Murtadi Suleiman; Mr. Fomba; Mr. Hassouna; Mr. Kamto; Mr. Kemicha; Mr. Laraba, Mr. Ouazzani; Mr. Ojo; Mr. Peter; Mr. Tladi; Mr. Wako); 10 members (15,6%) obtained at least one degree in the Latin American and Caribbean region (Mr. Argüello Gómez; Mr. Candioti; Mr. Grossman Guiloff; Mr. Niehaus; Mr. Ruda Santolaria; Mr. Saboia; Mr. Valencia-Ospina; Mr. Vargas Carreño; Mr. Vasciannie; Mr. Vázquez-Bermúdez); 10 members (15,6%) earned at least one degree at Asian universities (Mr. Hmoud; Mr. Huang; Mr. Murase; Mr. Park; Mr. Perera; Mr. Rajput; Mr. Singh; Mr. Wisnumurti; Ms. Xue; Mr. Yamada); 9 members (14,1%) held at least one degree from Eastern European universities (Mr. Aurescu; Mr. Galicki; Mr. Gevorgian; Mr. Kolodkin; Mr. Melescanu; Mr. Nguyen; Mr. Petrič; Mr. Šturma; Mr. Zagaynov).

270 The remaining 4 non-WEOG-nationals received their whole education at WEOG-universities (Mr. Al-Marri, Qatar; Mr. Jalloh, Sierra Leone; Mr. Gómez-Robledo, Mexico; and Mr. Kittichaisaree, Thailand).

271 These members are Mr. Vázquez-Bermúdez (Ecuador; holding degrees from Peru and Chile) and Mr. Nguyen Hong Thao (Vietnam; holding degrees from the USSR).

272 A total of 41 out of 64, or 64,1%. Given that some members obtained degrees from more than one of these countries, the sum of the following figures per country is higher than 41.

273 15 members earned at least one degree at French universities: Mr. Al-Marri; Mr. Aurescu; Mr. El-Murtadi Suleiman Gouider; Mr. Fomba; Mr. Forteau; Mr. Gómez-Robledo; Mr. Kamto; Mr. Kemicha; Mr. Niehaus; Mr. Nguyen; Ms. Oral; Mr. Ouazzani; Mr. Park; Mr. Pellet; Mr. Šturma. This number equals the total number of members who obtained at least on degree from African universities, see above.

274 14 members hold at least one degree obtained at universities from the United States: Mr. Caflisch; Mr. Comissário Afonso; Ms. Escarameia; Mr. Hmoud; Ms. Jacobsson; Mr. Kittichaisaree; Mr. McRae; Mr. Murphy; Ms. Oral; Mr. Reinisch; Mr. Valencia-Ospina; Mr. Wisnumurti; Ms. Xue; Mr. Yamada.

Kingdom[275] or Switzerland[276]. By contrast, not more than 20 members held degrees awarded by universities of any other WEOG-States.[277]

Within the highly influential national education systems mentioned, specific institutions stick out as having been chosen particularly frequently by the ILC members for university education: the British duo of Oxford and Cambridge[278], the ivy league law schools of Columbia and Harvard in the United States[279], Paris as the neuralgic point of the French legal education system[280] and the francophone international law stronghold of Geneva[281]. 31 members, almost half of the total number, were educated at these prestigious hubs of international law.

In sum, reflecting the high requirements in terms of qualification, qualified international lawyers, the ILC members will mostly have earned at least one degree in their home country, and at least one degree abroad, very often at renowned universities. In terms of education, there is consequently an ascendancy of the (western) centres over the (non-western) peripheries, although most members will still be rooted in their national systems. Within the centre, most of the influence is exercised at a handful of places, which have built powerful traditions of international law.[282] Considering the aspiration to represent the "*principal legal systems of the world*", the result of this phenomena appears to be an indirect overrepresentation of the traditions of WEOG-States through the educational background of members.

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275 13 members have British degrees: Mr. Adoke; Mr. Brownlie; Mr. Dugard; Mr. Hassouna; Mr. Jalloh; Mr. Kittichaisaree; Mr. McRae; Mr. Murphy; Mr. Ojo; Mr. Rajput; Mr. Vasciannie; Mr. Wako; Mr. Wood.

276 5 members earned degrees at Swiss universities (Mr. Caflisch; Ms. Escobar Hernández; Ms. Galvâo Teles; Mr. Melescanu; Mr. Nolte). This does not mean Switzerland played politically a particular role in the history of the ILC; in fact, Mr. Caflisch was the first Swiss national elected to the ILC.

277 In percentage, 31,3%. These 20 members, who obtained degrees from the universities of in sum 10 countries, are Mr. Petrič, Mr. Reinisch (Austrian degrees); Mr. Cissé, Mr. Galicki, Mr. Jalloh, Mr. McRae, (Canadian degrees); Mr. Grossman Guiloff, Mr. Jalloh, Mr. Tladi (Dutch Degrees); Ms. Lehto (Finnish degrees); Mr. Niehaus, Mr. Nolte, Mr. Peter (German degrees); Mr. Gaja, Mr. Vargas Carreño (Italian degrees); Mr. McRae (degrees obtained in New Zealand); Ms. Escarameia, Ms. Galvâo Teles (Portuguese degrees); Ms. Escobar Hérnandez, Mr. Ruda Santolaria (Spanish degrees); Mr. Hmoud and Ms. Jacobsson (Swedish degrees). This number equals the sum of members holding either a French or Swiss degree.

278 9 members, equalling the total number of graduates of Eastern European universities (see above), had obtained degrees at either Cambridge (Mr. Dugard; Mr. Hassouna; Mr. Kittichaisaree; Mr. McRae; Mr. Murphy; Mr. Wood) or Oxford University (Mr. Brownlie; Mr. Jalloh) or both (Mr. Vasciannie).

279 8 members obtained degrees in ivy league law schools in the United States, Columbia University (Mr. Caflisch; Mr. Comissário Afonso; Mr. McRae; Mr. Murphy; Mr. Wisnumurti; Ms. Xue) and Harvard University (Ms. Escarameia; Mr. Kittichaisaree; Mr. Valencia-Ospina).

280 12 members had obtained at least one degree at the Parisian universities: Panthéon-Sorbonne (Paris I: Mr. Al-Marri; Mr. Aurescu; Mr. El-Murtadi Suleiman Gouider; Mr. Gómez-Robledo; Mr. Kemicha; Mr. Nguyen; Ms. Oral; Mr. Ouazzani), Panthéon-Assas (Paris II; Mr. Park; Mr. Pellet; Mr. Šturma) or Paris Ouest Nanterre La Défense (Paris X; Mr. Forteau; Mr. Gómez-Robledo).

281 All 5 members with degrees from Switzerland obtained them in Geneva (Mr. Caflisch; Ms. Escobar Hernández; Ms. Galvâo Teles; Mr. Melescanu; Mr. Nolte).

282 This phenomenon can perhaps most strikingly be observed throughout the decades of the ILC's existence regarding the universities of Oxford and Cambridge. Asides the many non-British ILC members having graduated from these two institutions, all British members ever elected to the ILC were educated at either Cambridge (7) or Oxford (2). Two British members were at some point of their careers "Whewell Professor of International Law" at Cambridge University (Sir Hersch Lauterpacht, Sir Derek Bowett); three others were nominated "Chisele Professor of Public International Law" at Oxford University (James Leslie Brierly, Sir Humphrey Waldock, Ian Brownlie). Similar educational background and academic honours can be met with British ICJ judges, revealing patterns in the recruitment by the United Kingdom of its candidates for some of the most prestigious and influential positions for international lawyers in the United Nation system.

The soft power of the WEOG-States, finding expression in their dominant legal discourses and the promoted worldviews, is hence crucially perpetuated through their academic institutions. These institutions were attended not only by all the WEOG-nationals, but also by three quarters of the elected non-WEOG-nationals assessed in this study. Conversely, as the legal education centres of non-WEOG-States do in most cases not have a comparable leverage beyond national borders, this dynamic works only as a one-way-street. Whilst this finding seems intuitive, its scale makes the phenomenon remarkable: in Foucaultian terms, it emphasises the potential impact of the production of knowledge as an instrument of power.

4. Language: The Predominance of English and French

Closely connected to the impact of education is the ascendancy of language skills. Looking at the members in service in the quinquennia in question, most members were nationals of States with at least one of the Commission's working languages[283] as an official language.[284] The emerging picture is a tripartition. 20 members, close to one third of the assessed former and current members, are nationals of States having either English[285] or French[286] or both[287] as official languages. Another third of the membership, 22 members, is composed of nationals of States with another working language of the ILC as an official language: Spanish[288], Arabic[289], Russian and Chinese[290]. The final third of as well 22 members is composed by nationals of States having other official languages.[291]

283 The ILC's working languages correspond to the UN working languages: Arabic, Chinese, English, French, Russian and Spanish, see rule 51, Rules of Procedure of the General Assembly.

284 Members are in the following considered for analytical reasons "native speakers" of their home country's official languages.

285 13 members were nationals of States having English as an official language: Mr. Adoke and Mr. Ojo, Nigeria; Mr. Brownlie and Mr. Wood, United Kingdom; Mr. Dugard and Mr. Tladi, South Africa; Mr. Jalloh, Sierra Leone; Mr. Murphy, United States; Mr. Peter, Tanzania; Mr. Rajput and Mr. Singh, India; Mr. Vasciannie, Jamaica and Mr. Wako, Kenya.

286 French is an official language in the home countries of 5 members: Mr. Caflisch, Switzerland; Mr. Cissé, Côte d'Ivoire; Mr. Fomba, Mali; Mr. Forteau and Mr. Pellet, France.

287 Mr. Kamto (Cameroon) and Mr. McRae (Canada) are nationals of States having both English and French as official languages.

288 10 former and current members are natives of Spanish-speaking countries: Mr. Argüello Gómez, Nicaragua; Mr. Candioti, Argentina; Ms. Escobar Hernández, Spain; Mr. Gómez-Robledo, Mexico; Mr. Grossman Guiloff, Chile; Mr. Niehaus, Costa Rica; Mr. Ruda Santolaria, Peru; Mr. Valencia-Ospina, Colombia; Mr. Vargas Carreño, Chile and Mr. Vázquez-Bermúdez, Ecuador.

289 7 former and current members are native speakers of Arabic: Mr. Al-Marri, Qatar; Mr. El-Murtadi Suleiman, Libyan Arab Jamahiriya; Mr. Hassouna, Egypt; Mr. Hmoud, Jordan; Mr. Kemicha, Tunisia; Mr. Laraba, Algeria; Mr. Ouazzani, Morocco.

290 3 members were nationals of States having Russian (Mr. Gevorgian, Mr. Kolodkin and Mr. Zagaynov, Russian Federation) as an official language, whilst 2 were nationals of a State having Chinese as an official language (Mr. Huang and Ms. Xue, China).

291 This group is composed of 22 members: Mr. Aurescu (Romania) Mr. Comissário Afonso (Mozambique), Ms. Escarameia (Portugal), Mr. Gaja (Italy), Mr. Galicki (Poland), Ms. Galvão Teles (Portugal), Ms. Jacobsson (Sweden), Mr. Kittichaisaree (Thailand), Ms. Lehto (Finland), Mr. Melescanu (Romania), Mr. Murase (Japan), Mr. Nolte (Germany), Mr. Nguyen (Viet Nam), Mr. Park (South Korea), Mr. Perera (Sri Lanka), Mr. Petrič (Slovenia), Ms. Oral (Turkey), Mr. Reinisch (Austria), Mr. Saboia (Brazil), Mr. Šturma (Czech Republic), Mr. Wisnumurti (Indonesia) and Mr. Yamada (Japan). The number of members nationals of States not having any ILC working language as an official language variated little over the three quinquennia, oscillating around one third of the membership. 12 members in the years 2007-2011 were nationals of States not having any ILC working language as an official language; 10 in the years 2012-2016; and again 12 in the years 2017-2021.

Whilst hence on paper there seems to be balance between English and French and the other working languages of ILC, the role played by these languages varies in practice. The quinquennia 2007-2011[292] and 2012-2016[293] were characterised by an equal number of native speakers of either English and French on the one hand, and of native speakers of any other ILC working language on the other hand. The analysis of the ILC members elected in 2016 indicated a decreasing influence of English and French at the expense of the Commission's other working languages: the 7 nationals of States having Spanish as an official language equal the 7 members from anglophone countries. Whilst only 1 member is a national of a French-speaking country, 5 members are native speakers of Arabic.[294]

Despite these findings, the effective role of English and French emerges in the statements of qualifications. Most members claim good knowledge of either English or French, often both, and will have published in either of these two languages. Sticking to the language skills certified by university degrees, in the current Commission, although only 1 member is a national of a francophone country, 12 members obtained significant parts of their legal education in French.[295] 7 members are nationals of anglophone countries, but 14 members obtained degrees in English.[296] Considering the total 64 ILC members looked at, 32 earned degrees in English, and 22 in French. Even if only

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292 In 2007, 6 members were nationals of English-speaking States (Mr. Brownlie, United Kingdom; Mr. Dugard, South Africa; Mr. Ojo, Nigeria; Mr. Singh, India; Mr. Vasciannie, Jamaica; Mr. Wako, Kenya), 3 came from French-speaking countries (Mr. Caflisch, Switzerland; Mr. Fomba, Mali; Mr. Pellet, France), and 2 from States recognizing both English and French as official languages (Mr. Kamto, Cameroon and Mr. McRae, Canada), for a total of 11. Conversely, 5 were native speakers of Spanish (Mr. Candioti, Argentina; Mr. Niehaus, Costa Rica; Mr. Vargas Carreño, Chile; Mr. Valencia-Ospina, Colombia; Mr. Vázquez-Bermúdez, Ecuador), 4 of Arabic (Mr. Al-Marri, Qatar; Mr. Hassouna, Egypt; Mr. Hmoud, Jordan; and Mr. Kemicha, Tunisia), and 1 respectively of Russian (Mr. Kolodkin, Russia) and Chinese (Ms. Xue, China), for a total of 11 as well.

293 In 2012, the members from English speaking countries were 8 (Mr. Adoke, Nigeria; Mr. Peter, Tanzania; Mr. Murphy, United States; Mr. Singh, India; Mr. Tladi, South Africa; Mr. Vasciannie, Jamaica; Mr. Wako, Kenya; Mr. Wood, United Kingdom); 2 were nationals of francophone States (Mr. Caflisch and Mr. Forteau) and again 2 were nationals of bilingual Anglo- and francophone States (Mr. Kamto, Cameroon and Mr. McRae, Canada), for a total of 12. With regard to the other working languages of the ILC, respectively 5 were native speakers of Spanish (Mr. Candioti, Argentina; Ms. Escobar Hernández, Spain; Mr Gómez-Robledo, Mexico; Mr. Niehaus, Costa Rica; Mr. Valencia-Ospina, Colombia) and Arabic (Mr. Al-Marri, Qatar; Mr. El-Murtadi Suleiman, Libyan Arab Jamahiriya; Mr. Hassouna, Egypt; Mr. Hmoud, Jordan; and Mr. Laraba, Algeria), plus respectively 1 native speaker of Russian (Mr. Gevorgian, Russia) and Chinese (Mr. Huang, China) for an equal total of 12.

294 The native speakers of English are Mr. Jalloh, Sierra Leone; Mr. Murphy, United States; Mr. Peter, Tanzania; Mr. Rajput, India; Mr. Tladi, South Africa; Mr. Wako, Kenya; and Mr. Wood, United Kingdom. The 1 national of a francophone country is Mr. Cissé, Côte d'Ivoire. The nationals of Spanish-speaking countries are Mr. Argüello Gómez, Nicaragua; Ms. Escobar Hernández, Spain; Mr. Gómez-Robledo, Mexico; Mr. Grossman Guiloff, Chile, Mr. Ruda Santolaria, Peru; Mr. Valencia-Ospina, Colombia; Mr. Vázquez-Bermúdez, Ecuador. The 5 native speakers of Arabic are Mr. Al-Marri, Qatar; Mr. Hassouna, Egypt; Mr. Hmoud, Jordan; Mr. Laraba, Algeria; Mr. Ouazzani, Morocco. Considering the respectively 1 native speakers of Russian (Mr. Kolodkin, replaced by his successor Mr. Zagaynov, both Russian Federation) and Chinese (Mr. Huang, China), there are in total 8 native speakers of either English or French, whilst there are 14 native speakers of any other ILC working language.

295 Mr. Al-Marri (Paris I, Rennes, Clermont-Ferrand); Mr. Aurescu (Paris I); Mr. Cissé (Abidjan, Quebec); Ms. Escobar-Hérnandez (Geneva); Ms. Galvâo Teles (Geneva); Mr. Gómez-Robledo (Paris I, X); Mr. Nguyen (Paris I); Mr. Nolte (Geneva); Ms. Oral (Paris I); Mr. Ouazzani (Paris I); Mr. Park (Paris II) and Mr. Šturma (Paris II) earned degrees in French.

296 Those having obtained degrees in English are: Mr. Cissé (Ottawa); Mr. Grossman (Amsterdam); Mr. Hassouna (Cambridge); Mr. Hmoud (Washington DC, New Hampshire, Lund); Mr. Jalloh (McGill, Oxford, Amsterdam); Mr. Murphy (Virginia, Cambridge, New York Columbia); Ms. Oral (Berkeley, Santa Clara, Washington DC); Mr. Peter (Dar es Salaam); Mr. Rajput (Pune, London, Singapore); Mr. Reinisch (New York NYU); Mr. Tladi (Pretoria, Connecticut, Rotterdam); Mr. Valencia-Ospina (New York Columbia, Harvard); Mr. Wako (Nairobi, London) and Mr. Wood (Cambridge).

a total of 20, less than one third of the members, were nationals of States with either English or French as official languages, 51 of the 64 members, close to 80%, earned degrees in either or both of these languages.

Conversely, whilst knowledge of Spanish is frequently claimed in the *curricula vitae*, only the nationals of Spanish-speaking countries obtained degrees in Spanish.[297] Knowledge of Russian is claimed, besides the Russian members, by few nationals of countries with historical ties with the USSR in the past.[298] None of the members claimed any knowledge of Chinese and Arabic besides native speakers.

Those members who are national of States having none of the ILC working languages as an official language, will still have to formulate their interventions in one of these six languages. They will usually not use Spanish, Arabic, Russian or Chinese, but they will almost certainly make their contributions in the plenary either in French, or more commonly, in English.[299] Ultimately, at least two thirds of the members will make their formal statements in either of those two languages. Only the one third of members being native speakers of other working languages of the Commission will intervene in those languages. In more informal settings, the dominant role of English becomes even more articulate. In the Drafting Committee, despite the possibility of intervening in any ILC working language given the availability of simultaneous translation, some members will renounce speaking in their native language. As discussions generally take place in English[300], the use of this language allows a more immediate participation in the struggle over consensus.

Concepts acquire sense through language; the dominance of English and French give a prominent role to the concepts developed by the legal cultures working in these languages, like the common and civil law traditions. [301] Observing the practices of language use in the ILC seems to further question the ideal of representation of the "*principal legal systems of the world",* contributing to the dominance of the centre over the periphery. Paraphrasing Wittgenstein, the following seems to apply: the limits of our language are the limits of our influence.[302]

III. Personal Features Relating to Age and Sex– An "Old Boys' Club"?

ILC Membership is reserved to practitioners and academics with extraordinary professional achievements. As a consequence, young international lawyers will have more difficulties in getting

297 All the former and current members who are native speakers obtained degrees in Spanish, except for Mr. Gómez-Robledo, who obtained his entire university education in Paris.

298 The 3 members being native speakers of Russian are Mr. Gevorgian, Mr. Kolodkin and Mr. Zagaynov. Knowledge of Russian is further indicated by the legal education or claimed by Mr. Galicki (Poland), Mr. Nguyen (Vietnam), Mr. Petrič (Slovenia) and Mr. Šturma (Czech Republic).

299 Most these 22 members obtained at least one degree in either Anglo- or francophone countries (except Ms. Lehto, Mr. Murase, Mr. Perera, Mr. Petrič and Mr. Saboia) whilst none of them obtained a degree in any other ILC working language.

300 *The work of the International Law Commission*, p. 59, Section c) and FN 246, referring to *Yearbook of the International Law Commission*, doc. A/CN.4/SER.A/1996/Add.l (Part. 2) (1996), para. 216.

301 Few members (Mr. Caflisch, Mr. Cissé and Ms. Oral) obtained degrees in both languages. This relatively clear division could indicate that members will usually be affiliated to the families of either common law or civil law, or at least predominantly influenced by either of these traditions.

302 Cfr. L. Wittgenstein, *Tractatus logico-philosophicus: Logisch-philosophische Abhandlung*, Edition Suhrkamp, 12 ([Frankfurt am Main]: Suhrkamp, 1963), 5.6.

nominated for ILC elections, due to their usual deficit in professional experiences. On the other end of the scale, there is no age limit. Not infrequently, ILC members are highly decorated international law veterans still willing to be involved in international affairs. The ILC is dominated by members in the second half of their careers (1.). The overwhelming majority of members identifies as male – gender equality is far from achieved within the ILC (2.).

3. Age

Dividing the ILC members into three approximative age groups, the following distribution[303] emerges: around one third of the members were born in the 1930s and 1940s (a.); around one sixth in the 1970s and 1980s (b.); the remaining half was born in the 1950s and 1960s (c.).

d. Born in the 1930s and 1940s

Analysing recent ILC membership according to the age of members, the quantitative role of experienced senior international lawyers becomes visible. Whether the current ILC[304] or the totality of members assessed[305]: an important percentage of members (roughly 40%) were born in the 1930s and 1940s. Age did not necessarily imply long tenure: for instance, 3 current members joined the ILC for the first time in 2017, when they were in their seventieth year of age or older.[306] As of 2017, almost one third of the current members were aged seventy or older.[307]

The achievements of these members, including the effort some of them put into fulfilling their tasks as special rapporteurs or speakers in the plenary, were widely recognised. For instance, Michael Wood was appreciated by his colleagues as one of the most diligent and hardest working ILC members.[308]

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303 This approximative ratio reflects the current ILC (32,3% - 14,7% - 52,9%); taking the totality of 64 members as a sample, the percental ratio of the three groups is 39,0% - 9,4% - 51,6%.

304 3 members elected in 2016 were born in the 1930s, and 8 in the 1940s. Current members from the 1930s are Mr. Petrič (born 1936); Mr. Hassouna (born 1937) and Mr. Valencia-Ospina (born 1939); Current members born in the 1940s are Mr. Argüello Gómez (born 1946), Mr. Ouazzani Chahdi (born 1945), Mr. Grossman Guiloff (born 1947), Mr. Laraba (born 1947), Mr. Murase, (born 1943), Mr. Wako (born 1945), Mr. Saboia (born 1942) and Mr. Wood (born 1947).

305 Looking at the members in service between 2007 and 2021, 10 were born in the 1930s; 15 were born in the 1940s, a combined total of 39,6%. Former members born in the 1930s are Mr. Yamada (born 1931), Mr. Brownlie (born 1932), Mr. Candioti (born 1936), Mr. Dugard (born 1936), Mr. Gaja (born 1939), Mr. Caflisch (born 1936) and Mr. Vargas Carreño (born 1937); former members born in the 1940s are Mr. Pellet (born 1947), Mr. Niehaus (born 1941), Mr. Melescanu (born 1941), Mr. McRae (born 1944), Mr. Galicki (born 1943), Mr. El-Murtadi Suleiman (born 1945) and Mr. Wisnumurti (born 1940).

306 These members are Mr. Argüello Gómez (born 1946), Mr. Ouazzani Chahdi (born 1945) and Mr. Grossman Guiloff (born 1947).

307 All current members born in the 1940ies were born in 1947 or earlier, meaning that in 2017, 11 members (32,3%) were in their 70th year of life or older.

308 See the highly appreciative commentary on Sir Michael Wood's dedication posted by the former ILC member Kriangsak Kittichaisaree, in D. Akande, *Outcome of 2016 Elections to the International Law Commission + Trivia Questions*. http://www.ejiltalk.org/outcome-of-2016-elections-to-the-international-law-commission/ (last access: 13 March 2019).

In the quinquennium 2007-2011, Ian Brownlie, John Dugard, Chusei Yamada and Alain Pellet stood out as prime examples of this charismatic genre of ILC members. Whilst they left the Commission in 2011, other senior members like Lucius Caflisch, Enrique Candioti or Eduardo Valencia-Ospina continued to serve on the Commission. In the current quinquennium, Ernest Petrič is in terms of age the "dean" of the ILC; other notable members aged 70 or older include, besides Michael Wood, Gilberto Vergne Saboia, Hussein Hassouna, and Shinya Murase.

e. Born in the 1970s and 1980s

Albeit numerically weaker, members characterized by their young(er) demographics play a significant role in the ILC. Six members in service in the years since 2007 were born in the 1970s or later. In the quinquennium 2011-2016, only 2 members were born after 1969: Mathias Forteau[309] and Dire Tladi[310]. In the elections in 2016, Mr. Forteau was re-nominated by France, but not re-elected. Mr. Tladi was however joined by 4 newly elected young members, namely Patrícia Galvão Teles[311], Bogdan Aurescu[312], Charles C. Jalloh[313] and Aniruddha Rajput[314]. The nomination of Mr. Rajput, the youngest candidate ever running for ILC membership and the youngest to get elected, caused polemics, as the Indian press doubted his qualifications were sufficient to consider him to be of "recognized competence in international law", speculating over political motivations for the non-consideration of more experienced international lawyers from India.[315] Without entering the merits of these disputes, they confirm the suspicion young members might at times be confronted with. Nevertheless, the young ILC members gave proof of being hard-working, vigorous and critical in their function. Whilst the non-confirmation of Mr. Forteau in 2016 surprised many, the appreciation of Mr. Tladi is underlined by his nomination as Special Rapporteur for the topic "*Jus Cogens*" in 2015.[316]

f. Born in the 1950s and 1960s

The remaining half of members were born in the 1950ies and 1960ies.[317] These members had already accumulated significant professional experiences. They usually had not retired from their professional activities in practice and academia, meaning they had strong institutional ties, the ambition to reach further prestigious positions in the international legal order, and a finger on the

309 France, born 1974.
310 South Africa, born 1975.
311 Portugal, born 1970.
312 Romania, born 1973.
313 Sierra Leone, born between 1975 and 1980. Not all *curricula vitae* explicitly state the date of birth; however, the other curricular information contained (year of final exams of primary education, year of completion of first secondary degree etc.) allow to approximate the age.
314 India, born 1982 or 1983; press reports claimed he was 33 years old at the time of election in November 2016, see the article on indiatoday.in, S. Biswas, 'All you need to know about Aniruddha Rajput, India's newest member at UN's International Law Commission', indiatoday.in, 04 November 2016)
315 D. Mitra, 'PMO Foists Junior Lawyer with RSS Links as Indian Nominee to Top World Legal Body', The Wire, 14 October 2016 (last access: 13 March 2019)
316 See the first report, D. Tladi, *First report on jus cogens: doc. A/CN.4/693* (2016).
317 18 of those currently serving in (52,9%), and 33 of those having served since 2007 (51,6%),

pulse of time regarding the most important trends and topics. Some particularly active and dedicated members stand out, pragmatically driving the Commission's progress: Georg Nolte[318], Sean Murphy[319] and Roman Kolodkin[320] deserve particular mention.

4. Sex – The Hesitant Rise of Female Membership

The ILC does not have a great record in promoting gender equality in membership. For decades, the members were exclusively male. The first female candidates were nominated in 1961 and 1991.[321] It was not before the year 2001 that with Paula Escarameia (Portugal) and Hanqin Xue (China) 2 female members were elected.

In the 2006 elections, they were confirmed and joined by Marie G. Jacobsson (Sweden, who later became the first female special rapporteur in the history of the ILC), raising the total number of female members to 3. During the quinquennium 2006-2011, 2 of these 3 female members were replaced. Whilst Ms. Xue was replaced by a Chinese male successor, Huikang Huang[322], Concepción Escobar Hernández (Spain, who would later have become the second female special rapporteur of the ILC), was elected to fill the vacancy after the passing away of Ms. Escarameia[323]. In the elections in 2011, Ms. Jacobsson and Ms. Escobar Hernández were confirmed, but not joined by other female members, signing a decrease in female membership. The 2016 elections saw this number rise again to 4, as Ms. Escobar Hernández was joined by Nilüfer Oral (Turkey), Marja Lehto (Finland, since 2018 the third female special rapporteur of the ILC) and Patrícia Galvão Teles (Portugal).

Despite the increase female membership since the last election, the numbers were fluctuant and generally low[324], and mainly confined to the WEOG[325]. The dominance of male membership is likely to affect the ILC's discursive practices in manifold ways; investigating these issues transcends the scope of this study.

IV. Analysis – Comparing Elected and Unelected Candidates

As last step for this part of the analysis, the comparison of successful and unsuccessful (hence elected and not elected) [326] candidates in the relevant period might prove productive for an understanding of the workings of the Commission. Over time, the election process became gradually

318 Germany, born 1959.
319 United States, born around 1960.
320 Russian Federation, born 1960.
321 See *The work of the International Law Commission*, vol. I, p. 8 (FN 24).
322 Ms. Xue was elected to the bench of the ICJ; see the membership records on the Commission's webpage, to be found under http://legal.un.org/ilc/guide/annex2.shtml, FN 39 (last access: 13 March 2019).
323 See the membership records on the Commission's webpage, to be found under http://legal.un.org/ilc/guide/annex2.shtml, FN 41 (last access: 13 March 2019).
324 6 of 229 members (3,8%) and 3 of 61 Special Rapporteurs (4,9%) in the ILC's history were women.
325 Except for Ms. Xue, all female ILC members were nominated by WEOG-States. In the 2016 elections, the WEOG-States seem to have agreed on an internal quota to fill half of its eight allocated seats with female members. This seems to have contributed to the unexpected non-confirmation of the French candidate, Mr. Forteau.
326 The decisive criterion considered was whether a candidate did get elected in any of the three elections between 2006 and 2016 and hence served as a member at some point of time while the topic of State official immunity was

more competitive, as more candidates ran for membership – at least in some regional groups. The overall group of non-elected candidates is composed of a total of 32 individuals, half as many as the 64 successful candidates.[327] Reflecting the various degrees of competition over seats in the different regional groups, the majority of these candidates came from African, Asian and Latin American States. In detail, 10 were nationals of States belonging to the GRULAC-Group[328], 8 to the African Group[329], 8 to the Asia-Pacific Group[330], 5 to the WEOG-Group [331] and only 1 to the EEG-Group[332].

The following section analyses this group of individuals according to the criteria applied to the members, with the goal of detecting eventual analogies and deviations. Are there any significant differences between successful and unsuccessful candidates, do any patterns explaining the outcome of elections emerge? Do the legal education, linguistic proficiency, age, gender, nationality and eventual previous experience in the ILC influence the likeliness of successful election?[333]

discussed, or not. **(I.)** In the group of "successful candidates" are hence included those candidates who managed to get elected in some of these occasions, but failed in others, like Mr. Fomba, Mr. Galicki and Mr. Perera (elected in 2006, not elected in 2011), Mr. Wisnumurti (elected in 2006 and 2011, not elected in 2016), Mr. El-Murtadi (elected in 2011, not elected in 2006 and 2016), Mr. Kittichaisaree (not elected in 2001, elected in 2011, Mr. Melescanu (not elected in 2001, elected in 2006) Mr. Forteau (elected in 2011, not elected in 2016) or Mr. Argüello Gómez and Mr. Cissé (not elected in 2011, elected in 2016). **(II.)** Conversely, lawyers that were members before 2007 but failed to get elected on any occasion between 2006 and 2016 are counted as "unsuccessful candidates" (Mr. Economides was a member from 1997 to 2001 and from 2003 to 2006; Mr. Daoudi was a member from 2002 to 2006; Mr. Momtaz from 2000 to 2006; Mr. Matheson from 2003 to 2006; Mr. Pambou-Tchivounda from 1992 to 2006; Mr. Solari Tudela from 1987 to 1991). Other categorisations would have been possible, for instance a tripartition between candidates successful in all elections they participated, candidates never elected in any election and candidates successful in some elections and unsuccessful in others. The consideration underlying the choice made here was the priority of juxtaposing those candidates that had finally at some point engaged with the topic of State official immunity, and those that had not. (**III**.) Included in the group of "unsuccessful candidates" are those that withdrew prior to the actual elections, but who were nominated by their delegations as candidates, and whose *curricula vitae* are included in the statements of qualifications. This was the case of Mr. Solari Tudela (Peru) in 2006, Mr. Subedi (Nepal) in 2011 and Mr. Appreku (Ghana); Mr. Borrego Pérez (Venezuela), Mr. El-Murtadi Suleiman Gouider (Libya); Mr. Habarugira (Burundi); Mr. M'viboudoulou (Congo); and Mr. Tungo (Sudan) in 2016.

327 Deducting from the total 43 unsuccessful candidatures those candidates that succeeded in other elections assessed (see above) and taking into consideration multiple ill-success (Mr. Momtaz failed to get elected both in 2006 and 2016; the same happened to Mr. Maluwa in 2011 and 2016), the outcome is a total of 32 individual candidates never successful between 2006 and 2016.

328 Unsuccessful candidates from this group were Mr. Solari Tudela (Peru), 2006; Mr. López Contreras (Honduras) 2006; Mr. Ferrero Costa (Peru), 2011; Mr. Limon (Suriname), 2011; Ms. del Luján Flores (Uruguay), 2011; Mr. Salgado Espinoza (Ecuador), 2011; Mr. Kohen (Argentina), 2016; Mr. Ventura Robles, (Costa Rica), 2016; Mr. Collot (Haiti), 2016; and Mr. Borrego Pérez (Bolivarian Republic of Venezuela), 2016.

329 In detail: Mr. Pambou Tchivounda, (Gabon), 2006; Mr. Maluwa (Malawi), 2011; Mr. Tungo (Sudan), 2011 and 2016; Mr. Afande (Togo), 2016; Mr. Ugirashebuja (Rwanda), 2016; Mr. Appreku (Ghana), 2016; Mr. Habarugira, (Burundi), 2016; and Mr. M'viboudoulou (Congo), 2016.

330 Mr. Buena (Philippines), 2006; Mr. Daoudi (Syrian Arab Republic), 2006 and 2011; Mr. Momtaz (Iran), 2006 and 2016; Mr. Ziadé (Lebanon), 2006; Ms. Ariffin (Malaysia), 2011; Mr. Droushiotis (Cyprus), 2011; Mr. Subedi (Nepal), 2011; Mr. Mohamad (Malaysia), 2016.

331 Mr. Matheson (United States), 2006; Mr. Versan (Turkey), 2006; Mr. Economides (Greece), 2006; Mr. Wouters (Belgium), 2011; and Mr. Brown (Australia), 2016.

332 This candidate was Mr. Zybari (Albania), 2016.

333 Another interesting dimension of analysis would be to observe the competition within national settings for nomination, to investigate whether there are significant differences between the profiles of those international lawyers States consider apt to run for election, and the profiles of those discarded. The lack of information regarding these usually non-public processes constitutes a serious obstacle to a similar investigation.

3. Comparing Legal Education, Language Skills, Age, Sex and Experience - Substantial Similarity of Elected and Unelected Candidates

(1) *University education*: In terms of legal education, the two groups seem quite comparable. Some unelected candidates delivered in their statements of qualifications incomplete or unclear information regarding their educational background[334] – not necessarily an indicator of the professionalism of the candidature[335]. Basing the inquiry on the information specified by candidates, the numbers highlighting the places where university education was obtained differ, but not by much. Between two thirds and three quarters of the individuals of both groups obtained at least one degree outside their home countries.[336] The elected members constituted altogether a slightly more cosmopolitan group.[337]

Similarly, differences regarding the figures relating to the western-centrism of educational backgrounds were minor: the percentage of candidates holding at least one degree from a legal education institute of the WEOG-States oscillated around 80%, compared to a slightly higher percentage among members.[338] When juxtaposing the education of unelected candidates from the WEOG-States to those from other groups, proportions similar to those observed among members emerged. The ratio of holders of at least one western degree is slightly lower among non-WEOG candidates than among non-WEOG members[339]; the absence of WEOG-candidates with non-WEOG degrees is identical[340]. Whilst a great majority of unelected candidates from non-WEOG States held degrees from universities of non-WEOG States[341], earning a degree at a non-WEOG school located outside the State of origin was an exceptional phenomenon[342].

In line with these findings, unelected candidates had comparable preferences for the centres of international legal education as elected ones. If the percentages of unelected candidates having

334 Mr. M'viboudoulou, Ms. Ariffin, Ms. Del Luján, Mr. Droushiotis and Mr. Salgado Espinoza provided incomplete information on their university education, or no information at all.

335 Although it is striking that similar cases of incomplete information on the educational background could not be observed among the elected candidates, it cannot be verified whether these shortcomings of *curricula* had any impact on the outcome of elections.

336 22 of 32 unsuccessful candidates (68,8%; no information for 5 candidates) compared to 47 of 64 elected members (73,4%). Among the latter group, 17 of 64 obtained their entire secondary education in their home countries (26,6%), whilst the same can with certainty only be affirmed about 5 of 32 unsuccessful candidates (16,9%). This percentage might be higher, as some of the members not specifying their background might have obtained their entire legal education at home.

337 This impression seems to be confirmed by another finding: whilst among the members, 6 out of 64 (9,4%) had obtained their entire education in universities outside their home countries, only one unsuccessful candidate (3,1%) showed the same features (Mr. Momtaz, Iran, educated in France).

338 In detail, 23 out of 32 unsuccessful candidates (71,9%; no information delivered by 5 candidates) and 52 out of 64 members (81,3%) obtained degrees at western universities.

339 18 out of 27 non-WEOG unsuccessful candidates (66,7%; no records on 5 candidates), compared to 36 of 48 non-WEOG members (75%) obtained at least one degree in WEOG-universities.

340 All 5 non-elected WEOG-candidates obtained their entire university education in WEOG-universities, just as the 16 nationals of WEOG-States.

341 In detail, 22 of 27 non-western unsuccessful candidates (81,5%, no information for 5 candidates) obtained at least one degree in non-western universities, compared to 43 out of 47 non-western members (91,5%). Considering it likely that most of the non-western unsuccessful candidates not having provided information regarding their educational background will have obtained at least one degree in their respective home States, the effective percentage of individuals with at least one non-western degree is probably very similar among elected and unelected non-western candidates, if not higher among the unsuccessful ones.

342 If this was the case of two members, only one unelected candidate obtained a degree in a university in a non-WEOG-State that was not his State of origin (Mr. Tungo, Sudan, who obtained a degree in Morocco).

obtained at least one degree in France[343], the United Kingdom[344] or Switzerland[345] are similar to those among members, the number drops significantly regarding those having obtained education in the United States[346]. Analogously, if the universities of Oxford and Cambridge[347], Paris[348] and Geneva[349] were comparably popular among both groups, only one non-elected candidate obtained a degree at the law school of an ivy league law school in the United States[350]. Ultimately, the picture emerging is that the educational background of both elected and unelected candidates is highly cosmopolitan and western-centric – although slightly more so in the case of successful candidates.[351]

(2) *Languages*: The linguistic proficiency of non-elected candidates does not reveal significant insights either. If the numbers of unsuccessful candidates who are nationals of States having English[352] or Arabic[353] as an official language were roughly in line with the numbers among members,

343 8 unsuccessful candidates (25%), compared to 15 out of 64 (23,4%) members. In detail: Mr. Afande, Mr. Collot, Mr. Daoudi, Mr. Economides, Mr. Mohamad, Mr. Momtaz, Mr. Pambou Tchivounda and Mr. Ziadé.

344 7 unsuccessful candidates (21,9%) compared to 13 out of 64 (20,3%) members. In detail: Mr. Brown, Mr. Maluwa, Mr. Subedi, Mr. Tungo, Mr. Ugirashebuja, Mr. Versan and Mr. Ziadé.

345 2 unsuccessful candidates (6,3%) compared to 5 out of 64 (7,8%) members. In detail: Mr. Kohen and Mr. Solari Tudela.

346 3 unsuccessful candidates (9,4%) compared to 14 out of 64 (21,9%) members. Possibly, this finding could be connected to the States of origin of unelected candidates and the high cost of legal education in the United States Several of the non-elected candidates were nationals of some of the least wealthy countries in the world. Of the three unelected candidates having obtained university education in the United States, one was a citizen of the United States (Mr. Matheson), one of Belgium (Mr. Wouters) and one of Peru (Mr. Ferrero Costa).

347 6 unsuccessful candidates had obtained degrees in either Cambridge (Mr. Maluwa, Mr. Tungo, Mr. Versan and Mr. Ziadé), Oxford (Mr. Subedi) or both (Mr. Brown) for a total 18,8% (6 out of 32), compared to 14,1% (9 out of 64) of successful candidates.

348 4 unsuccessful candidates earned degrees in Paris (Mr. Collot, Mr. Daoudi, Mr. Momtaz and Mr. Ziadé) for a total of 12,5%, compared to 12 out of 64 (18,8%) successful candidates.

349 Both candidates with Swiss degrees (Mr. Kohen and Mr. Solari Tudela) graduated in Geneva.

350 This candidate was Mr. Wouters (Yale, Harvard) for a percentage of 3,1%, compared to the percentage of 12,5% (8 out of 64) among members.

351 For instance, whilst 41 out of 64 members (64,1%) had obtained a degree in either France, Switzerland, the UK or the US, the same was true of only 19 out of 32 unsuccessful candidates (59,4%). The holders of degrees from these four countries were more successful at elections (41 out of 60 total candidates with this kind of degrees, 68,3%) than the group of those not holding any degree from these four countries (23 out of 36, 63,9%). Similarly, whilst 31 out of 64 successful candidates (50%) had obtained at least one degree in the mentioned "hot spots" of the Western traditions of international legal education, this percentage drops to 37,5% (12 out of 32) among the unsuccessful candidates. The success rate of those with an educational background obtained in these strongholds of international law education is significantly higher (72,1%, 31 out of 43 candidates with degrees of this kind) than the rate among all other candidates (62,3%, 33 out of 53). The percentages of successful candidates having obtained degrees in Paris (12 out of 16, 75%) and Geneva (5 out of 7, 71,4%) is not much higher than the general success rate (64 of 96, 66,7%). The success rate of holders of degrees from Oxford and Cambridge is even lower (9 out of 15, 60%) than the success rate of all candidates. The situation is different regarding the holders of degrees from ivy league law schools: 8 out of 9 (88,9%) got elected at least once.

352 7 out of 32 unelected candidates were nationals of States having English as an official language: Mr. Matheson (United States), Mr. Brown (Australia), Mr. Buena (Philippines), Mr. Appreku (Ghana), Mr. Maluwa (Malawi), Mr. Tungo (Sudan) and Mr. Ugirashebuja (Rwanda), a percentage of 21,9%. Among the 64 members, 15 were native speakers of English (23,4%).

353 Compared to 7 of 64 members (10,9%), 3 of 32 candidates were nationals of States with Arab as an official language (9,4%): Mr. Daoudi (Syria), Mr. Tungo (Sudan) and Mr. Ziadé (Lebanon).

the numbers of nationals of French-[354] and Spanish-speaking[355] States were higher. Conversely, the percentage of non-elected candidates not being native speakers of any of the ILC's working languages was lower.[356] These numbers were explainable with the above-average numbers of unsuccessful nationals of Spanish- and French-speaking States due to the increased competition in the African Group and in the GRULAC Group.[357]

Looking at the languages in which unelected candidates earned degrees, the percentages of those who obtained at least one degree in either anglo- or francophone countries were high, and comparable to those among members[358]. Degrees in Spanish – more frequent among unsuccessful candidates than among members due to the high number of non-elected GRULAC-nationals – and Arabic were obtained exclusively by native speakers, whilst none of the unelected candidates obtained degrees in Russian or Chinese. The analysis of the linguistic proficiency hence revealed a comparable dominance of English and French as among members.

(3) *Age:* Analysing the group of unelected candidates according to the age structure[359] showed a striking analogy with the group of members. Whilst roughly 40% of the non-elected candidates

354 7 of the 32 candidates not elected were nationals of States having French as an official language (21,9%): Mr. Pambou Tchivounda (Gabon), Mr. Afande (Togo), Mr. Collot (Haiti), Mr. Habarugira (Burundi), Mr. M'viboudoulou (Congo), Mr. Wouters (Belgium) and Mr. Ugirashebuja (Rwanda). Among the 64 members, 7 were native speakers of French, a percentage of only 10,9%.

355 8 out of 32 candidates were nationals of Spanish-speaking States (25%): Mr. Borrego Pérez (Venezuela), Mr. Ventura Robles (Costa Rica), Ms. Del Luján (Uruguay), Mr. Kohen (Argentina), Mr. Ferrero Costa and Mr. Solari Tudela (Peru), Mr. López Contreras (Honduras) and Mr. Salgado Espinoza (Ecuador). Among members, the percentage was considerably lower (10 of 64, 15,6%).

356 9 out of 32 unsuccessful members were nationals of States having no UN working language as an official language: Mr. Droushiotis, Cyprus; Mr. Economides, Greece; Mr. Momtaz, Iran; Mr. Versan, Turkey; Mr. Subedi, Nepal; Mr. Limon, Suriname; Mr. Zybari (Albania); Ms. Ariffin and Mr. Mohamad (Malaysia) for a total 28,1%. By comparison, 22 out of 64 members (34,4%) were not native speakers of any UN working language.

357 In particular, the tendency towards ill-success of candidates from francophone sub-Saharan African States is noteworthy: whilst in 2006 only 1 out of 3 candidates from that region failed to get elected (Mr. Pambou Tchivounda, Gabon), this number rose over time to 2 out of 3 in 2011 (Mr. Cissé, Côte d'Ivoire and Mr. Fomba, Mali) and 4 out of 5 in 2016 (Mr. Afande, Togo; Mr. Habarugira, Burundi; Mr. M'viboudoulou, Congo; Mr. Ugirashebuja, Rwanda, a State recognizing both French and English as official languages).

358 Whilst 12 of the 32 unsuccessful candidates obtained degrees in French-speaking countries (37,5%) compared to 22 out of 64 elected candidates (34,4%), 15 out of 32 unelected candidates obtained degrees in English-speaking countries, (46,9%), compared to 32 out of 64 successful candidates (50%). In total, 26 of 32 unsuccessful candidates (81,3%) obtained education in either of these languages, compared to 51 out of 64 (79,7%) of the elected members. This count includes candidates who did not give details regarding their education in French or English, but provided proof of excellent knowledge of either of these languages through other information contained in their *curricula* like bar exams, publications etc. As among members, obtaining degrees in both English and French was quite exceptional among unelected candidates; only Mr. Ziadé obtained degrees at Cambridge University (LL.M) and Paris I (Ph.D.), compared to three elected members (Mr. Caflisch, Mr. Cissé and Ms. Oral) who earned degrees in both languages.

359 2 of the unsuccessful candidates (Ms. Del Luján and Mr. Salgado Espinoza) did not provide any information regarding their age, nor could it be deduced from the statements of qualifications.

were born in the 1930s and 1940s[360], about 10% of them were from the 1970s[361]. The other half was born in the 1950s and 1960s.[362]

Taking these findings into consideration, age did not seem to decisively impact the likeliness of election. Once nomination was achieved, the chance of success was comparable, as roughly two out of three got elected within each age groups,.[363] It should however be highlighted that this finding should not be understood as implying that age plays no role at all. The likeliness of election is not to be confused with probability of nomination. The threshold of required qualifications heavily increases the chances for older and more experienced lawyers to achieve nomination.

(4) *Sex*: Comparing unsuccessful candidates to the group of members, it became visible that, whilst 7 out of 64 members were female, only 2 out 32 unelected candidates[364] were women, allowing for several readings. On the one hand, these numbers showed clearly how underrepresented women are in the ILC – looking at the combined numbers of elected and unelected candidates, the percentage of women is even lower than in the already low percentage of women among members.[365] On the other hand, it can be outlined that compared to men, the likeliness of successful election is higher for women.[366] However, this finding needs a qualification: if the 6 female candidates nominated by WEOG-States all got elected[367], of the 3 female candidates ever nominated by all other regional groups only 1 was successful[368]. Hence, whilst the likeliness of election of a WEOG-woman is statistically considerably higher than that of a male candidate, the chances of the few women nominated within the other regional groups are lower than those of men.[369]

Being a woman hence increases the probabilities of election, but only under certain conditions. Moreover, beyond elections, it should not be overlooked how in many legal systems, outside (but as well inside) the WEOG-Group, the access of women to the legal profession or to positions qualifying for nomination is severely obstructed. Thereby, the chances of achieving nomination

360 12 of the 30 unsuccessful candidates who delivered information regarding their age. Born in the 1930ies were Mr. Economides (1932), Mr. Buena (1932) and Mr. Solari Tudela (1935); born in the 1940ies were Mr. López Contreras (1942), Mr. Daoudi (1942), Mr. Matheson (1944), Ms. Ariffin (1946), Mr. Ferrero Costa (1946), Mr. Ventura Robles (1948), Mr. Droushiotis (1949), Mr. Pambou Tchivounda (1949) and Mr. Momtaz, who was born in that decade according to his CV.

361 3 out of 30: Mr. Brown (1972), Mr. Ugirashebuja (1976) and Mr. Zyberi (1977).

362 15 out of 30: Mr. Limon (1953); Mr. Versan (1954); Mr. Borrego Pérez (1955); Mr Kohen (1957); Mr. Subedi (1958) as well as Mr. Maluwa, who was born around 1950 according to the data contained in his CV. Born in the 1960ies were Mr. Habarugira (1960), Mr. Mohamad (1960), Mr. M'viboudoulou (1961), Mr. Appreku (1961), Mr. Ziadé (1962), Mr. Wouters (1964) as well as Mr. Collot, Mr. Tungo and Mr. Afande born in the 1960ies according to the chronologies contained in their statements of qualification.

363 In detail, 25 out of 37 born in the 1930ies and 1940ies (67,6%); 33 out of 48 born in the 1950ies and 1960ies (68,8%); 6 of 9 born in the 1970ies and 1980ies (66,7%); no information available on the age of two unsuccessful candidates.

364 The 2 female unelected candidates were Ms. Ariffin (Malaysia) and Ms. Del Luján (Uruguay).

365 Whilst 7 of 64 members were women (10,9%), of all candidates, 9 of 96 were female (9,4%).

366 Based on these numbers, as 7 out of 9 female candidates were successful, the likeliness of election was 77,8%; a higher rate than compared to men, among which 57 of 87 (65,5%) were elected.

367 These successful candidates were Ms. Escarameia, Portugal; Ms. Escobar Hernández, Spain; Ms. Galvâo Teles Portugal; Ms. Jacobsson, Sweden; Ms. Lehto, Finland; and Ms. Oral, Turkey.

368 Ms. Xue (China) got elected, unlike Ms. Ariffin (Malaysia) and Ms. Del Luján (Uruguay).

369 The emerging picture is quite clear: whilst female candidates from the WEOG had a success rate of 100% (6 out of 6), men in general had a success rate of 65,5% (57 out of 87). Non-WEOG female candidates had a success rate of only 33,3% (1 out of 3).

drop significantly, as underlined by the slow and geographically confined growth of female candidatures.

(5) *Length of tenure*: Experience as a variable does not apply to all candidates, but by definition only those successfully re-elected in one or more elections. In the three elections under investigation, a vast majority of the candidates had already served during the previous quinquennia. Statistically, previous service seems to play a noteworthy role: of the total 146 nominations, 73 were re-nominations after terms of service, of which 62, almost 85%, resulted to be successful – a far higher success rate than the candidates not having served on the outgoing Commissions.[370] However, despite the possible benefits of ILC experience, even several terms of service are eventually no safeguard against failure in elections.[371]

4. Nationality – Strategies and Negotiating Power of States

Whilst age seems to play no major role once nomination is achieved, whilst sex might increase the likeliness of election but only under certain conditions, whilst a cosmopolitan, anglo- or francophone background seems to be an advantage but neither sufficient nor indispensable to achieve election, whilst long tenure seems to be an asset but not a guarantee of re-election, the decisive factor appears to be the nationality of candidates and the State-centred dynamics underlying the elections.

Nationality impacts on several relevant factors, which, as discussed above, play a crucial role in increasing the chances of nomination or election, as, for instance, access to education in the global centres of international law. Moreover, as previously shown, certain nationalities can significantly increase the possibility of election of female members. Furthermore, nationality has a strong impact on the campaigning for election, which, beyond the individual candidate's efforts, is indissolubly tied to the leverage of the State of origin. The more influential the State and the more strategic its negotiation position, the more positive the candidate's prospects of success. As confirmed by background interviews with ILC members, behind-the-scenes bargaining significantly influences the election process.[372]

In this light, the correlation between the candidates' electoral success or unsuccess and the global status and strategies of nominating States contributes to explaining electoral patterns: certain candidates are elected despite modest electoral campaigning[373], others, from either economically least developed States or States with a complex global political standing, have high rates of electoral

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370 Of the re-nominations, 84,9% were successful. Of the 72 nominations on candidates not having served the outgoing Commission, only 40 (55,6%) were successful. Looking at all the 145 candidatures (52 in 2016, 49 in 2011, 44 in 2006), a considerably lower 70,3% (34 at each election for a total of 102) were successful. These numbers take into consideration nominations, not candidates; several individuals have more than once successfully or unsuccessfully run for election. Furthermore, these figures regard re-nominations straight after service, and do not consider as "re-nominations" if the term of service was interrupted by a period of absence from the Commission.

371 See the cases of Mr. Fomba and Mr. Galicki, who did not get re-elected in 2011 after three terms of service; see further Mr. Economides, unsuccessful in 2006 after two terms of service.

372 Describing the increasing importance of lobbying and election strategy, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, p. 40.

373 Pointing in this direction, see for instance the comments on the 2016 elections of a former member, Mr. Kittichaisaree, Akande, *Outcome of 2016 Elections to the International Law Commission + Trivia Questions*.

failures[374]. Even the occasional failure of "P5-nationals" can be accounted for through this correlation.[375]

C. The "Invisible College of International Lawyers" – Professional and Expertise Communities

The ILC and its members operate within the multi-layered structures of the international legal order. Within this context, the ILC has a specific function, not of law-making but of seizing the momentary *status quo* of international law in specific aspects, and of giving input for its dynamic development. This "seismographic" function is defined and shaped by the community of international law, delimiting the ILC's activities, underpinning the ILC's legitimacy and giving rise to the legal standards the ILC is confronted with. This community and its various sub-communities are in the following conceptualised from two perspectives.

First, the approval of the community of international law is vital for the authority of the Commission, and the legitimacy of the ILC's output. From this viewpoint, the community of international law includes, beyond the category of international lawyers *stricto sensu*, also other actors the ILC is addressing to improve the effectiveness of its endeavours. These actors are to be found among lawmakers and law-appliers, both on the national and international level. Examples of the interactions with this community are the declared intentions to provide guidance on State official immunity to domestic judges and prosecutors, or the efforts undertaken to convince State delegates in the 6th Committee to back the Commission's proposals.

This viewpoint will be investigated in more detail in the parts of this study dedicated to the argumentations and strategies of ILC members, and the dynamics in the 6th Committee. In the following sections, the issue will be conceptualised from a different viewpoint: the community of international law functions as an identity-fostering factor, influencing the member's knowledge, skills and professional ethos. The ILC members are embedded in numerous networks of those applying, studying and developing international law.

Sub-communities of this kind might coalesce around factors as, *inter alia*, origin (e.g., the community of international lawyers of a State or region), political preferences (e.g., "conservative" or "progressive" international lawyers), methodical preferences (e.g., scholars of natural law, positivists, realist and critical scholars etc.) and so forth. The following sections will analyse two sets of affiliations, which are relatively objectifiable based on the members' *curricula vitae*. These two cleavages are the professional background of members (I.), and their specific expertise and main interests within the wide discipline of international law (II). The aspiration is to characterise the ILC members as professionals and experts. Where do they come from, what interests and experiences shape

374 See for instance the repeated unsuccess of highly qualified candidates such as Mr. Maluwa (Malawi; 2011 and 2016), Mr. Subedi (Nepal; 2001 and 2011), Mr. Momtaz (Iran; 2006 and 2016), Mr Daoudi (Syria, 2006 and 2011) and Mr. El-Murtadi Suleiman (Libya, 2006 and 2016).

375 On the failure of Mr. Matheson (United States) in 2006, explained by some observers with the opposition to United States activities in Iraq, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, p. 38.

their world views? Not only do these affiliations impact the members' preferences and their methods; they are further the source of expectations the ILC members internalize and want to live up to.

These professional and expertise networks constitute the forum to acquire the reputation facilitating a career as an international lawyer. The qualifications, experiences and expertise of international lawyers constitute their social capital.[376] The social capital accumulated during their careers is the basis for the nomination and eventual election of candidates. Members profit from a virtuous circle: whilst their social capital eases the way towards nomination and election, ILC membership itself once achieved enhances their prestige, fostering the continuation of their careers. From this angle, the following sections investigate some key strategies and behavioural patterns capable of increasing and consolidating the members' social capital, like multifaceted profiles, international experience combined with a solid embedment in national contexts, and networking with other international lawyers.

I. The Impact of Profession and Expertise on the ILC Members' Attitudes

Because of the versatility of many profiles encountered in the ILC, recognising and describing the overlapping affiliations of members with diverse professional and expertise communities is a complex task. The following sections are based on the premise that the effort is worthwhile, as these backgrounds provide an important key for a more nuanced view on the dynamics underlying the discursive practices in the ILC. The foundational hypothesis is that the imprinting coming with different backgrounds affects the interaction of ILC members. For instance, the paradigmatic disagreement between members approaching State official immunity from different perspectives is characteristic of controversies in the ILC. Among the factors giving rise to these divergent perspectives are the different professional backgrounds of members. These different viewpoints in turn reinforce certain argumentative and methodological attitudes, capable of affecting the ILC's discursive practices.

In terms of expertise, the concerns and priorities of members with regard to specific issues emerging in the context of State official immunity will plausibly be affected by their previous experiences in different sub-fields of international law. In terms of discursive attitudes, members with backgrounds in human rights and international criminal law might tend to prioritise issues of rights, victims and justice and to embrace the cause of fighting impunity through limitations and exceptions to State official immunity. Conversely, members with a focus on sub-fields of international law revolving around the prerogatives of States and the stability of international relations might more often tend to promote views defending State official immunity for the sake of non-interference and the equal sovereignty of States.

Assessing the embedment of members in communities of profession or expertise might foster a refined understanding of the argumentations of individual members. It might also provide insights into how the positions prevailing within the ILC developed as the incidence of professional and

[376] Describing how international lawyers build their careers on social capital, see Y. Dezalay, B. G. Garth and P. Bourdieu, *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*, Language and legal discourse (Chicago, London: University of Chicago Press, 1996), pp. 18-30.

expertise profiles changed over time. In the light of these premises, the following sections describe the main typologies of expertise and professional profiles most commonly met among members, and investigate the shifting frequency of these profiles, developing reflections on the reasons for these shifts and their impact on the course of elections and debates.

II. Professional Communities: Divergent Academics and Practitioners?

The Statute provides that the members of the ILC "*shall be persons of recognized competence in international law*"[377] and are expected to "*individually possess recognized competence and qualifications in both doctrinal and practical aspects of international law and […] collectively represent the principal legal systems of the world*"[378]. Members come from academia, the diplomatic corps, from other national government entities and international organizations. As the appointment to the ILC is part-time, members are expected to pursue other professional activities, in turn preventing the discussion of issues to take place in an "ivory tower".[379]

The statements of qualifications demonstrated a rich picture of highly diverse profiles. Characteristic of all of them was, however, the level of excellence reached by the ILC members in their respective professions. The requirement of both doctrinal and practical knowledge resulted in frequent hybrid *curricula vitae*, giving proof of important achievements in both fields. Academics and practitioners were not divided into two neatly divided and opposed camps. The spectrum of profiles was wide, and it was not uncommon that ILC members parallelly pursued different career paths. The following sections intend to describe primary allegiances and affiliations to professional profiles relevant for the individual member's self-understandings, and hence for their outspoken or implicit foundational assumptions.

6. The Practitioners

The practitioners could be roughly divided into two groups: those affiliated with ministries for foreign affairs, and those with a legal-political background in other domestic legal institutions.

The group of members affiliated to ministries of foreign affairs was not monolithic; two distinct profiles were widespread. Many members coming from national ministries of foreign affairs had primarily served in the departments of international law. Frequently, they had been their respective government's principal "*legal advisors*" in the field of international law.[380] Unlike their colleagues pursuing a more ambassadorial career abroad, they had principally advised their governments at

377 See General Assembly, *Statute of the International Law Commission*, Article 2, paragraph 1.

378 *The work of the International Law Commission*, p. 8, referring to *Yearbook of the International Law Commission*, vol. II, Part One, doc. A/9610/Rev.1 (1974), para. 207.

379 *The work of the International Law Commission*, p. 9, referring to *Yearbook of the International Law Commission*, para. 210.

380 This group includes, from the current ILC, Mr. Argüello Gómez, Mr. Gómez-Robledo, Mr. Hmoud, Mr. Kolodkin and his successor, Mr. Zagaynov, Ms. Lehto, Ms. Galvâo-Teles, and Mr. Wood; from previous Commissions, Mr Comissário Afonso, Mr. Gevorgian, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Perera, Mr. Singh, Mr. Tladi, Mr. Wisnumurti, Ms. Xue.

home. Only occasionally, if at all[381], had they served abroad. In those cases, they were often deployed in diplomatic missions where an official with a distinct profile in international law represented a significant added value, like embassies in the Netherlands[382] or the permanent missions of States to the United Nations in New York[383] or Geneva[384]. As legal advisors, they had often accumulated extensive experiences in the making of international treaty law, having headed their country's delegations to international conventions and treaty negotiations. Moreover, they had frequently represented their States of origin as agents and counsels in diverse international dispute settlements. Influential examples of this category are, from the current Commission, the special rapporteurs Mr. Gómez-Robledo and Mr. Wood, and in the past, Mr. Kolodkin, Ms. Jacobsson and Ms. Xue.

The second profile encountered among members coming from ministries for foreign affairs were the "*diplomats*".[385] They had served their countries abroad, representing their governments as ambassador in several foreign States. As for the legal advisors, it is not uncommon that they had served in places like New York, The Hague or Geneva.[386] Some of the most active members from this group include Mr. Hassouna, Mr. Saboia and Mr. Vázquez-Bermúdez from the current Commission, as well as Mr. Candioti and Mr. Yamada in the past.

Some members categorised as practitioners made their ways into ministries for foreign affairs after long academic careers.[387] Most practitioners occupied parallel positions as lecturers, researchers or assistant professors, allowing them to share their experiences with future generations of practitioners in international affairs. Often, they taught at the diplomatic academies of their States of origin.[388]

Other practitioners came from institutions outside international law. Their profiles had a stronger domestic focus, rooted in the profession of the "*attorney*". Often, they had started their careers as

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381 Some legal advisors claim no professional experience as diplomats abroad at all, for instance Ms. Jacobsson, Mr. Perera and Ms. Xue, ibid.

382 The relevance of international law expertise is due the international courts and tribunals in The Hague. Two Russian members of the ILC, Mr. Gevorgian and Mr. Kolodkin were for instance ambassador of the Russian Federation in the Netherlands, respectively from 2003 to 2009 and from 2009 to 2015. Mr. Argüello Gómez served twice as ambassador of Nicaragua in the Netherlands.

383 Among the legal advisors who served in their country's permanent mission to the UN were Mr. Gómez -Robledo, Mr. Hmoud, Ms. Lehto, Mr. Vázquez-Bermúdez and Mr. Wood from the current Commission, as well as Mr. Comissário Afonso, Mr. Singh, Mr. Wisnumurti and Mr. Tladi.

384 Among the legal advisors, Mr. Gómez-Robledo and Mr. Kolodkin served in the permanent missions of their countries in Geneva.

385 The line between legal advisors and diplomats is blurred, as many practitioners from ministries of foreign affairs served in both functions; examples include Mr. Vázquez-Bermúdez, Mr. Comissário Afonso and Mr. Kittichaisaree. Typical examples of (former) diplomats with generalist profiles and vast experiences as representatives of their countries abroad include currently Mr. Hassouna, Mr. Huikang, Mr. Nguyen Hong Thao and Mr. Saboia; further Mr. Candioti, Mr. Niehaus, Mr. Petrič, Mr. Vargas Carreño and Mr. Yamada in the past.

386 Diplomats with professional experiences in these places include: Mr. Hassouna (New York), Mr. Saboia (Geneva, The Hague); Mr. Niehaus (New York), Mr. Yamada (New York, Geneva) and Mr. Petrič (New York).

387 For examples of a similar career, see Mr. Petrič (who eventually resumed his academic career after his time at the Ministry of Foreign Affairs of Slovenia) and Mr. Niehaus.

388 Taking the current Commission as an example, 9 out of 12 practitioners claim a similar position in teaching and/or research: Mr. Argüello Gómez, Mr. Gómez -Robledo, Mr. Hassouna, Mr. Huikang, Mr. Kolodkin, Ms. Lehto, Mr. Hong Thao, Ms. Galvâo-Teles, and Mr. Vázquez-Bermúdez.

barristers or in similar professions, and their *curricula* highlighted their membership in bar associations.[389] Their careers often had a pronounced political dimension, leading them to become their country's attorney-generals or to assume similar positions.[390] Their presence is decreasing: whilst 5 members with a similar profile were voted into the ILC in 2006[391], their number dropped to respectively 3 in 2011[392] and 2016[393]. Current examples are Mr. Al-Marri, Mr. Rajput and Mr. Wako.

Infrequent is the profile of the "*judge*".[394] It is a widespread phenomenon among members to become judges at international courts or tribunals after ILC membership. Only a handful of members, including Mr. Caflisch, Mr. Murase and Mr. Petrič, experienced judgeship before or whilst serving on the ILC. For none of them was judgeship their primary vocation.[395] Judgeship did not necessarily contribute positively to the chances of election: 4 candidates serving or having served on international courts and tribunals failed to get elected in 2011 and 2016.[396]

The profile of the "*international organization officer*" is not frequent either. Whilst many members represented their States in the context of international organisations or externally advised the latter, few members, including Mr. Grossman Guiloff, Mr. Jalloh and Mr. Valencia-Ospina, were affiliated with international organizations.[397]

7. The Academics

An important share of membership was constituted by the "*professors*": their primary professional activity was of academic nature, usually as holders of chairs at prestigious universities in their States

389 Examples for this background as attorneys include, from the current Commission, Mr. Rajput and Mr. Wako; from previous quinquennia, Mr. Adoke, Mr. Kemicha, Mr. Ojo and Mr. Vasciannie.

390 Mr. Wako (Kenya), Mr. Adoke (Nigeria), Mr. Ojo (Nigeria), Mr Al-Marri (Qatar) were attorney-generals of their respective countries, whilst Mr. Vasciannie was deputy solicitor-general of Jamaica. Mr. Kamto was minister delegate of justice in Cameroon, but his profile is more international-academic.

391 *54th Plenary Meeting*: Mr. Al-Marri, Mr. Kemicha, Mr. Ojo, Mr. Vasciannie and Mr. Wako.

392 See *59th Plenary Meeting*: Mr. Adoke, Mr. Al-Marri and Mr. Wako.

393 See United Nations General Assembly (ed.), 71st session, 40th plenary meeting, doc. A/71/PV.40: Mr. Al-Marri, Mr. Rajput and Mr. Wako.

394 „Judge" in this context meaning judges in permanent national or international courts or tribunals, excluding ad *hoc* judges, investment arbitrations etc.

395 Mr. Caflisch was a judge at the European Court of Human Rights from 1998 to 2006; Mr. Murase was a judge at the administrative tribunal of the ASEAN Development Bank from 1998 to 2004; Mr. Petrič is a constitutional judge of Slovenia since 2008. More of a theoretical nature seemed to be the appointments of Mr. Brownlie (European Nuclear Energy Tribunal, 1995-2000), Mr. El-Murtadi Suleiman Gouider (Arab Maghreb Union, Judicial Instance) and Mr. Ruda Santolaria (First Alternate Judge for Peru at the Andean Tribunal of Justice).

396 In 2011: Mr. Salgado Espinoza, Judge of the Court of Justice of the Andean Community from 2005 to 2011; In 2016: Mr. Koffi Afande, judge at the ICTY from 2013 to 2016; Mr. Ventura Robles, judge at the Inter-American Court of Human Rights; and Mr. Ugirashebuja, President of the East African Court of Justice (EACJ) since 2014. See further Mr. Buena, who did not get elected as a judge at the Supreme Court of the Philippines in 2006.

397 Mr. Valencia-Ospina was a UN official first with the Office of Legal Affairs of the United Nations Secretariat, then as a registrar of the ICJ. One unsuccessful candidate in the 2006 election, Mr. Ziadé, served as an Executive Secretary of the World Bank Administrative Tribunal and previously with the International Centre for Settlement of Investment Disputes; a candidate in the 2016, Mr. Mohamad, served as a Secretary General of the Asian African Legal Consultative Organization (AALCO). 2 members elected in 2016 served on international organizations, but in the case of both, academia is their principal vocation: Mr. Grossman Guiloff, (Vice-) Chairperson of the United Nations Committee against Torture since 2003 and member of the Inter-American Commission on Human Rights from 1994 to 2001; and Mr. Jalloh, legal officer with the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone from 2005 to 2009.

of origin.[398] Their academic duties usually did not prevent them from fulfilling advisory functions for their respective governments or other entities. It is not uncommon that academics elected to the ILC had served for some time as civil servants in their national ministries for foreign affairs before beginning their academic careers.[399]

The prestige of full-time professors is first and foremost the result of their academic achievements. These achievements might in turn give them access to prestigious advisory assignments. They usually published extensively, either with distinct specialisations, or on a broad variety of fields. Full-time academics with an important influence included, in the quinquennium 2017-2021, the special rapporteurs Ms. Escobar Hernández, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Šturma and Mr. Tladi, as well as Mr. Park and Mr. Peter; from past Commissions, Mr. Brownlie, Mr. Dugard, Mr. Forteau, Mr. Gaja, Mr. McRae and Mr. Pellet deserve mention.

8. Multifaceted Profiles

Categorising ILC members as either practitioners or academics is necessarily approximative. Most members exhibited important experiences of both practical and academic nature. Some of these multifaceted profiles deserve being highlighted.

A first category with polyvalent profiles was constituted by the "*politicians*". Members with high-level political profiles through (previous) service as members of parliament[400], ministers of foreign affairs[401], ministers of justice[402], attorney-generals[403] or deputies in ministerial rank[404], were not an uncommon phenomenon. Other members had been appointed to prestigious positions in the judiciary.[405] Although a past as a minister did not in all cases assure success in elections[406], the diverse prestige coming with political appointments of this kind generally increased these candidates' social capital. Some of the most remarkable profiles are a mixture of academic distinction, extensive activities in the practice of international law and political visibility. Profiles of this kind included Mr.

398 Despite the statute is silent at regard, countries prefer nominating academics holding positions in their home country, strengthening the impression that a strong "national" profile and network are a prerequisite for nomination as an ILC member. Among the few exceptions in the current Commission are Mr. Grossman Guiloff, (Chile; professor in Washington, DC at the time of election) and Mr Jalloh (Sierra Leone; professor in Miami at the time of election).

399 Examples for a similar path from practice to academia are, in the current Commission: Ms. Escobar Hernández, Mr. Tladi, Mr. Murphy and Mr. Aurescu.

400 Mr. Wako is currently a Senator of Kenya, whilst Mr. Petrič was a member of Parliament in the Socialist Federal Republic of Yugoslavia from 1967 to 1972.

401 Two former Romanian Ministers of Foreign Affairs, Mr. Melescanu and Mr. Aurescu, as well as Mr. Niehaus as Minister of Foreign Affairs of Costa Rica, have served on the Commission between 2007 and 2021.

402 Mr. Argüello Gómez was Minister of Justice of Nicaragua in 1982-1983.

403 Mr. Wako (Kenya), Mr. Adoke (Nigeria), Mr. Ojo (Nigeria) and Mr. Al-Marri (Qatar) were former or current attorney-generals in their home countries when serving on the Commission.

404 Members with political offices as deputy ministers or in similar ranks include Mr. Kamto (Cameroon), Mr. Gómez-Robledo (Mexico), Mr. Saboia (Brazil), Mr. Vasciannie (Jamaica) and Mr. Vargas Carreño (Chile).

405 Mr. Caflisch had served as a judge at the European Court of Human Rights for Liechtenstein; Mr. El-Murtadi Suleiman Gouider (Libya) was a judge and then President of the Court of Justice of the Arab Maghreb Union; Mr. Petrič is currently a judge at the Constitutional Court of Slovenia.

406 See the cases of Mr. Ferrero Costa, Minister for Foreign Affairs of Peru from 1997 to 1998, in the 2011 election; and Mr. López Contreras, Minister for Foreign Affairs of Honduras from 1986 to 1990, as well as Mr. Solari Tudela, Former Vice Minister and Secretary General of Foreign Affairs of Peru, both in the 2006 election.

Kamto[407], Mr. Niehaus[408], and Mr. Vasciannie[409] from former Commissions. Examples from the current ILC are Mr. Aurescu[410] and Mr. Tladi[411] from the young generation, as well as Mr. Petrič[412].

Another category exemplar for the multi-faceted profile favoured for membership in the ILC is the group of "*counsels*". Many ILC members had been "*agents*" of their home countries in international dispute settlement mechanisms, in particular those with experiences as legal advisors. However, some of them entered the exclusive pool of those litigation experts nominated, independently of nationality, as counsels by the governments of different States in cases of litigation before international courts and tribunals, or in complex arbitration procedures. Often, these members had reached illustrious positions in the field of academia[413]; at times, their background was however also rather practical.[414] The skills developed in international dispute settlement mechanisms and the respect paid to their litigation records gave them at times a considerable self-confidence. The main representatives of this category were often nationals of those States hosting the epicentres of international law. Usually, these members had received their legal education in universities identified previously as successfully transmitting traditions of international law.[415] Examples counsels with a strong impact on the ILC's efforts included Mr. Brownlie, Mr. Caflisch, Mr. Forteau, Mr. Murphy, Mr. Pellet and Mr. Wood.[416]

9. Communities, Prestige and Networks of International Lawyers

The statements of qualifications of candidates usually contained lists of various institutions, associations and learned societies the individuals were affiliated to. Membership in these institutions created opportunities for networking, increasing the likeliness of election. In a virtuous circle, the election in turn increased the individual's prestige, opening the doors to further honours. As a consequence, the career opportunities developed, positively affecting the chances of re-election.

Frequently, candidates were connected to national institutions dealing with international law and international relations, like diplomatic academies. They were members of the editorial board of

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407 Professor, Minister Delegate to the Vice-Primer Minister and Minister of Justice, political leader and candidate in the 2018 presidential elections in Cameroon.

408 Former professor, ambassador, political leader and minister of foreign affairs for Costa Rica

409 Professor, political leader, deputy solicitor-general, chairman of the board of a Jamaican bank and, after service on the Commission, ambassador.

410 Born 1973; legal advisor, former minister of foreign affairs and professor.

411 Born 1975; legal advisor, professor and novel author.

412 Former member of the Parliament of Yugoslavia, Ambassador and currently professor at the University of Ljubljana and Judge at the Constitutional Court of Slovenia.

413 Counsels included Mr. Pellet (France, professor in Paris), Mr. Brownlie (United Kingdom, professor in Oxford), Mr. Caflisch (Switzerland, professor in Geneva), Mr. Forteau (France, professor in Paris) and Mr. Murphy (United States, professor in Washington, DC).

414 Mr. Wood served as legal advisor in the ministry of foreign affairs of the United Kingdom.

415 Mr. Caflisch is a Swiss national and was educated in Geneva and New York (Columbia); Mr. Murphy is US-American and was educated in Cambridge and New York (Columbia); Mr. Pellet and Mr. Forteau are both French and were both educated in Paris; Mr. Brownlie and Mr. Wood are both British nationals and were educated respectively in Oxford and Cambridge.

416 A rare case of a candidate of this kind not achieving election is Mr. Kohen, since many years based in Geneva, whose candidature was supported by Switzerland, not elected in 2016.

academic journals or held important positions in their respective national associations of international law. Amongst the manifold options for interconnection in the world of international law, some stuck out for the frequency of their mention or the prestige they conveyed.

First, not few of the candidates were among the 132 total members and associates of the *Institut de Droit International* (IDI), one of the most prestigious learned societies of international law.[417] The Institute's scope and methods of work are not that different from the ones of the ILC: various commissions prepare studies of different topics, which are examined by the plenary at biennial sessions. The candidates to the IDI, selected from among academics and practitioners[418], are elected by secret ballot[419]. A consistent number of candidates were affiliated to the IDI when elected to the ILC or joined the IDI during ILC membership.[420] At the 2006 election, 7 successful candidates were affiliated to the IDI.[421] This number dropped to 4 respectively in 2011[422] and 2016[423].

Second, underlining both the on average exceptionally high level of legal education of members and their drive towards the "centres" of international legal education, many of them had taken part in courses at the *Hague Academy of International Law* as either attendees or lecturers. This renowned institution, housed in the Peace Palace in The Hague, gathers promising young international lawyers during its courses, and boasts illustrious senior international lawyers among its faculty. Mentioning this institution in the *curriculum vitae* was an indicator of two features. Those who had been attendees started frequenting other junior and senior international lawyers with above-average success (prospects) from an early stage of their careers. Those who had been lecturers had reached an exceptional level of expertise in their respective fields of specialization. Some of the strongest academic profiles in the ILC had lectured at the Hague Academy before, during or after membership.[424] In the elections in 2006[425], 2011[426] and 2016[427], the number of elected candidates claiming a connection to the Hague Academy was in constant growth[428].

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417 Article 3 of the IDI Statute reads: "*The Institute shall be composed of Honorary Members, Members and Associates. The total number of Members and Associates under the age of 80 shall not exceed 132 but need not necessarily be equal to that number.*" According to Article 4, "*Those Associates who have participated effectively in three sessions shall become Members."*

418 Article 5: "*1. Associates shall be selected by the Institute from among those of various nations who have given service to international law either in the field of theory or in that of practice.*"

419 See Articles 14 to 16 of the Statute.

420 In total, 14 out of 64, more than one fifth of the ILC members looked at, are current or defunct associates or members of the IDI. Mr. Perera (elected to the Institute in 2017) is the only member looked at who became affiliated to the IDI subsequently to his ILC membership.

421 Mr. Brownlie (elected to the Institute in 1977), Mr. Caflisch (1979), Mr. Dugard (1995), Mr. Gaja (1993), Mr. Kamto (2005), Mr. Pellet and Ms. Xue (2005).

422 Mr. Caflisch (IDI since 1979), Mr. Kamto (2005), Mr. McRae (2011) and Mr. Murase (2011).

423 Mr. Kolodkin (elected to the IDI in 2009), Mr. Murase (2011), Mr. Nolte (2015) and Mr. Reinisch (2015). As Mr. Tladi (elected to the Institute in 2017) recently became an associate, as of 2017 five Commission members were affiliated to the IDI.

424 Lecturers at the Hague Academy among the members looked at were Mr. Brownlie, Mr. Caflisch, Mr. Dugard, Mr. Gaja, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park and Ms. Xue; Mr. Tladi has been selected to lecture at the Academy in 2020.

425 Mr. Brownlie; Mr. Caflisch; Mr. Fomba; Mr. Gaja; Mr. Kamto; Mr. McRae; Mr. Pellet; Mr. Perera; Mr. Petrič; Mr. Singh and Mr. Valencia-Ospina.

426 Mr. Caflisch, Ms Escobar Hernández, Mr. Forteau, Mr. Gómez-Robledo, Mr. Kamto, Mr. Kittichaisaree, McRae, Mr. Murase, Mr. Park, Mr. Petrič, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina.

427 Mr. Aurescu; Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Murase, Mr. Nguyen, Mr. Ouazzani, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Ms. Teles, Mr. Tladi and Mr. Valencia-Ospina.

428 Whilst 11 of the members elected in 2006 claimed a connection to the Hague Academy, this number grew to 13 in 2011 and 15 in 2016.

The *Max Planck Institute for Comparative Public Law and International Law* in Heidelberg is an example of a stronghold of international legal scholarship outside anglo- or francophone States having welcomed several members as fellows.[429]

In conclusion, membership in the IDI or lectureship at the Hague Academy come with considerable social capital. Although there is no guarantee of success in ILC elections as a consequence of close connections to the IDI[430] or the Hague Academy[431], the percentage of successful candidates with similar affiliations is significantly above average[432]. In particular in the quinquennium 2006-2011, there was a strong group of influential academics being part of both institutions.[433] Membership in the ILC, the IDI or lectureship at the Hague Academy shapes a self-reinforcing circle, with any of these positions increasing the chances of succeeding in the quest for the others – these interconnections work in all directions.[434]

10. Is the Influence of Academics Decreasing?

At times, it is claimed that the ILC is transforming from an institution dominated by international law professors into a domain of practitioners: the influence of academics is suggested to be decreasing[435]. At this regard, the numbers reveal noteworthy fluctuations. In the elections in 2006, only 10 of the members were, at the time of election, full-time academics[436], whilst 16 members came from ministries for foreign affairs[437], and 8 members had a different background, mainly in

429 Mr. Nolte and Mr. Petrič among the members and Mr. Kohen and Mr. Versan among the non-elected candidates were affiliated to the Max Planck Institute.

430 See Mr. Momtaz (elected to the Institute in 1999, unsuccessful at the ILC elections in 2006 and in 2016), Mr. Subedi (elected to the Institute in 2011, unsuccessful at the ILC elections in 2011) and Mr. Kohen (elected to the Institute in 2007, unsuccessful at the ILC elections in 2016).

431 Inter alia Mr. Daoudi, Mr. Droushiotis, Mr. Pambou Tchivounda, Mr. Subedi and Mr. Wouters are former attendees not elected in 2006, 2011 and 2016. Former attendees Mr. Cissé, Mr. Fomba, Mr. Forteau and Mr. Perera failed in some of elections but succeeded in others. Mr. Kohen and Mr. Momtaz are unsuccessful candidates having lectured at the Hague Academy.

432 Considering that 12 out of the 15 candidates that were IDI affiliates at the time of election were successful, the success rate of Institute associates is 80%, considerably higher than the general overall success rate of 66,7% (64 out of 96 candidates). Comparably, of the total 33 candidates claiming any connection to the Hague Academy, 26 managed to get elected at least once at the elections between 2006 and 2016 (78,8%), compared for instance to 38 out of 64 candidates without connection to the Hague Academy (60,3%) achieving election.

433 This refers in particular to Mr. Brownlie, Mr. Caflisch, Mr. Dugard, Mr. Gaja, Mr. Kamto and Mr. Pellet. Mr. McRae and Mr. Nolte were already part of the ILC but had for instance not yet been elected to the IDI.

434 Whilst some ILC members built first their relationships with the IDI and the Hague Academy to then get elected to the ILC (inter alia Mr. Brownlie, Mr. Caflisch, Mr. Gaja or Mr. Murase), others joined these institutions after having been elected to the ILC (Mr. Kamto, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Tladi and Ms. Xue). Mr Dugard was already an IDI member when elected to the ILC but lectured at the Hague Academy only after ILC membership, in 2012.

435 A. Peters, 'Roles of Legal Thinkers and Practitioners: From a Public International Law Perspective (Rollen von Rechtsdenkern und Praktikern: Aus Völkerrechtlicher Sicht) (in German)' , p. 122.

436 The academics elected in 2006 were Mr. Brownlie, Mr. Caflisch, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. McRae, Mr. Nolte, and Mr. Pellet.

437 Practitioners from the respective ministries of foreign affairs include Mr. Candioti, Mr. Comissário Afonso, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Ms. Xue, Mr. Yamada and Mr. Wisnumurti.

national-political offices[438]. In 2011, at the time of election, 14 members were academics[439], 15 came from ministries for foreign affairs[440] and 5 had different backgrounds in practice[441]. In 2016, the elections produced Commission with an even more pronounced group of academics: 18 members were professors[442], some however with considerable experiences in international law's practice[443], 12 came from ministries for foreign affairs[444] and 4 had different backgrounds in legal practice[445].

The growing dominance of practitioners does hence not find reflection in figures. The claimed receding importance of the group of academics within the membership of the ILC is to be evaluated carefully. This caution is further suggested by the analysis of Special Rapporteurs. 12 of the 20 Special Rapporteurs in office in the years since 2007 are primarily academics[446], whilst 8 have a prevalently practical background[447]. 6 of the 10 members serving as Special Rapporteurs in the quinquennium 2017-2021 are academics and 4 are practitioners[448]. The prevalence of academics among Special Rapporteurs might depend on factors like pronounced experience in the systematic elaboration of customary international law, and resources, in particular in terms of access to research facilities.

438 Other professional backgrounds had Mr. Al-Marri, Mr. Kamto, Mr. Kemicha, Mr. Melescanu, Mr. Ojo, Mr Valencia-Ospina and Mr. Vasciannie.

439 Academics at the time of election in 2011 were Mr. Caflisch, Mr. El-Murtadi Suleiman, Ms. Escobar Hernández, Mr. Forteau, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič (in 2008, Mr. Petrič had left the ministry of foreign affairs and resumed his academic career at the University of Ljubljana), Mr. Šturma and Mr Vasciannie (in 2008, Mr Vasciannie ended his activity as Deputy Solicitor-General of Jamaica, and returned to his academic career at Norman Manley Law School).

440 Mr. Comissário Afonso, Mr. Gevorgian, Mr. Gómez-Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huikang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Niehaus, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Wisnumurti, Mr. Wood and Mr. Candioti.

441 Mr. Adoke, Mr. Al-Marri, Mr. Kamto, Mr. Valencia-Ospina and Mr. Wako.

442 The academics elected include Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Ouazzani, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma and Mr. Tladi (He left his position as a principal legal advisor at the ministry of foreign affairs in 2013 and has since worked as a professor at the University of Pretoria).

443 For instance, 5 of the 18 academics elected to the Commission in 2016 have had considerable careers in their respective ministries of foreign affairs (Before joining the ILC, Mr. Aurescu was a career diplomat and Minister of Foreign Affairs of Romania from 2014 to 2015. Other academics with important pasts in their national ministries of foreign affairs are Ms. Escobar Hernández, Mr. Murphy, Mr. Petrič and Mr. Tladi) and one professor, Mr. Ruda Santolaria, reported as a special legal advisor to his country's minister for foreign affairs.

444 Legal advisors and diplomats include Mr. Argüello Gómez, Mr. Gómez-Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kolodkin and his successor, Mr. Zagaynov, Ms. Lehto, Mr. Hong Thao, Ms. Galvâo-Teles, Mr. Vázquez-Bermúdez and Mr. Wood.

445 This group is constituted by Mr. Al-Marri, Mr. Rajput, Mr. Valencia-Ospina and Mr. Wako.

446 The "academic" special rapporteurs are Mr. Brownlie, Mr. Dugard, Mr. Galicki, Mr. Gaja, Mr. Pellet, Ms. Escobar Hernández, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Šturma and Mr. Tladi (who was nominated special rapporteur, after having assumed the position of professor at the University of Pretoria); Further Mr. Kamto, who had a considerable academic career in international law as a professor in Cameroon (University of Yaoundé II) since 1994, before dedicating most of his time to legal practice as a national politician.

447 The practitioners among the special rapporteurs are Mr. Gómez-Robledo, Ms. Jacobsson, Mr. Kolodkin, Ms. Lehto, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wood and Mr. Yamada.

448 The academics working on topics as special rapporteurs are Ms. Escobar Hernández, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Šturma and Mr. Tladi; the practitioners are Mr. Gómez-Robledo, Ms. Lehto, Mr. Vázquez-Bermúdez and Mr. Wood.

III. Expertise Communities: Diverse Paradigms of International Law?

The international law expertise of the candidates nominated for the ILC elections is, as the statute requires, usually of extraordinarily high level. Describing the specific expertise of individual members is an arduous task, given the mere amount of assignments and publications listed by most candidates. Moreover, in their interventions in the ILC, members tend not to explicitly highlight their legal specialisations and interests, and the interconnections between these factors and the views they express: the discourse in the Commission is generally universalist in tone. At least on surface, there is usually no explicit opposition between different camps of activists from the respective fields of expertise. Nevertheless, legal expertise was among the aspects capable of influencing the individual members' positions regarding State official immunity. Experts in different sub-fields look differently at international law because of the different paradigms and priorities they are acquainted with. Consequently, the following sections identify and classify specific sub-fields of international law candidates specialized in. The conceptual couple of "generalists" (1.) and "specialists" (2.) needs to be taken with a grain of salt. All the candidates looked at were, because of their rich experiences, to some degree generalists of international law; equally, during their careers they all had acquired special knowledge in some fields. The intention is nevertheless to distinguish between those whose main feature was the general vastness of their expertise, and those who rather demonstrated a clear focus on one or several specific subfields. Over time, a shifting distribution of expertise could be observed within the Commission (3.).

4. Generalist Expertise

In the light of the variety of practical experiences and academic achievements the statements of qualifications of many candidates boosted, they could be categorised as generalists of international law. It could be complex to connect members to any specific expertise, as they appeared to have so many: eventually, they had published on a broad range of subjects, or they had acted on behalf of their home countries, foreign States or the international community in diverse fields of practice.

The term "generalist" might convey different meanings relevant in the present characterisation of the ILC. It might describe members, mainly practitioners, dealing with all kinds of topics but from a perspective focusing mainly on their State or region of origin.[449] As well, it might describe members with a broad legal horizon, whose professional excellence allowed them to engage with the most diverse subjects from different angles.[450] Broad general knowledge of international law fostered the participation in the plenary and in the ILC's various committees. The need for generalists is also highlighted by the fact that five out of the ten topics on the Commission's agenda in the

[449] Members of this kind are Mr. Argüello Gómez, Mr. Gómez Robledo, Mr. Hassouna, Mr. Huang, Mr. Ouazzani and Mr. Ruda Santolaria. Mr. Comissário Afonso, Mr. Melescanu, Mr. Niehaus, Mr. Vasciannie, Mr. Wisnumurti and Mr. Yamada belonged to this category in the past.

[450] Examples of this category in the current ILC are Mr. Nolte, Mr. Rajput, Mr. Valencia-Ospina and Mr. Wood. In the past, exponents were Mr. Brownlie, Mr. Forteau, Mr. Gaja and Ms. Xue.

quinquennium 2017-2021 belong to the general category classified as "sources of international law" by the ILC.[451]

5. Specialised Expertise

Different specialisations were mentioned with different frequency. A not very common profile were specialisations in fields connected to the economic dimension of the international legal order, like international trade law, international investment law, intellectual property rights or commercial arbitration.[452] A partial explanation might be that the ILC has only occasionally dealt with explicitly economic topics.

More frequent was expertise in fields broadly categorized by the ILC as the "law of international spaces". Several members had experience in this highly practice-relevant field, including law of the sea, land and maritime boundaries, international watercourses and Polar law[453]; air and space law; and environmental law, right to development and shared natural resources[454]. Moreover, currently two topics on the Commission's agenda belonged to this category.[455]

Finally, a third category of expertise revolved around sub-fields of international law concerned, in one way or another, with the rights and duties of individuals, and the corresponding competences and obligations of States in the realization of these rights and duties, like international human rights law and rights of minorities[456], crimes against humanity and international criminal law[457], and the suppression of terrorism[458]. Whilst international human rights law and international humanitarian law have in the past not been at the centre of the Commission's attention, the tradition of topics dealt with from the field of international criminal law is long[459], and two current topics focus on issues of criminal responsibility or jurisdiction[460].

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451 These topics are: "Subsequent agreements and subsequent practice in relation to interpretation of treaties", Special Rapporteur Mr. Nolte; "Provisional application of treaties", Special Rapporteur Mr. Gómez -Robledo; "Identification of customary international law", Special Rapporteur Mr. Wood; "Peremptory norms of general international law (*Jus cogens*)", Special Rapporteur Mr. Tladi; "General principles of law", Special Rapporteur Mr. Vázquez-Bermúdez. Furthermore, the topic "Succession of States in respect of State responsibility", Special Rapporteur Mr. Šturma, can be considered to be of general nature.

452 Expertise in these fields was in the past claimed by Mr. Adoke, Mr. El-Murtadi Suleiman Gouider, Mr. Kemicha, Mr. Ojo, Mr. McRae, Mr. Pellet; currently, see Mr. Hmoud, Laraba, Mr. Rajput and Mr. Reinisch.

453 Experts in this fields were Mr. Caflisch, Mr. Candioti, Ms. Jacobsson, Mr. Kittichaisaree, Mr. McRae, and of the current Commission, Mr. Cissé, Mr. Kolodkin, Mr. Nguyen and Ms. Oral.

454 From past Commissions, Mr. Galicki, Ms Jacobsson and Mr. Kamto, and of the current Commission, Mr. Cissé, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Park and Mr. Tladi.

455 "Protection of the environment in relation to armed conflicts", previous Special Rapporteur Ms. Jacobsson, since 2017 replaced by Ms. Lehto; and "Protection of the atmosphere", Special Rapporteur Mr. Murase.

456 Mr. Caflisch, Mr. Dugard, and Mr. Vargas Carreño in the past; of the current Commission, Mr. Aurescu, Mr. Grossman Guiloff, Mr. Peter, Mr. Petrič, Mr. Vergne Saboia and Mr. Wako.

457 Ms. Escarameia, Mr. Fomba, Mr. Galicki and Mr. Kittichaisaree in the past; currently, Ms. Escobar Hernández, Mr. Jalloh, Mr. Murphy, Mr. Šturma, Mr. Tladi and Ms. Teles.

458 Claiming expertise in this field were in the past Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Perera and Mr. Singh; and currently, Mr. Aurescu, Mr. Hmoud, Ms. Lehto, Mr. Murphy and Mr. Vázquez-Bermúdez.

459 The topics "Formulation of the Nürnberg Principles", "Question of international criminal jurisdiction", "Draft code of offences against the peace and security of mankind (Part I)", "Draft code of crimes against the peace and security of mankind (Part II) — including the draft statute for an international criminal court" and "Obligation to extradite or prosecute (*aut dedere aut judicare)".

460 Beyond the topic of Immunity of State officials from foreign criminal jurisdiction itself, see the topic "Crimes against humanity", Special Rapporteur Mr. Murphy.

Hybridity as a factor increasing the social capital and reputation also works in the context of expertise. Pronounced expertise in several subfields is highly valued within the ILC, as shown for instance by the frequent nomination of members with this quality to serve as Special Rapporteurs, like Ms Escobar Hernández[461], Ms Jacobsson[462], Mr. Murphy[463] and Mr. Tladi[464].

6. Evolving Compositions Reflecting Evolving Priorities?

The possible readings of the incidence of specific kinds of expertise are multiple. The reading suggested by this study is that the evolving compositions reflect the evolution of issues the international legal order has been confronted with over the last 20 years. These issues found their way on the ILC's agenda, increasing the need for members with specific expertise. Whilst the frequency of profiles specialized in long-standing sub-fields of post-war international law, like human rights[465], anti-terrorism[466], international economic law[467] and law of the sea[468] have remained roughly stable, the frequency of expertise in the growing fields of international environmental law[469], and international criminal law[470] has noticeably increased.

As the cases of non-election of candidates with specialization in the latter fields shows[471], this evolution is not necessarily an expression of a political initiative of States to push these issues on the Commission's agenda. Much rather, the emergence of new problems affected the range of issues having high priority within the international legal order. The urgency of giving an answer to these issues grew, and more prominent international lawyers eligible to serve on the ILC accumulated experiences in these fields. Regarding the topic of State official immunity, these dynamics hold in

461 Expertise in human rights law and international criminal law; Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

462 Expertise in law of the sea, its environmental aspects and international humanitarian law; former Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts".

463 Expertise in international criminal law, international environmental law and the suppression of terrorism, Special Rapporteur for the topic "Crimes against humanity".

464 Expertise in international criminal law and international environmental law, Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)".

465 With regard to human rights, the number went from 6 (2007-2011: Mr. Caflisch, Mr. Dugard, Mr. Petrič, Mr. Vargas Carreño, Mr. Vergne Saboia and Mr. Wako) to 5 (2012-2016: Mr Caflisch, Mr. Peter, Mr. Petrič, Mr. Vergne Saboia and Mr. Wako) and then back to 6 (2017-2021: Mr. Aurescu, Mr. Grossman Guiloff, Mr. Peter, Mr. Petrič, Mr. Vergne Saboia and Mr. Wako).

466 Anti-terrorism expertise was claimed first by 7 members (2007-2011: Mr. Dugard, Mr. Fomba, Mr. Hmoud, Mr. Galicki, Mr. Perera, Mr. Singh and Mr. Vázquez-Bermúdez), then by 4 (2012-2016: Mr. Hmoud, Mr. Murphy, Mr. Singh and Mr. Vázquez-Bermúdez) to rise again to 5 (2017-2021: Mr. Aurescu, Mr. Hmoud, Ms. Lehto, Mr. Murphy and Mr. Vázquez-Bermúdez).

467 In the case of international economic law, the number has slightly decreased from 5 (2007-2011; Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Ojo and Mr. Pellet) to 4 (2012-2016: Mr. Adoke, El-Murtadi Suleiman Gouider, Mr. Hmoud, Mr. McRae; 2017-2021: Mr. Hmoud, Mr. Laraba, Mr. Rajput, Mr. Reinisch).

468 Regarding law of the sea, the number dropped from 5 (2007-2011: Mr. Caflisch, Mr. Candioti, Ms. Jacobsson, Mr. Kolodkin and Mr. McRae; 2012-2016: Mr. Caflisch, Mr. Candioti, Ms. Jacobsson, Mr. Kittichaisaree, Mr. McRae) to 4 (Mr. Cissé, Mr. Kolodkin, Mr. Nguyen and Ms. Oral).

469 In international environmental law, the number rose from 3 (2007-2011: Mr. Galicki, Ms. Jacobsson and Mr. Kamto) to 6 (Ms. Jacobsson, Mr. Kamto, Mr. Murase, Mr. Murphy, Mr. Park and Mr. Tladi) to then seven (2017-2021: Mr. Cissé, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Park and Mr. Tladi).

470 In this field, the number rose from 3 (2007-2011: Ms. Escarameia, Mr. Fomba and Mr. Galicki) to 5 (2012-2016: Ms. Escobar Hernández, Mr. Kittichaisaree, Mr. Murphy, Mr. Šturma and Mr. Tladi) and then to 6 (2017-2021: Ms. Escobar Hernández, Mr. Jalloh, Mr. Murphy, Mr. Šturma, Mr. Tladi and Ms. Teles).

471 See for instance the ill-successes of Mr. Afande (international criminal law), Mr. Brown (international environmental law) or Mr. Wouters (suppression of terrorism).

particular true for the rising consciousness about the frequent impunity for the most horrendous crimes, and consequently the increasing prominence of international criminal law. The evolving compositions do hence not in themselves reflect changes in global agendas or the political goals of States, but they do reflect a changing awareness within the international legal community. At any rate, the growing number of informed and interested experts in the ILC, in some cases equipped with the determination of activists, might tip the balance when it comes to sensitive issues as State official immunity arguably is.

D. Evaluation – A Limited but Dynamic Diversity of Profiles

In conclusion, only few features can be stated as being characteristic for all ILC members, except their broad range of experiences and expertise. The most common profile corresponds to a person that is male, aged over 50, educated in the most prestigious law schools, anglo- or francophone, and national of a State with considerable influence within the respective regional group. The membership in its totality showed a wide range of diverse profiles. This diversity was however not always the product of meritocratic mechanisms, but due to the pursuit of representativity (I.). Moreover, the composition of the ILC was, beyond the individuals elected, not static: the incidence of specific profiles shifted over time, with potentially considerable consequences for the efforts in the field of State official immunities (II.).

I. Meritocracy and Representativity

A characteristic feature of the candidates in ILC elections was the prevalence of profiles with strong *domestic* roots. Among the academics, the overwhelming majority were based at universities in their home countries, with few exceptions like Mr. Grossman Guiloff and Mr. Jalloh.[472] Few members came from the ranks of international law experts who made their careers within international organizations: only one member, Mr. Valencia-Ospina, was principally a high-profile practitioner in a United Nations institution[473]. An important role was also played by international experience: candidates with a predominantly domestic profile frequently withdrew prior to elections[474], or received a limited number of votes[475]. In sum, a multi-faceted profile both in terms of profession and ex-

472 Noteworthy exceptions are Mr. Grossman Guiloff (Chile), professor in Washington, DC and Mr. Jalloh (Sierra Leone), professor in Miami, Florida; see also the unsuccessful candidates Mr. Maluwa (Malawi), professor in Pennsylvania, and Mr. Subedi (Nepal), professor in Leeds.

473 Mr. Valencia-Ospina (Colombia) was a UN professional and registrar at the ICJ before joining the ILC; other members with important experiences in other UN bodies include Mr. Grossman Guiloff (Chile; member and vice chair of the United Nations Committee against Torture and previously member and president of the Inter-American Commission on Human Rights) and Mr. Jalloh (Sierra Leone, counsel before the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda and the International Criminal Court). Among the unsuccessful candidates, see Mr. Ziadé, at the time Executive Secretary of the World Bank Administrative Tribunal and previously with the International Centre for Settlement of Investment Disputes; and Mr. Mohamad, with experiences as Secretary General of the Asian African Legal Consultative Organization (AALCO).

474 See for instance the withdrawals in 2016 of Mr. Borrego Pérez (Venezuela); Mr. Tungo (Sudan), Mr. Habarugira (Burundi) and Mr. M'viboudoulou (Congo).

475 In 2006, Mr. Buena (Philippines) received 60 votes, compared to the 144 votes of the candidate with the most votes in the same regional group (Mr. Yamada, Japan); in 2011, Mr. Tungo (Sudan) received 92 votes, compared to the 156 votes of Mr. Hassouna (Egypt); Mr. Salgado Espinoza (Ecuador), 57 votes, compared to the 159 votes

pertise, combined with domestic roots and international experience, was the most promising mixture for success in elections. Whilst the embedment in national institutions assured the support of the State of origin for the candidature, international experience increased the strength of the candidature. Academic honours contributed to building up prestige. Assignments as a practitioner, in particular within or around the UN in New York, had the side-effect of enhancing the opportunities for pre-election lobbying.

When looking at the outcome of elections, profiles with a lower level of qualification consequently struggled to emerge. While this seems to indicate meritocratic electoral outcomes, a closer look demonstrates that among candidates with limited international experience, some still managed to succeed[476]. Also, several highly qualified candidates failed to get elected[477] or to ensure re-election[478], or got re-elected with the lowest number of votes in their respective regional groups[479].

Close observation seems to suggest that several cases of failed election despite strong qualifications stand in relation to the professional background of the candidates: practitioners, especially those serving in permanent missions in New York, often had more frequent campaigning occasions than their academic peers.

The ILC's composition might have been different, if strictly meritocratic criteria had been applied. The main limit to meritocracy was constituted by the regional quota system. While it happened that unsuccessful candidates from one regional group were better qualified than the elected ones of another group, it also occurred that, within regional groups, candidates nominated by the most influential States had better chances of success than better qualified candidates from the same group.

The regional quotas were not the only logic of representativity playing a role: the priority within the WEOG-group to elect an equal number of female and male candidates played a role in the missed election of highly qualified candidates in 2016.[480]

These dynamics, which eventually lead to a complex balance of power, representativeness and qualification, made it far from unlikely that candidates of certain nationalities got elected regardless of their qualification, and that less qualified candidates could prevail over more qualified ones.[481]

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of Mr. Vergne Saboia (Brazil); in 2016, Mr. Ugirashebuja, (Rwanda), 76 votes, compared to the 160 votes of Mr. Laraba (Algeria); Mr. Collot (Haiti), 98 votes, compared to the 148 votes of Mr. Valencia-Ospina (Colombia).

476 Inter alia Mr. Ojo (Nigeria) in 2006; Mr. Adoke (Nigeria) in 2011; Mr. Ouazzani (Morocco) in 2016.

477 See the cases in 2011 of Mr. Maluwa (Malawi), Mr. Subedi (Nepal) and Mr. Wouters (Belgium); in 2016, failure happened inter alia to Mr. Brown (Australia) and Mr. Kohen (Argentina).

478 See for instance at the 2006 elections, Mr. Matheson (United States) and Mr. Momtaz (Iran); in 2011, Mr. Galicki (Poland) and Mr. Forteau (France).

479 See the cases of Ms. Escobar Hernández (Spain) and Mr. Wood (United Kingdom), both receiving 141 votes in the WEOG group in 2016.

480 This priority was confirmed by several involved actors in background interviews. In particular, see the case of Mr. Forteau, who, between his profile and his record as an incisive member in the precedent quinquennium, was not to be considered a weaker candidate than the 8 candidates preceding him in the election results. Nevertheless, it would be reductive to claim that Mr. Forteau did not get re-elected because he was male. Although in 2016 the election of WEOG-males was more difficult to achieve because of the informal gender quota, the actual (ill-)success of candidates is produced by the dynamics described above, affected by campaigning and the strategies of States.

481 Describing this problem with regard to the ICJ, see A. Gros, 'La Cour internationale de Justice 1946-1986: Les reflexions d'un juge' in Y. Dinštein and M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff, 1989), p. 306. Discussing how the regional quota system can result in the most qualified

Ultimately, limits to meritocracy were to be accepted for the sake of representativity, which in turn increased the Commission's legitimacy and authority. If a trade-off between meritocracy and representativity must be made, even highly qualified candidates run the risk of being sacrificed. Whilst the interference with meritocratic principles were regrettable, the underlying priorities partly justified these shortcomings.

II. Consequences of the ILC's Evolving Composition

Making claims based on the foregoing analysis of the shifting incidences of different professional and expertise groups is a difficult task. It could be tempting to oversimplify, describing two opposed factions. A group of positivist practitioners and generalists, decreasing in terms of numbers and influence, expressing governmental views against reform and in defence of precedent and State will; opposed by an up-and-coming community of academics, principally from the fields of human rights and international criminal law, vigorously pushing for profound limitations of State official immunity based on considerations of justice and principle.

The state of affairs in the ILC is more complex: expertise does not equal specific positions on State official immunity. However, the growing number of members with a background in human rights or international criminal law was likely to affect the ILC's discursive practices on State official immunity. The intuitive hypothesis is that the increasing impact of these fields of expertise affected the way the ILC discussed the topic. Numerous members were acquainted with the vocabulary of rights and justice and inclined to recur to argumentations questioning sovereignty through the prism of the rights and duties of victims and perpetrators. An example of this shift was the second Special Rapporteur, Ms. Escobar Hernández, combining expertise in both human rights and international criminal law.

The changing composition of the ILC gave rise to perpetually evolving dynamics. Members and Special Rapporteurs served the ILC on the basis of personal experiences, perspectives and priorities. Along the red threads constituted by these features, different and fluid majorities formed in different moments of time. In each quinquennium, the identity of the ILC was different. Evolving positions of the ILC were also the expression of who the 34 individuals composing the Commission in a given moment were, rather than exclusively reflecting new circumstances or changing State priorities. The capacity of influential and charismatic members to influence the direction of debates was a factor deserving attention. The following chapters, analysing the development of the ILC's discursive practices on State official immunity over time, investigate whether these hypotheses can be upheld.

candidates not being elected to the ICJ bench, see Mackenzie, *Selecting International Judges: Principle, Process, and Politics*, p. 36.

Part 3
The Topic –
Immunity of State Officials from Foreign Criminal Jurisdiction

The immunity of State officials from foreign criminal jurisdiction is among the most practice-relevant, but also among the most controversial issues in contemporary international law. Interfering with the action of foreign States, by impinging on the acts of their officials, it is a sensitive issue capable of triggering noteworthy tension between States. At the same time, State official immunity is increasingly perceived as an undue shield, allowing the perpetrators of the most heinous crimes to hide away from accountability.

The following sections evaluate the status quo of positive customary international law in the field and the existence of relevant trends pushing towards emerging norms, based on international conventions and State practice as sources of international law, as well as on judicial practice and academic writings as subsidiary sources, article 38 (1) of the Statute of the ICJ.[482] This evaluation recurs to the expressions of practice assessed by the ILC itself, in particular relevant treaty practice and national legislation, as well as international and national jurisprudence in the field.

The contours of the concept of State official immunity from foreign criminal jurisdiction under international law are in many regards relatively clear (A.). Regarding other facets of the issue, first and foremost, whether the immunity of State officials is subject of limitations and exceptions, the legal situation is way less clear (B.)

A. General Characteristics of State Official Immunity

The immunity of State officials from foreign criminal jurisdiction is a rule of procedural nature[483], directly deriving from the idea that equally sovereign States should not sit in judgment over each other (*par in parem non habet imperium*). Consequently, the rule limits the prerogatives of forum States to exercise criminal jurisdiction over the acts of foreign State officials, in order to avoid interference in the internal affairs of the officials' States, violating the latter's sovereign rights.[484]

Two main rationales are frequently purported to justify these privileges accorded to foreign States and their officials. One is the representative rationale – State officials are embodiments of the State, and any subjection of an official's acts to foreign jurisdiction is equivalent to sitting in judgment

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482 Chapter II - Competence of the Court - Article 38
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

483 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* I.C.J. Reports 2002, p. 3 (ICJ, 11 April 2000), para. 60.

484 Describing the relationship between jurisdiction and immunity in general terms of this kind: *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* I.C.J. Reports 2012, p. 99 (International Court of Justice, 03 February 2012), para. 57.

over the State itself. The other is the functional rationale – State officials need the protection of immunity to assure the unhindered performance of their functions, allowing them to fulfil sovereign prerogatives free from foreign influence[485]. The immunity of specific categories of officials has been laid down in international conventions[486]; the immunity of all other officials is based on customary international law.

Equally uncontroversial is the analytical distinction between status-based personal immunity (immunity *ratione personae*) on the one hand and functional immunity (immunity *ratione materiae*) on the other. Immunity *ratione personae* is accorded to the highest-ranking officeholders during their terms of office, excluding foreign jurisdiction over the acts of both official and private nature of the beneficiaries. Conversely, immunity *ratione materiae* covers the acts performed by State officials in an official capacity in a timely unlimited fashion beyond their terms of office.[487]

The relationship between the two categories can be described in the following way: State officials (delimiting, if appropriate, the scope of this category was one of the objectives of the ILC's efforts) enjoy ongoing immunity for those acts identified, because of their official nature, as acts of the State itself (another qualification the ILC aspired to clarify). The protection is accorded in the first place to the foreign State, whilst State officials are only indirect beneficiaries of immunity. Among the State officials enjoying immunity, some particularly crucial ones for the States' sovereignty enjoy during their tenure the absolute protection of immunity *ratione personae*. After office, they continue enjoying immunity *ratione materiae* for those acts they performed in an official capacity, as any other State official.[488]

The category of officeholders falling under the scope of immunity *ratione personae,* generally considered to include the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs, has come under scrutiny with the *Arrest Warrant* decision of the ICJ. A dissenting opinion stated the view that Ministers of Foreign Affairs did not enjoy immunity ratione personae[489]; conversely, the wording of the majority decision left the door open for an expansive interpretation of the category[490]. Both views have however not found a significant impact in practice or academia, which solidly recur to the view that immunity *ratione personae* is enjoyed by no less and no more than the troika.[491]

Several other facets of the issue of State official immunity were however far more ambiguous, causing the greatest controversy both in the Commission and in the 6th Committee. These aspects were firstly the circumscription of the category of high-level officials enjoying immunity ratione

485 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para 53.

486 Cfr. *Vienna Convention on Diplomatic Relations* (1961); *Vienna Convention on Consular Relations* (1963); *Vienna Convention on Special Missions* (1969); *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* (1975).

487 This distinction emerged from the distinct legal evaluations of the President and the procureur général of the Republic of Djibouti, *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* I.C.J. Reports 2008, p. 177 (International Court of Justice, 04 June 2008) paras. 170 and 194, as well as the majority decision in the case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 61.

488 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 61.

489 Ibid., Dissenting Opinion of Judge Van den Wyngaert, para. 25.

490 Ibid., para. 51.

491 This view was for instance confirmed by the ICJ, *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, para. 170.

personae (I.), and secondly whether the scope of State official immunity was subject to any limitations or exceptions, especially in the light of the increasing prioritisation of fostering the accountability of the perpetrators of international crimes (II.).

B. Exceptions and Limitations to State Official Immunity

Immunity *ratione personae* is widely considered not to be subject to limitations and exceptions under positive international law. The practice in the context of immunity *ratione materiae* is far more varied and inconclusive.

I. Treaty practice

The extent of the status-based personal immunity of the highest representatives in the context of foreign criminal jurisdiction, in particular with regard to international crimes, is an issue not covered by treaty-based rules of international law. Insights can however be gained by assessing conventions dealing with immunity *ratione personae* in general. For instance, exceptions to the immunity *ratione personae* of diplomats are not recognised under relevant rules of treaty law.[492] Treaties from the fields of international human rights law and international criminal law usually do not explicitly establish exceptions to immunity. They either indirectly postulate the irrelevance of official status in the context of criminal responsibility and prosecution[493], or remain silent at regard[494]. Provisions of this kind contained in the *Convention against Torture* triggered heated debates in the *Pinochet* case, as the question arose whether the definition of torture in the convention as a crime necessarily committed by officials meant that the parties had implicitly waived the latter's' immunity in cases of said crimes.[495] The proposal to include an exception in cases of *jus cogens* violations had not prevailed during the elaboration of the *Convention on the Jurisdictional Immunities of States and Their Property*, yet to come into force, as the time did not seem ripe to codify the issue.[496]

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492 See article 31, paragraph 1, of the *Vienna Convention on Diplomatic Relations*; article 31, paragraph 1, of the *Vienna Convention on Special Missions*; and articles 30, paragraph 1, and 60, paragraph 1, of the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*. Individuals having committed crimes who enjoy immunity can however under certain circumstances be declared "*persona non grata*" and forced to leave the country, see Vienna Convention on Diplomatic Relations, art. 9, para. 1; and Convention on Special Missions, art. 12; compare C. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/701 (2016), para. 24.

493 See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 33, referring to article IV, *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948); article III, *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973).

494 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006); the *Inter-American Convention to Prevent and Punish Torture* (1985); and the *Inter-American Convention on Forced Disappearance of Persons* (1994), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 33.

495 This argument and its counter-arguments in the *Pinochet* cases was outlined by Mr. Brownlie, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984: 60th session* (2008), pp. 15-16.

496 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 31, referring to *Convention on jurisdictional immunities of States and their property: Report of the Chairman of the Working Group*, doc. A/C.6/54/L.12 (1999), para. 47; see *Convention on Jurisdictional Immunities of States and Their Property* (2004).

II. State Practice - National Legislation

Only few national laws contemplate the existence of an international crimes' exception regardless of the official's rank.[497] The Spanish *Organic Act 16/2015* explicitly denies immunity for international crimes in connection to the troika with regard to the *ratione materiae* of former office holders, whilst the immunity *ratione personae* of incumbent troika members remains however unaffected.[498]

National legislation dealing with the immunity of foreign States and their officials, enacted mainly in States from the common law tradition[499], applies primarily to the State's immunity from civil jurisdiction, with only generic references to State officials[500]. They can hence be considered to be only indirectly relevant in the context of criminal jurisdiction.[501] Most of these statutes contain exceptions reflecting the absence of immunity for *acta jure gestionis*[502], whilst exceptions regarding *acta jure imperii* are exceptional. The United States *Foreign Sovereign Immunities Act*[503] and the Canadian *State Immunity Act*[504] include provisions excluding, under specific circumstances, immunity from civil jurisdiction for acts constituting international crimes if the State deemed responsible is a "sponsor of terrorism"[505].

Among the domestic laws referring to immunity when regulating the State's jurisdiction on international crimes[506], the Belgian *Repression of Serious Violations of International Humanitarian Law Act* of 1993 is particularly well-known as its application gave rise to the ICJ's *Arrest Warrant* case. Whilst

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497 The laws cited by Ms. Escobar Hernández were the following: Burkina Faso: *Act No. 52* (2009); *Act No. 11-022* (2011); *International Criminal Court Act* (2006); *International Criminal Court Act* (2001); *Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court* (2002), see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para 238.

498 See *Organic Act 16/2015,* articles 22 to 25 and 29. In the case of serving troika members, Spain will only exercise criminal jurisdiction if obliged to do so under international law or if cooperation is requested by the ICC. Conversely, if only immunity *ratione materiae* is enjoyed, prosecution is hence unconditional, Article 23. If the immunity *ratione materiae* of the highest-ranking State officials is excluded, *a fortiori* the same must apply to the immunity of other State officials.

499 This group includes *inter alia* the following laws: United States: *Foreign Sovereign Immunities Act* (1976); United Kingdom: *State Immunity Act* (1978), Singapore: *State Immunity Act* (1979); Pakistan *State Immunity Ordinance* (1981); South Africa: *Foreign States Immunities Act* (1981); Australia: *Foreign States Immunities Act* (1985); Canada *State Immunity Act* (1985); Argentina: *Jurisdictional Immunity of Foreign States in Argentine Courts Act* (1995); Japan: *Civil Jurisdiction of Japan with respect to a Foreign State Act* (2009); and Spain: *Privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain Organic Act 16/2015* (2015), cfr. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 44.

500 Referring generically to Heads of State or the representatives of the State: Australia, Foreign States Immunities Act, sects. 3.1, 3.3 (a) and 36; Canada, State Immunity Act, sect. 2 (a); Pakistan, State Immunity Ordinance, sect. 15; Singapore, State Immunity Act, sect. 16 (1) (a); South Africa, Foreign States Immunities Act, sect. 1 (2) (a); and United Kingdom, State Immunity Act, sect. 14 (a) as well as the laws of Spain, art. 2 (c) (iv), and Japan, art. 2 (iv), cfr. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 125.

501 Ibid., para. 45.

502 See the following provisions, compare ibid., FN 124: Argentina, Jurisdictional Immunity of Foreign States in Argentine Courts Act, art. 2 (c), (d), (f), (g) and (h); Australia, Foreign States Immunities Act, sects. 11, 12, 14, 15, 16, 17, 18, 19 and 20; Canada, State Immunity Act, sects. 5, 7 and 8; Spain, Organic Act 16/2015, arts. 9, 10 and 12-16; United States, Foreign Sovereign Immunities Act, sect. 1605 (a) (2)-(4) and (6) (b) and (d); Japan, Civil Jurisdiction of Japan with respect to a Foreign State Act, arts. 8, 9 and 11-16; Pakistan, State Immunity Ordinance, sects. 5-12; United Kingdom, State Immunity Act, sections 3, 4 and 6-11; Singapore, State Immunity Act, sects. 5 and 6-13; and South Africa, Foreign States Immunities Act sects. 4, 5 and 7-12.

503 Sect. 1605 A.

504 Sect. 6.1, 11 and 13.

505 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras 47-49.

506 Ibid., para. 43. Not considered were the laws determining the competences of domestic judicial organs in the context of immunity, generically referring to applicable norms of international law.

before that case the Belgian act did not recognize immunity at all as an obstacle to the exercise of jurisdiction over international crimes, an amendment affirmed in 2003 that this principle was only valid within the limitations established by international law.[507]

A comparable rule is contained in the *International Crimes Act* of the Netherlands of 2003.[508] An example of a law straightforwardly excluding immunity linked to official status in the case of international crimes is the *Penal Code* of the Republic of the Niger.[509] In some laws implementing the Rome Statute, national legislators generally excluded the invocation of immunity against the prosecution by national authorities of crimes under the competence of the ICC.[510] The implementation laws of other States limited the irrelevance of immunity and official status to situations of cooperation with the ICC, usually regarding arrest and surrender.[511]

III. Subsidiary Sources – Judicial Practice and Doctrinal Contributions

The subsidiary sources of international law, of great importance in the field of State official immunity given the inconclusiveness of international conventions and national legislatory practice, are the judicial practices of domestic (a.) and international judges (b.), as well as the "*teachings of the most highly qualified publicists of the various nations*" (c.).

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507 See *Repression of Serious Violations of International Humanitarian Law Act* (1993), article 5.3. Further provisions in the same law explicitly deal exclusively with officials enjoying immunity *ratione personae*; this choice was interpreted by Ms. Escobar Hernández as an implicit recognition of the absolute nature of immunity *ratione personae* only, whilst exceptions would apply to immunity *ratione materie,* see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 54, referring to article 13.

508 See section 16, *International Crimes Act* (2003), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 55.

509 *Penal Code* Article 208.7, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 56.

510 This was the way chosen by Burkina Faso, articles 7 and 15.1, *Act No. 52*; the Comoros, article 7.2, *Act No. 11-022*; Ireland, article 61.1, *International Criminal Court Act*; Mauritius, article 4, *International Criminal Court Act*; and South Africa, article 4 (2) (a) (i) and 4 (3) (c), *Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court*, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 58 and FN 144.

511 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 59. Under some laws the immunity of State officials of any nationality is irrelevant, see article 18, *Extradition Act* (1999); *Code of Criminal Procedure* (2002); articles 20. 1 and 21, *Courts Constitution Act* ; article 27, *Act No. 16 of 2008 on International Crimes* (2008); article 31.1, *International Crimes and International Criminal Court Act* (2000); article 2, *Act No. 65 of 15 June 2001 concerning implementation of the Statute of the International Criminal Court in Norwegian law* ; article 6, *Act on cooperation with the International Criminal Court* and article 25.1 (a) and (b), *Act No. 18 of 2006 on the International Criminal Court,* compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, FN 145). Other States chose to consider irrelevant only the immunity of nationals of States parties to the Rome Statute (this approach emerges from article 20.1, *Act on the International Criminal Court,* (2003); article 6.1, *International Criminal Court Act*; article 26, *Extradition Act* ; articles 32.1 and 41, *Act No. 26 of 2007 on the International Criminal Court* (2007), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, FN 146). Articles 40 and 41, *Act 26200 Implementing the Rome Statute of the International Criminal Court* ; article 12.4, *International Criminal Court Act No. 41* (2002); articles 9.1 and 9.3, *Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court* (2002) and article 10.1 (b) and (c), *Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals* (2004) do not contain the automatic non-applicability of immunity in all cases, but create a system of consultations to resolve eventual disputes with the court; see further article 2, *Act of 16 May 2001 on the International Criminal Court* (2001); compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, FN 147.

1. Domestic Judicial Practice

The overwhelming majority of decisions of national criminal courts relating to immunity *ratione personae* recognized the unrestricted immunity of incumbent Heads of State and other high-ranking officials, irrespectively of the gravity of the offences these officials were accused of.[512] Similar positions were affirmed by attorney generals and prosecutors exercising discretionary powers in the context of deciding over the initiation of proceedings.[513] Only occasionally did criminal courts recognise the existence of exceptions to immunity *ratione personae*.[514] Civil courts usually affirmed the applicability of immunity *ratione personae* in cases regarding the alleged perpetration of international crimes.[515]

The reading of national case law was a complex issue. In numerous domestic cases in the context of immunity *ratione materiae*, criminal courts either acknowledged the existence of exceptions to

512 The cases reviewed in the ILC included the decisions *Re Honecker* 80 ILR 366 (Federal Supreme Court, Germany, 14 December 1984); *In re Hussein* (Regional Superior Court of Cologne, Germany, 16 May 2000); *In re Bouteflika* (Court of Cassation (Criminal Chamber), France, 13 November 2001); *Teodoro Obiang Nguema and Hassan II* (National High Court, Spain, 23 December 1998); *Fidel Castro* (National High Court, Spain, 04 March 1999); *Milosevic* (National High Court, Spain, 25 October 1999); *Alan García Pérez and Alberto Fujimori,* (National High Court, Spain, 15 June 2001); *Silvio Berlusconi* (National High Court, Spain, 27 May 2002); *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron),* 127 ILR 123 (Court of Cassation, Belgium, 12 February 2003); *Hugo Chávez* (National High Court, Spain, 24 March 2003); *Re Mofaz* 128 ILR 712 (Bow St. Magistrates' Court, 12 February 2004); *Tatchell v. Mugabe* 136 ILR 573 (Bow St. Magistrates' Court, 14 January 2004); *The Hague City Party v. Netherlands* (The Hague District Court, Netherlands, 04 May 2005); *Re Bo Xilai* 128 ILR 714 (Bow St. Magistrates' Court, 08 November 2005); *Rwanda (Kagame)* (National High Court, Spain); *Pinochet* 119 ILR 349 (Court of First Instance of Bruxelles, 06 November 1998); *Sesay (Issa) and ors v. President of the Special Court for Sierra Leone and ors,* (Supreme Court, Sierra Leone, 14 October 2005);*Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron),*; *Wei Ye v. Jiang Zemin* 2004 U.S. App. LEXIS 18944 (United States Court of Appeal, Seventh Circuit, 08 September 2004); *W.v Johannes (Hans) Adam, Fürst von Liechtenstein* (Supreme Court, Austria, 14 February 2001); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* (House of Lords, United Kingdom, 14 June 2006); *Tachiona v. United States* 2004 U.S. App. LEXIS 20879 (United States Court of Appeal, Second Circuit); *Tatchell v. Mugabe*; *Re Mofaz.* compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 110.

513 *In re Rajapaksa* (Attorney General of Australia, 25 October 2011); *In re Jiang Zemin* (Chief Prosecutor, Federal Supreme Court, Germany, 24 June 2005), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, FN 220.

514 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 111, referring to the case *In re Hussein.* Furthermore, she highlighted that the French Court of Cassation had reaffirmed the immunity *ratione personae* of a serving head of State, previously denied by the Court of Appeal, see *Gaddafi* 125 ILR 508 (Court of Cassation, France, 13 March 2001) and *Gaddafi* 125 ILR 490 (Court of Appeal of Paris, France, 20 October 2000). Finally, in the case *Teodoro Nguema Obiang Mangue* (Court of Appeal of Paris, France, 13 June 2013; 16 April 2015), the immunity of a serving Head of State for acts of corruption was denied.

515 See the cases *Mobutu v. SA Cotoni* 91 ILR 260 (Civil Court of Bruxelles, 29 December 1988); *Margellos v. Federal Republic of Germany* 129 ILR 532 (Special Supreme Court, Greece, 17 September 2002). In the case *Mobutu and Republic of Zaire v. Société Logrine* 113 ILR 484 (Court of Appeal of Paris, France, 31 May 1994), the court considered immunity ratione personae to cover only official acts; cfr. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 112.

immunity *ratione materiae* relating to international crimes[516] and other crimes of international concern[517], or tried foreign officials for international crimes without explicitly ruling on issues of immunity[518]. In other instances, courts had granted immunity *ratione materiae* in relation to international crimes.[519] Different treatment of immunity issues by various courts of the same legal order could be observed; this contradiction seemed often to be traceable to the different perspectives of criminal and civil courts.[520] United States courts frequently acknowledged that immunity is generally not applicable in cases concerning international crimes[521], although this finding had in some cases not prevented them from granting immunity *ratione materiae*[522].

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516 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 3)* (House of Lords, United Kingdom, 24 March 1999); *Pinochet*; *In re Hussein*; *Bouterse* (Court of Appeal of Amsterdam, Netherlands, 20 November 2000); *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron); Fujimori* (Supreme Court, Chile, 11 July 2007), paras. 15-17 *H. v. Public Prosecutor* ILDC 1071 (NL 2008) (Supreme Court, Netherlands, 08 July 2008), para. 7.2;*Lozano v. Italy* (Court of Cassation, Italy, 24 July 2008), para. 6; *FF v. Director of Public Prosecutions* (High Court of Justice, United Kingdom, 07 October 2014); *A. v. Office of the Public Prosecutor of the Confederation (Nezzar)* (Federal Criminal Court, Switzerland, 25 July 2012); similar affirmations were in her view also made in civil cases, including *Ferrini v. Germany* (Court of Cassation, Italy, 11 March 2004); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*. Furthermore, an exception of this kind was acknowledged in a case against a national of the forum State, see *Special Prosecutor v. Hailemariam* ILDC 555 (ET 1995) (Federal High Court, Ethiopia, 09 October 1995), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 114, FN 230.

517 The cases cited included the decisions *DC 10 UTA* (Special Court of Assizes of Paris, France, 10 March 1999); *R. v. Mafart and Prieur (Rainbow Warrior)* (High Court, Auckland Registry, New Zealand, November 1985); *Association des familles des victimes du Joola case* (Court of Cassation, France, 19 January 2010), compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 114, FN 232.

518 These rulings include the cases *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie* 78 ILR 125 (Court of Cassation, France, 06 October 1983, 26 January 1984 and 20 December 1985); *Attorney General of Israel v. Adolf Eichmann* 36 ILR 18 (District Court of Jerusalem, Israel, 11 December 1961); *Attorney General of Israel v. Adolf Eichmann* 36 ILR 277 (Supreme Court, Israel, 29 May 1962). Also the National High Court of Spain had not deemed it necessary to rule on immunity in several cases, cfr. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 114, FN 233.

519 See the decisions *Marcos and Marcos v. Federal Office of Police,* 102 ILR 201 (Federal Criminal Court, Switzerland, 02 November 1989); *Prosecutor v. Hissène Habré* 125 ILR 571 (Court of Appeal of Dakar, Senegal, 04 July 2000); *Prosecutor v. Hissène Habré* 125 ILR 577 (Court of Cassation, Senegal, 20 March 2001); *In re Jiang Zemin*; *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*.

520 See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 118, FN 240, referring to the jurisprudence of British courts, as well as to the decisions *Bouzari et. al v. Islamic Republic of Iran; Attorney-General of Canada et al, intervenors* (Court of Appeal for Ontario, Canada, 30 June 2004); *Fang v. Jiang Zemin* 141 ILR 717 (High Court of New Zealand, 21 December 2006); *Ferrini v. Germany*, in which courts tried to transfer deductions from the field of criminal jurisdiction to issues of civil jurisdiction.

521 See the cases *Letelier v. Republic of Chile* 79 ILR 561 (Court of Appeals, Second Circuit, United States, 20 November 1984); *Jimenez v. Aristeguieta* 33 ILR 353 (United States Court of Appeal, Fifth Circuit, 12 December 1962); *United States v. Noriega* (Court of Appeals, Eleventh Circuit, United States, 07 July 1997); *Hilao et al v. Marcos* (Court of Appeals, Ninth Circuit, United States, 16 June 1994); *Jane Doe I, et al. v. Liu Qi, et al.* (District Court for the Northern District of California, United States, 08 December 2004); *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.* (Supreme Court, State of New York, United States, 31 October 1988); *Chiudian v. Philippine National Bank and Another* (Court of Appeals, Ninth Circuit, United States, 29 August 1990); *Xuncax v. Gramajo and Ortiz v. Gramajo* (District Court, District of Massachusetts, United States, 12 April 1995); *Bawol Cabiri v. Baffour Assasie-Gyimah* (District Court, Southern District of New York, United States, 18 April 1996).

522 See for instance the cases *Saltany v. Reagan and others* (District Court for the District of Columbia, United States, 23 December 1988); *Saudi Arabia v. Nelson* (Supreme Court, United States, 23 March 1993); *Lafontant v. Aristide* (District Court, Eastern District of New York, United States, 27 January 1994); *A, B, C, D, E, F et al. Jiang Zemin* (District Court, Northern District of Illinois, United States, 2002); *Wei Ye v. Jiang Zemin*; *Ra'Ed Mohamad Ibrahim Matar et al. v. Avraham Dichter* (Court of Appeals, United States, Second Circuit, 16 April 2009).

2. International Judicial Practice

The most influential positions on behalf of international judicial institutions in the debates on the issue of exceptions to State official immunity in cases of international crimes were voiced by the ICJ. In the *Arrest Warrant* case, the majority affirmed that to ensure the effective performance of their functions on behalf of their respective States, Ministers for Foreign Affairs were granted the same full immunity from foreign criminal jurisdiction applying to Heads of State and Heads of Government, barring the exercise of foreign jurisdiction with regard to charges of war crimes or crimes against humanity.[523] This positions was upheld in the cases *Certain Questions of Mutual Assistance in Criminal Matters*[524] whilst the case *Questions Relating to the Obligation to Prosecute or Extradite* focused on issues of jurisdiction[525]. In the *Jurisdictional Immunities of the State* case, regarding State immunity[526], the ICJ reiterated the absence of a rule implying an exception to State immunity in cases of serious violations of human rights or international humanitarian law[527]. The scope of these judgments was however somewhat limited, as the denial of exceptions to immunity in the context of international crimes regarded exclusively instances of either State immunity or immunity *ratione personae*.

The position of the ECtHR, although confined to the immunity of the State and its officials from foreign civil jurisdiction[528], was comparable to that of the ICJ. As stated in the *Al-Adsani* decision, immunity from civil jurisdiction is compatible with the guarantees enshrined in the European Convention on Human Rights (ECHR), despite limiting the right of access to justice; immunity can bar domestic courts from searching compensation from a foreign State for acts of torture.[529]

Conversely, international criminal courts have resolutely affirmed since the International Military Tribunal in Nürnberg[530] that immunity and official status did not exempt from responsibility and could not be raised to challenge the jurisdiction of said courts. The International Criminal Tribunal for the former Yugoslavia (ICTY) stated in broad terms that State officials who had perpetrated international crimes could not invoke immunity from either national or international jurisdiction.[531] The Special Court for Sierra Leone (SCSL) based the irrelevance of immunity on the view that the

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523 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paras. 54-58.

524 *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, para. 170.

525 See *ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* I.C.J. Reports 2012, p. 422. (International Court of Justice, 20 July 2012).

526 The ICJ explicitly excluded issues relating to immunities in criminal proceedings against State officials from the judgment's scope, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 85, referring to *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 139, para. 91.

527 *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 137, para. 84.

528 Mrs Escobar Hernández underlined the limited impact of the ECtHR jurisprudence, as all judgments regarded immunity from civil jurisdiction, and only one regarded the immunity of State officials, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 89.

529 *Al-Adsani v. United Kingdom,* Report of Judgments and Decisions 2001-XI (European Court of Human Rights, 21 November 2001) paras. 40-41 and 59.

530 *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (International Military Tribunal, 01 October 1946); Compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 97

531 See *Prosecutor v. Tihomir Blaškić,* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 29 October 1997), para. 41.

Court was not a state organ violating the sovereign equality of States, but an institution with a direct mandate from the international community.[532]

The International Criminal Court (ICC) who bases the inapplicability of immunity on the express provision contained in article 27 of its statute[533], declared that this norm incorporates a principle of customary international law: the jurisdiction of international courts to try senior public officials for violation of international criminal law.[534] In other cases, the ICC based the refusal of immunity on the effects of the referral of situations to the Court, implying the implicit waiver of immunity by the Security Council, resulting in the inability to invoke the latter.[535]

The ICC's indictment of Umar Al-Bashir, President of Sudan, on charges of genocide, crimes against humanity and war crimes, constitutes the first case of an incumbent Head of State facing prosecution in an international criminal court. Regardless of the question whether insights from the observation of developments in international jurisdictions can be transferred to the field of national jurisdiction, the reluctance to give effect to the arrest warrant issued against Mr. Al-Bashir underlines the importance States attach to the troika's full immunity *ratione personae*.[536]

3. Academic Discussion and Doctrinal Contributions

Previous works of the ILC itself had dealt with questions of individual responsibility in the context of international crimes. The *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* of 1950 established the principles of (I) individual criminal responsibility under international law, (II) the irrelevance of official position and (III) of superior orders, not allowing to avoid responsibility.[537] These principles were later reiterated by the *Draft Code of Offences against the Peace and Security of Mankind*, adopted in 1954, and the *Draft Code of Crimes*

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532 *Taylor* 128 ILR 264 (Special Court for Sierra Leone, Appeals Chamber, 31 May 2004), paras. 51-52.

533 *Article 27- Irrelevance of official capacity*
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

534 See in particular the decisions *William Samoei Ruto and Joshua Arap Sang* (International Criminal Court, Trial Chamber V, 18 June 2013), paras. 66-70; *Uhuru Muigal Kenyatta* (International Criminal Court, Trial Chamber V, 18 October 2013), para. 32; *Omar Hassan Ahmad Al-Bashir* (International Criminal Court, Pre-Trial Chamber I, 04 March 2009).

535 See *Omar Hassan Ahmad Al-Bashir*, para. 45; *Abdel Raheem Muhammad Hussein* (International Criminal Court, Pre-Trial Chamber, 01 March 2012), para 8; *Omar Hassan Ahmad Al-Bashir* (International Criminal Court, Pre-Trial Chamber II, 09 April 2014), para. 29; *Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (International Criminal Court, Pre-Trial Chamber, 27 June 2011), para. 9.

536 See the proceedings against Jordan for having failed to comply with its obligation under the Rome Statute to extradite Mr. Al-Bashir, *Omar Hassan Ahmad Al-Bashir* (International Criminal Court, Appeal Chamber, 10 September 2018).

537 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 124-127; *Draft Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, vol. II, para. 97 (1950).

against the Peace and Security of Mankind, adopted in 1996. Both projects had a primarily substantive perspective, but procedural issues like immunity were not entirely left aside.[538]

As highlighted in the ILC, the academic debate on State official immunity is a rich one. [539] Many commentators engaged with the most topical examples of international judicial practice relating to the issue of State official immunity. The controversiality of the Arrest Warrant case found reflection in contrasting views on the ICJ's decision. Whilst some authors praised the decision for the clear guidelines it established[540], several others criticised the decision for not reflecting relevant trends towards the limitation of State official immunity[541]. In a similar line, vivid criticism of the ECtHR's decision in the *Al-Adsani* case and the national judicial reactions it triggered was voiced.[542] With regard to the ICC's indictment of Mr. Al-Bashir, whilst the jurisdiction of the Court and the circulation of an arrest warrant did not raise doubts, the lawfulness of requesting States to surrender the Sudanese President despite the latter's immunity *ratione personae* was considered questionable.[543]

Several recent monographies extensively reviewed international law in the field of State official, generally advocating the need to adapt the pertinent legal rules to the emerging priority to increase the accountability of perpetrators of international crimes.[544] Academic commentators differentiated

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538 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 128-133; *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1954, vol. II (1954); *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1996, vol. II, Part Two (1996).

539 See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 194-195, referring to R. van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*, Oxford monographs in international law (Oxford: Oxford Univ. Press, 2008); S. Humes-Schulz, 'Limiting Sovereign Immunity in the Age of Human Rights', *Harvard Human Rights Journal* vol. 21 (2008), 105; J. Stigen, 'Which Immunity For Human Rights Atrocities?' in C. Eboe-Osuji (ed.), *Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay* (Leiden, Boston: Martinus Nijhoff Publishers, 2010), pp. 749–88; B. Stephens, 'Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses', *Vanderbilt Journal of Transnational Law* 44 (2011); Daniel W. Van Ness, 'Accountability' in J. J. Llewellyn and D. Philpott (eds.), *Restorative justice, reconciliation, and peacebuilding* (New York: Oxford University Press, 2014); P. Craig, 'Accountability' in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015); Thakur R. and Malcontent P. A. M. (eds.), *From sovereign impunity to international accountability: The search for justice in a world of states* (Tokyo: United Nations Univ. Press, 2004); A. Bianchi, 'Serious violations of human rights and foreign states' accountability before municipal courts' in L. C. Vohrah (ed.), *Man's inhumanity to man: Essays on international law in honour of Antonio Cassese*, International humanitarian law series (The Hague: Kluwer Law Internat, 2003), pp. 149–82.

540 Cfr. *inter alia* M. A. Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity', *Duke Law Journal* 52 (2002), 651.

541 Cfr. *inter alia* A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', *European Journal of International Law* 13 (2002), 853–75; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', *European Journal of International Law* 13 (2002), 877–93.

542 A. Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', *European Journal of International Law* 18 (2007), 955–70; M. Rau, 'After Pinochet : Foreign Sovereign Immunity in Respect of Serious Human Rights Violations - The Decision of the European Court of Human Rights in the Al-Adsani Case', *German Law Journal* 3 (2002).

543 P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', *Journal of International Criminal Justice* 7 (2009), 315–32.

544 Y. Simbeye, *Immunity and International Criminal Law* (Abingdon, Oxon, New York, NY: Routledge, 2016); van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*; L. C. Walker, *Foreign State Immunity & Foreign Official Immunity: The Human Rights Dimension.*, Sydney Digital Theses (2017: University of Sydney, Sydney Law School); R. Pedretti, *Immunity of heads of state and state officials for international crimes* (Leiden, Boston: Brill Nijhoff, 2015); J. Foakes, *The position of heads of state and senior officials in international law*, Oxford International Law Library, 1. ed. (Oxford: Oxford Univ. Press, 2014); A. Bellal, *Immunités et violations graves des droits*

between status-based immunity ratione personae and functional immunity ratione materiae, considering the first type of immunity to be unlimited even in the context of international crimes, whilst the second one was more complex to assess.[545] Calls to balance the needs connected to justice and human rights on the one hand, and security and stability one the other, expressly underlies some of these studies.[546]

The predominant perspective among academic contributions on the issue of State official immunity was a critical one, speaking up for restrictive understandings of key concepts. In a historical perspective, it was at times highlighted how immunity *ratione materiae* is a fairly recent phenomenon, as State officials who were neither diplomats nor Heads of State were not granted immunity in the 18th century.[547] Some authors doubted that a customary rule of international law according immunity *ratione materiae* existed at all[548], or doubted that all State officials could be considered to benefit from functional immunity[549]. Other authors claimed that the personal scope of immunity ratione personae was limited to Heads of States and Heads of Government.[550] However, certain authors underlined the weak doctrinal foundation of claims for exceptions to State official immunity[551]. Criticism of calls for exceptions and limitations to State official immunity voiced in the ILC furthermore expressed for instance by Russian academic commentators.[552]

Generally, the ILC's efforts in connection to topics dealing with issues of international criminal justice, immunity and accountability noticeably reinvigorated the discussion and were widely reflected in doctrinal writings.[553] Whilst some highlighted the risks of working on closely connected topics such as State official immunity and crimes against humanity in a compartmentalised manner[554], or urged the Commission to impartially assess practice to consensually achieve a widely

humains: Vers une évolution structurelle de l'ordre juridique international?, Zugl.: Genève, Univ., Diss., 2010, Collection / Académie de droit international humanitaire et de droits humains à Genève (Bruxelles: Bruylant, 2011), vol. 5.

545 See inter alia d. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law* 21 (2010), 815–52.

546 Simbeye, *Immunity and International Criminal Law*.

547 C. I. Keitner, 'The Forgotten History of Foreign Official Immunity', *New York University Law Review,* 87 (2012), 704.

548 M. Frulli, 'On the Existence of a Customary Rule Granting Functional Immunity to State Officials and Its Exceptions: Back to Square one', *Duke Journal of Comparative & International Law* 26 (2016), 479–502.

549 R. P. Mazzeschi, 'The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories' in P. Acconci, D. Donat Cattin, A. Marchesi, G. Palmisano and V. Santori (eds.), *International law and the protection of humanity: Essays in honor of flavia* (Leiden: Brill Nijhoff, 2016), pp. 507–34.

550 R. Pedretti, 'Immunity of Heads of State and State Officials for International Crimes', *Swiss Review of International and European Law* 26 (2016), 758.

551 Q. Shen, 'Lingering Issues of Foreign Official Immunity in Enforcing Prohibition against Torture in Domestic Courts: Pinochet's Reasoning Reassessed', *Chinese Journal of International Law* 16 (2017), 311–50.

552 A. Abashidze and S. Shatalova, 'International Crimes Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: The Russian Perspective on the Work of the International Law Commission', *Netherlands International Law Review* 64 (2017), 213–36.

553 C. I. Keitner, 'Horizontal Enforcement and the ILC's Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction', *AJIL Unbound* 109 (2015), 161–6; Pedretti, *Immunity of heads of state and state officials for international crimes*.

554 M. Frulli, 'The Draft Articles on Crimes Against Humanity and Immunities of State Officials', *Journal of International Criminal Justice* 16 (2018), 775–93.

shared result[555], others expressed criticism of methodological shortcomings undermining the Commission's efforts on State official immunity, resulting in a worrying internal scission[556]. This scission overshadowed in the view of some authors the real issue: whether the "international crimes exception" under discussion was already part of customary international law.[557]

C. Evaluation

Summing up, the review of practice does not permit to establish any exceptions to the immunity *ratione personae* of the troika before national criminal jurisdiction. *De lege lata,* immunity ratione personae is in the context of national jurisdiction not subject to any limitations or exceptions, and hence of absolute nature.[558]

More difficult is the evaluation of the contrasting practice regarding immunity *ratione materiae*. The main argumentations against exceptions and limitations of State official immunity in the context of national criminal jurisdiction even in cases of international crimes were the following: (1) as a procedural rule, State official immunity could not be trumped by substantive rules, regardless of the latter's eventual *jus cogens* rank[559]; (2) State official immunity was an obstacle to jurisdiction, not an exemption from responsibility resulting in impunity, as other means of redress could be available, such as the courts of the official's State, international courts or the courts of the forum State if the official's State waived the immunity of its official[560]; (3) the establishment of jurisdiction in international treaties prohibiting international crimes did not mean absence of immunity.[561]

In response, proponents of exceptions and limitations claimed that (1) the procedural rules of immunity turn into substantive bars to justice if alternative ways of obtaining redress are effectively not available[562]; (2) the *jus cogens* prohibition of the most heinous crimes, expressing fundamental values of the international community relating to justice and the improvement of human rights enjoyment, must prevail over the ordinary procedural rule of immunity[563]; (3) the establishment of (universal) jurisdiction in international treaties prohibiting international crimes was to be read as implicit waiver by the ratifying States of the immunity of their officials if the latter were suspected of having perpetrated the prohibited crime[564].

Both argumentations are characterised by intrinsic convincingness. The preference for either stream of argument depended on the premises and convictions of lawmakers and law-appliers.

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555 R. O'Keefe, 'An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely', *AJIL Unbound* 109 (2015), 167–72.

556 Q. Shen, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction', *AJIL Unbound* 112 (2018), 9–15.

557 R. van Alebeek, 'The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?', *AJIL Unbound* 112 (2018), 27–32.

558 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 54.

559 *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 124, paras. 84; 93.

560 *Al-Adsani v. United Kingdom,* paras 54-56.

561 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 59.

562 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Dissenting Opinion of Judge Van den Wyngaert, para. 34.

563 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, dissenting opinion of Judge Al-Khasawneh, p. 98.

564 *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, International Law Association, Committee on International Human Rights Law and Practice, London Session (2000), p. 14.

Reflecting this bipolarity, practice was divided: whilst some national practitioners showed an inclination towards the first argumentation, others embraced the second one. Furthermore, the example of United States court practice revealed how different branches of State power can have different ideas on State official immunity.[565] Comparable findings showing the divisiveness of the issue emerged further from two prominent recent cases.

First, two highly publicised South African judgments denying the immunity *ratione personae* of an incumbent President in the context of the obligation to cooperate with the International Criminal Court[566] caused significant tension between the courts and the government of South Africa. The case confirmed the conflict potential of the typical opposition between the executive power, often advocating in favour of unrestricted immunities for the sake of *realpolitik*, whilst the judiciary might be prone to expand its jurisdiction by accepting exceptions to immunity.[567]

Second, a judgment of the Italian Constitutional Court[568] excluded the incorporation in the Italian domestic legal order of a rule of customary international law. The rule's content was that State immunity for *acta jure imperii* knows no exceptions regardless of the availability of other means of redress, identified by the ICJ in the case regarding *Jurisdictional Immunities of the State*. This decision highlighted the extraordinary frictions the issue can cause not only within national orders, but as well between domestic and international institutions.[569]

Attention deserved also the insight that in unknown number of cases, national law enforcement was aborted at the pre-trial stage and did hence not figure in records, as foreign officials were considered to enjoy immunity. [570] Conclusively evaluating national case law was in the light of all these factors a challenging task.

Treaty law and national law remained often silent or ambiguous about whether State official immunity *ratione materiae* was in principle recognised in the context of international crimes, or whether the latter was subject to exceptions and limitations. This finding allows for multiple readings: does the absence of explicit regulation imply a default solution of immunity, or unhindered jurisdiction?

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565 The consideration of United States court practice needs to be nuanced: since the *Samantar* case, *Samantar v. Yousuf* (United States Supreme Court, 01 June 2010) decided by the Supreme Court, State official immunity is no more determined exclusively by the courts. The competence of courts of determining immunity, enshrined in the US Foreign Sovereign Immunities Act, applies only to cases of State immunity strictu sensu. In cases of State official immunities, through application of the common law doctrine, the executive is enabled to decisively interfere by issuing a "suggestion of immunity" to be respected by courts. Previously, United States courts frequently derecognized immunity for acts not qualifying as acts performed in an official capacity, whilst immunity *ratione materiae* was more frequently recognised under common law rules owing to the weight of the executive's opinion contained in the suggestion of immunity. For cases in which courts decided to examine the issue despite a suggestion expressed by the government, see the Samantar case itself, as well as the decision *Enahoro v. Abubakar* (United States Court of Appeal, Seventh Circuit, 2005)

566 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others.* (High Court of South Africa, Gauteng Division, Pretoria, 23 June 2015); *The Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre and Others* (Supreme Court of Appeal, South Africa, 15 March 2016), concerning the ICC Arrest Warrant regarding Mr. Al-Bashir, incumbent President of Sudan.

567 On this judgment, see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 13.

568 *Judgment No. 238/2014* (Constitutional Court, Italy, 22 October 2014).

569 On the impact and argumentation of this judgment, see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 13 and 122.

570 Advancing this argument to explain the scarcity of practice, see inter alia Mr. Vasciannie, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986: 60th session* (2008), pp. 17-18.

International jurisprudence finally was both circumscribed in scope and divergent. Whilst influential courts such as the ICJ and the ECtHR had shown scepticism towards the idea of exceptions and limitation in decisions though mainly regarding immunity *ratione personae* or immunity from civil jurisdiction, international criminal courts and tribunals had demonstrated more openness to the idea that State official immunity did not apply to State official immunity.

Regardless of the preferability of either argumentation, which will be evaluated later in this study, this picture of contrasting practice, characterised by both conspicuous numbers of decisions upholding or denying immunity, allows for a finding sufficing so far: the practice was far from unequivocally affirming restrictions to immunity *ratione materiae*; the issue of limitations and exceptions, above all in the context of international crimes, was hence not a matter of *lex lata*. Conversely, claims affirming the existence of limitations and exceptions were not an isolated and negligible phenomenon: a certain tendency to increasingly invoke views of this kind could be observed. From the view hence advocated in this study, whilst exceptions and limitations did not express positive international law suitable for codification, there were significant amounts of practice allowing to enter into considerations on the advisability and viability of progressive development.

Not all ILC members who dealt with the topic over the years would have subscribed to this assessment, as views in the Commission on what constituted *lex lata* to be codified or *lex ferenda* ripe for progressive development varied. Reviewing these issues with the objective of formulating a widely shared perspective on State official immunity was exactly the task the ILC was called to perform: Part 4 outlines to what extent this endeavour was crowned with success.

Part 4
The Discursive Practices in the ILC – Trends, Positions and Argumentative Techniques

The foundation of the Commission's efforts on the topic of State official immunity are its working methods. The interplay of various structures within the ILC, above all the Plenary, the Special Rapporteurs and the Drafting Committee, are essential elements determining the positions expressed by the Commission (A.). The topic of State official immunity from foreign criminal jurisdiction was heatedly debated in the ILC, with different premises distinguishing the three quinquennia. After a chronological overview of the main tendencies characterizing each quinquennium (B.), the positions on specific issues emerging from the reports of the Special Rapporteurs and the plenary debates are described (C.). Finally, some topical examples of argumentative techniques employed by ILC members are reviewed (D.).

Section A delineates the events characterizing the interaction of the Special Rapporteurs and the plenary. Whilst in Section B the positions formulated by the Special Rapporteurs – integrated by the reactions these positions triggered in the plenary – constitute the analytical pivot, in Section C the argumentative techniques of both Special Rapporteurs and speakers in the plenary will be analysed on an equal footing. Nonetheless, given this study's focus on discursive practices, the statements are individually assessed according to their specific relevance. The latter implies that while all statements (in terms of their communicative quality as utterance) are equally important, they still discursively carry a different weight.

Regarding the first of these aspects, some members were far more active than others. Whilst some members made in numerous years of membership no o hardly any comments on State official immunity, in each quinquennium the works were pushed forward by a core of members, usually roughly corresponding to the voluntary membership in the Drafting Committee. Undeniably, influence can be exercised as well behind the scenes, and even absence from debates can be considered a way of impacting the works. However, in line with the premises of this study, the focus lies on the discursive practice produced in the ILC. The higher the frequency of statements, the more likely it is that member conquer an influential role in the Commission, and the more prominently their views contribute to shaping the debates.

Still, quantity is not everything. Qualities as accuracy, discursive articulation and persuasive power are also taken into account: the statements of eloquent proponents of different views emerge in greater clarity than those of their colleagues.

A. Working methods and structures of the International Law Commission

The working methods shaping discourses on the topic of immunity of State officials from foreign criminal jurisdiction were foremost characterised by the general conditions of membership (1.), as

well as by the interplay of the structures[571] at the basis of the Commission's works (2.), which follow a flexible but in broad lines pre-determined process of consideration (3.).

I. General conditions of membership

ILC members serve for terms of office of five years, with the possibility of re-election.[572] The ILC's proposal to extend the term of office to six or seven years, more suitable to complete a sensible programme of work given the time-consuming nature of the Commission's tasks, has not implemented by the General Assembly.[573]

The ILC is a permanent subsidiary organ of the General Assembly, though serving on a part-time basis. The Commission meets in annual sessions of between 10 and 12 weeks a year.[574] Membership in the ILC comes without retribution, although there is an indemnisation for travel expenses and a special allowance, the amount of which is determined by the General Assembly.[575] Led again by the intention to speed up its works, the Commission suggested putting the ILC on a full-time basis.[576]

Despite the invocation of retributed full-time membership, in analogy to the judges of the ICJ, ILC membership has remained non-retributed and part-time. Regardless of the advantages of full-time membership, keeping above all the workload to be tackled in mind, the fear that the most distinct international lawyers would not have been willing to join the Commission on a full-time basis prevailed. Other arguments speaking against a similar reform were the expenses and the potentially excessive number of drafts elaborated by the Commission that the States and the 6th Committee would have been confronted with.[577]

Throughout the year, members usually make a living through other sources of income. The latter will frequently consist in professional activities within their respective countries, often as ministerial civil servants or as academics. This however means that the duties as an ILC member compete with other duties in the profession providing the member's income, with possible negative effects on the priority given to the duties within the ILC. These financial circumstances are capable of limiting the independence of ILC members. Furthermore, inversing the arguments made in the General Assembly, theoretically part-time but factually highly time-consuming ILC membership

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571 Features of the Commission's structures not reviewed in this study as inter alia the Bureau of the Commission (consisting of the Chairman, the First and Second Vice-Chairmen, the Chairman of the Drafting Committee and the General Rapporteur), the Planning Group, the possibility of recurring to working groups, the Yearbook of the Commission and the International Law Seminar have a crucial impact on the works of the ILC in general. As they are not central to the perspective on the topic chosen in this study, they are in the following not considered in detail.

572 Art. 10, General Assembly, *Statute of the International Law Commission* (1947).

573 *The work of the International Law Commission*, 8th ed. (New York: United Nations, 2012), p. 18; see further, *Yearbook of the International Law Commission*, vol. II (Part (One), doc. A/CN.4/325 (1979, 1979), para. 4

574 For an overview of the changing duration of sessions, see *The work of the International Law Commission*, pp. 66-67.

575 Article 13, General Assembly, *Statute of the International Law Commission* as amended by *Resolution 485 (V) of 12 December 1950* (1950).

576 *The work of the International Law Commission*, p. 19; see further *Yearbook of the International Law Commission*, vol. II, doc. A/1858 (1951), paras. 60-71.

577 See *The work of the International Law Commission*, p. 17.

might not necessarily be attractive to the most prominent international lawyers the General Assembly is aiming at to recruit ILC members.

Regarding other resources provided by the ILC to its members, beyond a limited number of unpaid interns, mainly recruited among the students at the New York University School of Law, assisting Commission members during the annual sessions, the Commission itself does not provide any assistance.[578] This absence of resources appears to reinforce disequilibria within the ILC. The lack of resources does not affect all members in the same way. Commission members with a strong institutional background providing research staff and resources might be able to compensate this under-funding. The access to resources is often interlinked with the nationality of members. Nationals of wealthier States will usually have more resources at their disposals than those of other States, although again there will be exceptions to this assumption. Notwithstanding the role of individual qualities such as expertise or communicative skills, the connection between more research resources, more preparedness in the ILC sessions, and hence greater easiness in the development of argumentative power is an intuitive hypothesis.

II. Principal Structures of the ILC

Within the differentiated structures of the ILC, the Special Rapporteurs (a.), the Plenary (b.) and the Drafting Committee (c.), entrusted respectively with different specific tasks and functions, are crucial for the elaboration of topics.

1. Special Rapporteurs

These reflections related to the conditions of membership are directly related to the circumstances of service of Special Rapporteurs. Although influence can be exerted in many ways in the ILC, and does not necessarily require any formalization, the position as a Special Rapporteur is one of the most obvious gateways to significant impact. Special Rapporteurs prepare reports on the topic assigned to them, propose draft articles, have a key role in the works of the plenary and the Drafting Committee and prepare commentaries to draft articles.[579] On paper, the Statute requires the nomination of a Special Rapporteur only if the aim is progressive development.[580] In practice, as could be observed for instance in the case of the topic of State official immunities, Special Rapporteurs are nominated regardless of whether the goal is codification or progressive development.[581]

578 Beyond its impact on the work of the Commission, the lack of resources caused also significant tension between the Commission and the General Assembly. Historically, members were paid honorariums for their efforts (for instance, in 1981, the Chairman received per annual session 5.000$, other members 3.000$, and Special Rapporteurs an additional 2.500$). In 2002, the General reduced these rates to a symbolic honorarium of 1$ per year, intending to utilise the savings to restore Internet services to permanent missions in New York, to be halted owing to budgetary constraints, see General Assembly resolution 56/254D of 27 March 2002. The Commission protested against this measure and its adverse effects on the efforts of Commission members, reiterating these concerns on several occasions, and has since not collected the symbolic honorariums in view of the administrative costs the payment would have involved. See in general, ibid., FN 71.

579 Ibid., pp. 25-26.

580 Compare Article 16 a), General Assembly, *Statute of the International Law Commission*.

581 As shown by the topic of State official immunities, it might be the Special Rapporteurs themselves who decide whether a topic is more suitable for codification (as the topic at stake was in Mr. Kolodkin's view) or progressive development (Ms. Escobar Hernández' approach involved some degree of progressive development).

Through their reports elaborating the state of the law and through the proposed draft articles, Special Rapporteurs give the direction and set the standards in the topic of their competence.[582] The Special Rapporteurs for the topic of State official immunities were at times subject to heavy criticism; nevertheless, it was against the argumentative backgrounds they erected that issues were framed, discussed and critiqued.

The honour of this prestigious position comes with a heavy burden of workload. Special Rapporteurs are chosen internally based on a series of considerations, including the likeliness of successfully handling of the topic. Relying on factors like the motivation and expertise of the potential Special Rapporteur, the process of choosing Special Rapporteurs does not seem to imply any discrimination. Without adequate resources, being a Special Rapporteur might however come with considerable personal sacrifices.[583] To resist scrutiny by the plenary, the reports need to be thoroughly prepared during the months between the session, whilst other professional duties await. Preferences will consequently often converge on members with enough own resources in terms of financial means, research infrastructure and time. Often, these resources will be found in greater quantities with WEOG-nationals. The institution of the Special Rapporteur and the lack of funding for their activities appears hence as a gateway for increased influence of the nationals of WEOG-States within the Commission.

2. The ILC Plenary

The plenary is the central organ of the ILC: the plenary considers *inter alia* the reports of the Special Rapporteurs, decides whether to refer suggested draft articles to the Drafting Committee, and adopts provisional or final draft articles, commentaries thereto and the Commission's annual reports to the General Assembly.[584] The public nature of plenary debates and their documentation in official records are considered to play a crucial role in legitimising the ILC's efforts, increasing the acceptance for its proposals and enhancing the approval of States.[585] The general plenary debate establishes the guidelines to be followed by Special Rapporteurs and other sub-organs.[586] Regarding

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582 See *The work of the International Law Commission*, p. 26. Compare further *Yearbook of the International Law Commission*, doc. A/CN.4/SER.A/1996/Add.l (Part. 2) (1996), para. 188.

583 As emerged from the background interview with one former Special Rapporteur, he took vacation and came to Geneva outside the annual sessions to write his reports when he served as a Special Rapporteur.

584 *The work of the International Law Commission*, pp. 22-23.

585 The Commission considers the provision of summary records of its meetings "*an inescapable requirement for the procedures and methods of work of the Commission and for the process of codification of international law in general. The Commission has observed that the need for summary records in the context of its procedures and methods of work was determined by, inter alia, its functions and composition. As its task is mainly to draw up drafts providing a basis for the elaboration by States of legal codification instruments, the debates and discussions held in the Commission on proposed formulations are of paramount importance, in terms of both substance and wording, for the understanding of the rules proposed to States by the Commission. Pursuant to the Commission's Statute, members of the Commission serve in a personal capacity and do not represent Governments. Therefore, States have a legitimate interest in knowing not only the conclusions of the Commission as a whole as recorded in its reports but also those of its individual members contained in the summary records of the Commission, particularly if it is borne in mind that members of the Commission are elected by the General Assembly so as to ensure representation in the Commission of the main forms of civilization and the principal legal systems of the world. The summary records of the Commission are also a means of making its deliberations accessible to international institutions, learned societies, universities and the public in general. They play an important role, in that respect, in promoting knowledge of and interest in the process of promoting the progressive development of international law and its codification.",* ibid., p. 62.

586 Ibid., p. 23; see also *Yearbook of the International Law Commission*, para. 202-204.

the topic of State official immunity, severe criticism of the respective approaches of the two Special Rapporteurs was voiced in the plenary, eventually finding reflection in the latter's subsequent efforts, as well as in the recommendations of the Drafting Committee.

Central decisions of substantive or procedural nature are taken in the plenary, under the condition that a majority of members is present. The preferred way of taking decisions is to achieve consensus rather than to vote, reaching as far as possible a common understanding, whilst minority views are to be reflected in summaries, commentaries and reports to the General Assembly. If it is unclear whether consensus is close or achievable at all, the Chairman can call an indicative vote. If all attempts at reaching consensus fail, voting becomes unavoidable, and the decision is then taken by the majority of members present and voting.[587] Underlining the topic's controversiality, this exceptional path had to be chosen for the explosive issue of limitations and exceptions to State official immunity.[588]

3. The Drafting Committee

The Drafting Committee complements the plenary as a collegial sub-organ taking forward the ILC's efforts. With changing compositions for each topic, including the respective Special Rapporteurs, the Drafting Committee has a crucial function in harmonizing the discording positions voiced in the plenary, to reach shared formulations even on issues having previously given rise to division in the plenary. Beyond drafting activities in the narrow sense regarding draft articles, commentaries and reports, the Drafting Committee is the forum allowing to overcome substantive disagreement and points causing protracted controversy in the plenary.[589]

Central to the success of this operation is the non-public nature of these meetings, of which no summary records exist.[590] As described by members in background interviews, if the plenary debates constitute the moment of publicly making principled and maximalist claims, the meetings of the Drafting Committee represent the moment of converging positions towards generally acceptable solutions through compromise, often involving bargaining over formulations. The positions, cleavages and argumentations emerge in their greatest clarity in the plenary debates. In the Drafting Committee, little is added to these discourses: its function is to find practical solutions by bridging differences.

The privacy of the Drafting Committee meetings contributes to the more informal and spontaneous nature of discussions compared to the plenary. Participants usually intervene in English or French, rather than using their native languages (if the latter is a working language of the ILC) as they would eventually do in the plenary. The likeliness of harmonisation is enhanced by the fact that, unlike the situation in plenary debates, participants do not have to fulfil expectations in public, above all on the side of governments, but can flexibly open up to adequate compromises.

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587 On the ILC's decision-making, see *The work of the International Law Commission*, pp. 59-60; cfr. further *Yearbook of the International Law Commission*, para. 8.

588 ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378: 69th session* (2017).

589 On the Drafting Committee, see *The work of the International Law Commission*, pp. 32-33.

590 The Chairman of the Drafting Committee reports extensively on the activities of the latter organ to the plenary, without referring the positions of individual members in detail, compare ibid., p. 33, in particular FN 140.

Membership in the Drafting Committee is in practice open to members interested in participation and will usually include around half of the members. The proposals of the Drafting Committee are formally adopted by the plenary, where amendments and alternative formulations can be suggested. Far-reaching common understandings and compromissory formulations are however often prepared in the Drafting Committee, whose proposals are frequently adopted unanimously, sometimes without any further discussion.[591] Participation in the works of the Drafting Committee is hence essential for members to exercise influence in the Commission.

Joining the Drafting Committee implies however further time-intensive workload, as the organ usually meets after intense workdays. Consequently, first and foremost the most motivated members participate in the meetings of the Drafting Committee. Usually, members aspiring to play an influential role in the plenary debates will try to continue their endeavour by contributing to the works in the Drafting Committee. They thereby contribute to the dominance of a limited group of members over the general efforts of the ILC, whilst less active members develop *de facto* much less influence on the Commission's output. The results achieved by the Commission ultimately seem to be in the first place the merit of the most active members.

III. Process of consideration

Topics are usually considered in three stages, contained in article 16 of the Commission's statute; in the context of the topic of immunity of State officials from foreign criminal jurisdiction, this process was partly duplicated due to the change of the Special Rapporteur. In the first stage, the Special Rapporteurs, Mr. Kolodkin first and Ms. Escobar Hernández later, were appointed. During this preliminary stage, they expressed their ideas on how works were to be organised, and formulated work plans. A "*preliminary indication as to the final form of the work undertaken on a specific topic (draft articles which might be embodied in a convention, declaration of principles, guidelines, expository study with conclusions and recommendations, etc.) should, as far as possible, be made at an early stage by Special Rapporteurs […], subject to review and later adjustment as the work develops*".[592] Whilst Mr. Kolodkin's approach was that a expository study with conclusions would be the most appropriate output, Ms. Escobar Hernández opted for the more complex path of formulating draft articles.

The second stage was devoted to the consideration of the Special Rapporteurs' reports in the plenary. Furthermore, the draft articles proposed by Ms. Escobar Hernández were examined in the plenary and in the Drafting Committee. After re-elaboration, the provisional draft articles were approved in the Drafting Committee. Jointly with draft commentaries containing the precedents referred to, divergences of views in the plenary and potential alternative solutions evaluated[593], these provisional draft articles were approved in the plenary. The commented provisional draft articles were submitted to the General Assembly and governments for observations.

In the third stage, based on the replies of governments and comments in the 6th Committee, Ms. Escobar will be expected to submit another report to the Commission, containing appropriate

591 Ibid., p. 33.
592 Ibid., p. 49, FN 207.
593 The content of commentaries is laid down in Article 20, General Assembly, *Statute of the International Law Commission*.

amendments to the provisional draft articles. Considering the views of governments, the Drafting Committee will consider, amend and approve the revised draft. Afterwards, the final draft is adopted by the Commission in the plenary together with the final commentaries, containing the positions adopted by the Commission as a whole[594], and a recommendation to the General Assembly regarding further action[595]. If the General Assembly does not request the Commission to undertake further work on the topic of State official immunities, the task of the Commission will be completed once the final product will be submitted.

B. Overview – Between Worries about Sovereignty and Aspirations of Global Justice

The works on the topic can chronologically be divided in different phases, corresponding to the different quinquennia in which the topic was debated. The topic found its way on the Commission's agenda towards the end of the quinquennium 2002-2006 (I.). The quinquennium 2007-2011 was characterized by controversial debates in a Commission dominated by a handful of charismatic academics, heatedly confronting their diverging views (II.). The following quinquennium 2012-2016 was shaped by a newly composed Commission and a new Special Rapporteur, searching for a way out of the deadlock caused by the seemingly insurmountable opposites. The result was a tendency to put the most controversial aspects of the topic on hold (III.). The quinquennium 2017-2021 finally began with a reinvigorated quest for limitations to immunities, re-sparking controversy under the new auspices of changing majorities (IV.).

I. The Topic's Way into the ILC – First Steps

The procedure for the selection of future topics to be considered by the ILC is a complex one, involving a multitude of different actors and entities. Initially, either designated members or the secretariat elaborate summaries of potential topics. These outlines highlight the topic's main features. Furthermore, arguments favouring or opposing the inclusion of the topic on the long-term programme are reviewed. Topics should fulfil several criteria: they should reflect the needs of States, be sufficiently rich in State practice and suitable for progressive development, without excluding new developments reflecting pressing concerns of the international community.[596] These outlines are considered by the Working Group on the Long-term Programme of Work[597], a sub-

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594 On the differences between draft commentaries and final commentaries, see *The work of the International Law Commission*, FN 202.

595 The options for the recommendations of action are contained in General Assembly, *Statute of the International Law Commission*:
Article 23
1. The Commission may recommend to the General Assembly:
(a) To take no action, the report having already been published;
(b) To take note of or adopt the report by resolution;
(c) To recommend the draft to Members with a view to the conclusion of a convention;
(d) To convoke a conference to conclude a convention.
2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

596 Compare *The work of the International Law Commission*, p.45.

597 This group exists since 1992, and is in charge of preparatory works facilitating the selection of topics to be dealt with by the ILC in the future, see ibid., pp. 44-46.

group of the Planning Group[598]. The topic "State official immunity from foreign criminal jurisdiction" was outlined by Mr. Kolodkin.[599]

Mr. Kolodkin acknowledged that the issue was "*topical*", due to the growing tension between the increased protection of human rights and the declining willingness to accept the impunity of perpetrators of gross violations of these rights on the one hand, and the indispensability of immunities for the stability of international relations on the other.[600] The issue originated in his view in the conflict between the right of states to immunity, including their representatives and property, derived from the principle of sovereign equality, and the rights of other States to exercise full territorial jurisdiction over these persons and properties located on their territory. The issue "*displays new shades of meaning related to the development of universal and other types of domestic criminal jurisdiction, including extraterritorial jurisdiction, in the context of efforts to combat gross human rights violations […], against a background of globalization*".[601]

The development of international criminal law was according to this account intrinsically connected to the issue of the immunities of State officials; the charters and statutes of *ad hoc* international criminal tribunals and of the International Criminal Court deprive State officials of immunity within their jurisdiction. Touching upon issues of international criminal jurisdiction, this aspect was not considered to be part of the topic strictly speaking.[602]

The increase in academic and public debates on the topic was triggered by the case against the former Chilean dictator Augusto Pinochet, considered in several courts of the United Kingdom.[603] In the following, a multitude of attempts were made to prosecute various incumbent and former senior State officials in different national criminal courts.[604] Of great impact was further the *Arrest Warrant* judgment of the ICJ rendered in 2002, reviewing the status quo of State official immunities under international law, as well as other subsequent ICJ judgments.[605] Several conventions contain

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598 The Planning group, established irregularly since the 1970s for each session, has the task of considering the programme and methods of work of the Commission, see ibid., p. 22; for membership in 2006 see Report on the work of the fifty-eighth session (2006), doc. A/61/10, para. 6.

599 *Report of the International Law Commission, A/61/10: 58th session* (1 May-9 June and 2006), Annex I, pp. 436-454.

600 Ibid., para 1: "*The […] immunity of State officials from foreign criminal jurisdiction has begun to attract greater attention in recent years. This is connected to a large extent with the growth of the concept of protection of human rights, a decline in willingness to tolerate gross violations of human rights, and efforts to combat terrorism, transnational crime, corruption and money laundering. Society no longer wishes to condone impunity on the part of those who commit these crimes, whatever their official position in the State. At the same time it can hardly be doubted that immunity of State officials is indispensable to keep stable inter-State relations*."

601 Ibid., para. 8.

602 Ibid., para. 12. Mr. Kolodkin cited the examples of the post-war tribunals of Nuremberg, as well as the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda.

603 Of relevance are in particular the decisions of the House of Lords: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 1)* (House of Lords, United Kingdom, 25 November 1998); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 2)* (House of Lords, United Kingdom, 17 December 1998); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 3)* (House of Lords, United Kingdom, 24 March 1999).

604 Mr. Kolodkin mentioned the initiatives against President L.-D. Kabila of the Democratic Republic of the Congo in Belgium and France in 1998; against the Israeli Prime Minister A. Sharon in Belgium in 2001-2002; against President M. Al-Qadhafi of Libya, against President D. Sassou Nguesso of the Republic of the Congo and against the Cuban leader F. Castro in 2000-2001 in France, as well as against the former President of Chad H. Habré in Senegal in 2001; see *Report of the International Law Commission, A/61/10*, para. 2 for further references.

605 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* I.C.J. Reports 2002, p. 3 (ICJ, 11 April 2000). Other influential decisions relevant for the field of foreign criminal jurisdiction and immunities rendered by the ICJ since include the cases *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*

provisions on specific aspects of immunity of State officials from foreign national criminal jurisdiction; however, the main source on the issue was considered to be customary international law.[606]

The ILC had addressed issues connected to immunities on several occasions[607], most recently in the works on the *Draft Articles on Jurisdictional Immunities of States and Their Property*[608]. However, the ILC had never considered the topic in its own right. Mr. Kolodkin concluded by expressing the conviction that the ILC could contribute, through codification and progressive development, to an appropriate balance between the right of States to exercise their jurisdiction with the aim of assuring the accountability of State officials having perpetrated severe crimes, and the stability of international relations based on the sovereign equality of States.[609]

In 2006, the Chairman of the Working Group on the Long-term Programme of Work[610] delivered a written report to the Planning group, recommending the topic to be included on the Commission's long-term agenda. The Planning Group considered and adopted the report, thereafter submitting it to the ILC. After consideration in the plenary, the inclusion of the topic in the long-term programme of work was decided by the ILC and the report was included in the Commission's annual report to the General Assembly.[611] One year later, in 2007, the ILC decided to move the topic to the actual agenda, and to appoint Mr. Kolodkin as Special Rapporteur[612], followed by the approval of the General Assembly later in the same year[613]. The secretariat of the ILC prepared a preliminary study on the topic.[614]

II. The Quinquennium 2007-2011: Opposition

The quinquennium 2007-2011 was characterized by an above-average presence of charismatic and highly decorated academics, figuring among their generation's most prominent figures in international legal academia, like Mr. Brownlie, Mr. Caflisch, Mr. Dugard, Mr. Gaja, Mr. Kamto, Mr.

I.C.J. Reports 2008, p. 177 (International Court of Justice, 04 June 2008), and *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* I.C.J. Reports 2012, p. 99 (International Court of Justice, 03 February 2012).

606 These conventions include the *Vienna Convention on Diplomatic Relations* (1961); the *Vienna Convention on Consular Relations* (1963), the *Vienna Convention on Special Missions* (1969); the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (1973) and the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* (1975).

607 Mr. Kolodkin cited the *Draft Declaration on Rights and Duties of States*, annex to General Assembly resolution 375 (IV) of 6 (1949)*;* the *Draft Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, vol. II, para. 97 (1950); the *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1954, vol. II (1954); and the *Draft Code of Offences against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1996, vol. II, Part Two (1996).

608 *Draft Articles on Jurisdictional Immunities of States and Their Property*, Yearbook of the International Law Commission, 1991, vol. II (Part Two). (1991).

609 *Report of the International Law Commission, A/61/10*, paras. 17-18. As a Special Rapporteur, Mr. Kolodkin had a stronger preference for codification over progressive development than these statements made in 2006 revealed.

610 In the quinquennium 2002-2006, the Working Group on the Long-term Programme of Work was chaired by Mr. Pellet (France); the other members were Mr. Baena Soares (Brazil), Mr. Galicki (Poland), Mr. Kamto (Cameroon), Mr. Koskenniemi (Finland) and Ms. Xue (China). See ibid., para. 10.

611 Ibid., para. 257.

612 *Report of the International Law Commission, A/62/10: 59th session* (7 May-5 June and 2007), para. 376.

613 *Resolution 62/66 of 6 December 2007: A/RES/62/66* (2007)para 7.

614 Secretariat of the International Law Commission, *Immunity of State officials from foreign criminal jurisdiction: Memorandum by the Secretariat, A/CN.4/596* (2008) and. Corr. 1.

McRae, Mr. Nolte and Mr. Pellet[615], among others. Despite not prevailing numerically, they managed to play an important role in the first years of the works on State official immunity, shaping a controversial and principled discourse, very often in disagreement with the precedent-based approach of the Special Rapporteur, Mr. Kolodkin. However, in its majority, the ILC was composed by members with extensive experience as legal advisers of their respective governments. Although the faction favouring limited State official immunity could count on some eloquent voices, the approach favouring extensive State official immunities delineated by the Special Rapporteur in his three reports was equally energetically defended.

4. 2008: The Preliminary Report – Sparking Opposition

(a) In 2008, Mr. Kolodkin submitted a preliminary report, delineating the topic's boundaries and the legal issues to be covered: inter alia, the officials enjoying immunities, the scope and the procedural aspects of immunities.[616] The report gave a well-researched overview of the topic and its crucial issues. The topics touched upon were the relevant past efforts of the ILC and the Institut de Droit International, the role of customary international law, the interrelated concepts of jurisdiction and immunity, the analytical categories of immunity *ratione personae* and immunity *ratione materiae* and the rationales for State official immunity. The influential report already contained the seeds of this Special Rapporteur's approach: a focus on the ILC's past works on the topic and on prominent case law, combined with a penchant for functionalism, with a preference for *lex lata* and codification over *lex ferenda* and progressive development.

(b) The approach to the topic suggested by Mr. Kolodkin and its perceived strengths and shortcomings gave rise to a rich debate, in which both support for the Special Rapporteur's cautious approach and criticism of the latter's one-sidedness were voiced. The comments can be reassumed broadly along three lines of reasoning, exposed particularly persuasively in the statements of some members, in the following echoed, supported or criticized by their colleagues.

Full-heartedly expressed from the very beginning was a position of strong opposition to Mr. Kolodkin's general approach. Two fervent statements of Mr. Pellet[617] and Mr. Dugard[618] criticising the Special Rapporteur's work immediately highlighted the polarizing potential of the topic, with many members adhering to the factions of either those supporting or those opposing the Special Rapporteur's take.

The strong statements against the Special Rapporteur's approach triggered in turn the reaction of other members, like Mr. Brownlie[619] and Mr. Nolte[620], concerned about some members advocating concepts of immunity which might not be able to fulfil its beneficial functions. Other members

615 Underlining the prominence of these scholars, all these members have at some points of their careers been elected to the Institute de Droit International, and called to lecture at the Hague Academy, although in some cases after these members had joined the Commission.

616 See R. A. Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/601 (2008), para. 3-5.

617 ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983: 60th session* (2008), pp. 3-9.

618 Ibid., pp. 9-13.

619 ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984: 60th session* (2008), pp. 14-17.

620 ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986: 60th session* (2008), pp. 20-25.

voiced straightforward support for the Special Rapporteur's take, as for instance Ms. Xue.[621] An intermediary position, shared by several members, was finally expressed by Mr. McRae.[622] The ILC needed in his view to ponder the advisability of focusing on either codification or progressive development, mindful however of the task of balancing the reasons speaking in favour and against extensive State official immunity.

5. 2011: The Second Report and the Third Report – Deep Trenches

(a) Mr. Kolodkin's Second Report, issued in 2011 after two years of inactivity on the topic due to several delays acknowledged by the Special Rapporteur, followed the path chosen in his First Report. The Second Report dealt with the highly controversial issue of the scope of State official immunity from foreign criminal jurisdiction. Mr. Kolodkin underlined two cornerstones of his approach, heavily criticized in the subsequent discussions: the re-affirmation of his intention to focus on the scope of immunity *de lege lata*, according to positive international law[623] and the premise that the personal or functional immunity of State officials were well-affirmed rules, whilst proof was needed for the affirmation of exceptions[624]. In line with the thereby expressed predisposition in favour of immunity, Mr. Kolodkin scrutinized the rationales advanced in favour of exceptions to the latter, dismissing all of them firmly, as the claimed exceptions were not part of positive law.

(b) The third report, also submitted in 2011, focused on procedural aspects, discussing *inter alia* the stage of criminal proceedings when State official immunity comes into play, who has the right to invoke and waive immunity, and which State bears the burden of invocation, as well as the consequences of the double attribution of acts to the State official and to the State itself invoking the official's immunity.[625] In Mr. Kolodkin's view, the interplay of the different steps of invoking or waiving immunity, and the effects these actions trigger, could play a crucial role in striking an appropriate balance between the principles of immunity and accountability.[626]

(c) The Special Rapporteur's second and third report were coherent continuations of his preference for *lex lata* and codification. The debates continued in 2011 on similar confrontational notes as in 2008, expressing how the polarization was increasingly resembling a deadlock. Since some members, including Mr. Kolodkin, would not have been nominated by their governments for the elections of the new Commission to be held in autumn 2011[627], both reports were discussed in the 63rd session, respectively in May (second report) and July (third report). Mr. Kolodkin had informally circulated a summary of his Third Report before the examination of his Second Report[628], and

621 Ibid., pp. 28-31.

622 ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, pp. 7-9.

623 ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086: 63rd session* (2011), p. 3.

624 R. A. Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/631 (2011), para. 18. The Special Rapporteur highlights and defends the ICJ's approach in the *Arrest Warrant* case to investigate the existence of evidence for the absence of immunity, rather than for the existence of immunity.

625 R. A. Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/646 (2011), para. 10.

626 ILC, *Provisional summary record of the 3111th meeting, A/CN.4/SR.3111: 63rd session* (2011), p. 14.

627 Mr. Dugard explicitly referred to this aspect in his statement, see ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13.

628 See the introductory statement of Mr. Kolodkin, ibid., p. 3.

members commented on both issues of scope and procedure during the overlapping debates[629]. Most statements regarded the Second Report, whilst few members thoroughly engaged with the Third Report[630], considered "*less provocative*"[631] and examined in much less confrontational terms, except for moments were previously hotly debated issues like the officials enjoying immunity *ratione personae* or the absence of immunity for core crimes re-emerged[632]. The pressure resulting from the loaded agenda overshadowed the debates; members felt that not enough attention could be dedicated to the questions at issue.[633]

The opponents of the Special Rapporteur's approach, above all Mr. Dugard[634] and Mr. Pellet[635], once again voiced their criticism in strong, sometimes even emotional terms[636]. As in 2008, several other members expressed criticism of the Special Rapporteur, although in less drastic words.[637]

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629 Statement of the Chairman, indicating that members had expressed their desire to comment on the second report in the debate in July theoretical dedicated to the examination of the third report.

630 Mr. Dugard, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113: 63rd session* (2011), pp. 9-11; Mr. Perera, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, pp. 12-14; Mr. Pellet, pp. 14-15; Mr. McRae, pp. 15-17; Mr. Petrič, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114: 63rd session* (2011), pp. 3-4; Ms. Jacobsson, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 7-9; Mr. Nolte, pp. 9-12; Mr. Wisnumurti, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 12-14; ; Mr. Wood, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 14-15; Ms. Escobar Hernández, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 19-20; Mr. Vasciannie, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 20-21 and Mr. Fomba, ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115: 63rd session* (2011), p. 3-4.

631 This was the view expressed by Mr. Pellet, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 14.

632 Recapitulating these moments, see the statement of Mr. Nolte, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p. 9.

633 Mr. Dugard, asking whether the Commission, if they could not accept the Second Report, could move on later in the same session to examine the Third Report: ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13. These worries were echoed by Mr. Melescanu, see ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 16, and Mr. Saboia, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 12. Mr. Vargas Carreño criticized the lack of time, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087: 63rd session* (2011), p. 6.

634 ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, pp. 9-13.

635 ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 9-13.

636 See the exchange of views between Mr. Wood, considering Mr. Dugard's statement to be very emotional, and Mr. Dugard's reply, explaining his emotional involvement with the events he had witnessed as a citizen of South Africa in the past, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 14. The emotional dimension of the topic was acknowledged by other members as well, see the statement of Mr. Melescanu, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 14. Ms. Jacobsson dismissed that idea that a legal position could be more authoritative if devoid of emotion, see ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 3.

637 See for instance the statement of Ms. Jacobsson, rejecting the Special Rapporteur's foundational premise, rather than his logic, as she claimed he had not taken into account the nature of sovereignty, which, although the concept was still at the heart of international law, had evolved over time; ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*; ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p.3. See further Mr. Petrič, speaking of a report „*too closely tied to lex lata*" and advocating progressive development ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 13; Mr. Galicki, finding it "*paradoxical that the Special Rapporteur should have derived a sole, dangerous and not very optimistic conclusion from the extensive analysis of State practice and jurisprudence*", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088: 63rd session* (2011), p. 19; Mr. Murase, stressing in particular that "*the rationale for official immunity* [could not] *be based on the ambiguous concept of sovereignty, which had undergone considerable change since the latter half of the twentieth century. It was now conceived not only as a combination of prerogatives and rights but also as a set of obligations entailing a responsibility to ensure the welfare and security of a nation*". However, he also stressed the need of adequate safeguards to avoid abuse of prosecutorial discretion, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 8.

Activist approaches[638] were openly rejected by other ILC members[639] and among them, Mr. Wood[640] and Mr. Nolte[641] stood out for their vehemence. An intermediate approach, highlighting the necessity for the Commission to "*overcome its conceptual and ideological differences*"[642], was voiced by several members, formulated in particularly poignant words by Mr. Vasciannie[643] and Mr. McRae[644]. Other members seemed to be generally unsure about the directions the works should take and did not assume a clear position.[645]

6. Evaluation: The Quinquennium 2007-2011 - Deadlock

In practice, the choice of a Special Rapporteur strongly inclined towards one reading of the law of immunities[646] might not have helped the ultimate progress on the topic. The debates on the topic on immunity of State officials from foreign criminal jurisdiction had ended with a final comment by the outgoing Special Rapporteur, reassuming the statements made on the reports. Moreover, he evaluated the progress made in the quinquennium, and his personal experience as a Special Rapporteur. One of Mr. Kolodkin's most pronounced opponents, Mr. Dugard, claimed the last word, acknowledging the Special Rapporteur's merits.[647] His outstretched hand illustrated the spirit of cooperation that should have driven the dialectical processes at the basis of the ILC's authority. However, contrary to ideals of constructive antagonism, the Special Rapporteur's strong action triggered a strong reaction, and the confrontation of different ideas often resembled almost personal hostilities between opposed factions. Particularly engaged members showed a tendency to repeat their views in ever-stronger terms, resulting in an increasing rhetoric escalation, spectacular under the angle of the power of argument, but seemingly detrimental to the pursued goal of constructive dialogue. Given the stagnation of the topic, the proposal to set up a working group was

638 See for instance the consideration of the ILC's mandate expressed by Mr. Pellet: "[…] *the world was witnessing the twilight of an old norm, that of immunity and impunity, in favour of a new and perhaps more respectable law which militated against immunity. Although it was not the Commission's job to legislate, it could not fail to take that development into account and could not allow itself to await further events*", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, pp. 17-18.

639 Other members concurring generally with the views expressed by Mr. Nolte and Mr. Wood include inter alia Mr. Perera, ibid., p. 20; Mr. Singh, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 9.

640 ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, pp. 9-11.

641 Ibid., pp. 16-17.

642 These words were used by Mr. Wisnumurti. First, he acknowledged that "*during the debate, the principle of sovereignty had evolved and continued to do so. Indeed, it had been shaped by State practice and by new values and principles focusing on the need to protect human rights and humanitarian law. The Commission must take that development into consideration in its debates*." He went on to affirm that "*As he saw it, the Special Rapporteur's conclusions were a bit too categorical. The review of State practice, case law and opinion juris was a good starting point, but the Commission should bear in mind that its collective responsibility was to go beyond those conclusions. It should overcome its conceptual and ideological differences, especially those concerning the scope and extent of immunity ratione materiae and immunity ratione personae, in order to strike a balance between immunity flowing from State sovereignty, on the one hand, and the need to prevent impunity, on the other",* see ibid., p. 13.

643 ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 17-19.

644 Ibid., pp. 19-22.

645 See for instance the statements of Mr. Valencia-Ospina, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 4.; Mr. Hassouna, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 19; Mr. Fomba, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 21.

646 Regarding this choice, it must however be underlined that the "*firm views*" Mr. Kolodkin admitted to have, see ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p. 5, did not explicitly transpire from his initial study on the topic.

647 Ibid., p. 10.

advanced by some members[648], without however ultimately being approved. As Mr. Kolodkin had not formulated any draft articles, one voiced impression was that, whilst debates had been intense and of high quality, little would remain of the Commission's efforts in the quinquennium; the new Special Rapporteur would have had to start almost from scratches.[649]

III. The Quinquennium 2012-2016: Struggle for Consensus

In the elections in 2011, several of the academics who had been among the most active members in the quinquennium 2007-2011 were not re-nominated. New members joining the ILC like Mr. Forteau, Mr. Gevorgian and Mr. Murphy were often practice-oriented. The statements of members warning against reforming immunities based on principle rather than on State practice became more prominent.

This new tendency in the plenary seemed to inverse the development regarding the position of the Special Rapporteur. With Ms. Escobar Hernández, an academic with a declared preference for systematic coherence and limitations to immunity was elected to succeed Mr. Kolodkin. Already in 2011, Ms. Escobar Hernández, had given proof in both her statements of her strong opposition to the positions of Mr. Kolodkin.[650] She had exposed a narrow concept of immunity, based on the functions of State officials (which do not include committing crimes), declaring the preservation of the essential values of the international community a priority.[651]

1. 2012: The Preliminary Report – Systematization

In her Preliminary Report, after a brief overview of the efforts of the former Special Rapporteur[652], Ms. Escobar Hernández reassumed the previous debates in the Commission[653] and in the Sixth Committee[654], describing in a neutral tone the emerging picture of controversy.

For the sake of "*conceptual and methodological clarification*"[655], the report introduced the main points of contention. The transpiring determination to discontinue her predecessor's approach[656] indicated from an early moment how the direction of works was about to change. Ms. Escobar Hernández hinted at one aspect of her perspective which would have given rise to controversy: her search for

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648 The idea of a working group and its potential mandate was in particular advocated by Mr. Vargas Carreño, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 7-9. Inter alia, the idea was supported by Ms. Jacobsson, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 5.; Mr. Petrič, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 16; Ms. Escobar Hernández, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p.13.

649 See Mr. Pellet's comment, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 15.

650 See ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, pp. 13-16 and ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, pp. 19-20.

651 ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 14.

652 C. Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/654 (2012), paras. 9-23.

653 Ibid., paras. 24-37.

654 Ibid., paras. 38-48.

655 Ibid., para. 52.

656 See inter alia the more or less veiled criticism of Mr. Kolodkin, ibid., paras. 24; 50; 66; 76.

consistent normative proposals fitting seamlessly into the system of international law and the expectations, values and principles of the international community, encompassing both the stability of international relations and the fight against impunity.[657]

2. 2013: The Second Report – Concessions?

Ms. Escobar Hernández' Second Report explicitly underscored that the studies of the previous Special Rapporteur and the Secretariat should continue to be the basis of works, but other opinions should be considered to move forward.[658] The consistently systemic, structured step-by-step approach should encompass both considerations *lex lata* and *lex ferenda.*[659] The report reviewed Ms. Escobar Hernández' perspective on the scope of the topic, covering, in line with the views of her predecessor, the basic concepts of immunity and jurisdiction, and the personal, material and temporal scope of immunity *ratione personae*. Whilst Ms. Escobar Hernández felt reaffirmed in her approach by the debates held in 2012 in the ILC and in the Sixth Committee, she also noted the great divergences existing in both bodies when it came to substantive issues[660]. The workplan presented already revealed a tendency to postpone the discussion of more controversial issues to a later moment.[661]

3. 2014: The Third Report – The Quest for Delimitation

In her Third Report, recurring to a range of doctrinal writings in English, French and Spanish[662] and sticking to the same categorization used in the context of immunity *ratione personae*, Ms Escobar Hernández identified three normative elements of immunity *ratione materiae:* (1) the subjective scope: who enjoys this kind of immunity? (2) the material scope: what types of acts are covered? (3) the temporal scope: over what period of time can immunity *ratione materiae* be invoked and applied?[663] Whilst the timely unlimited nature of immunity *ratione materiae* was in her view consensual, the other two issue had been controversially discussed; the Third Report was dedicated to the analysis of the concept of an "official".[664] The report asserted to normatively describe the subjective scope of immunity *ratione materiae*, specifying what kind of connection between the State and the official is needed to justify the latter's immunity. This prerequisite was in Ms. Escobar Hernández' view met only if "*the individual may act in the name and on behalf of the State, performing functions that involve*

657 See inter alia ibid., paras. 5; 9; 24; 57-58; 60; 63-64; 67; 72-73.

658 C. Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/661 (2013), para. 7 (a).

659 Ibid., paras. 7 (b)-(d).

660 Ibid., paras. 8-12.

661 Ibid., paras. 13-18; for instance, this applied to the issues "Immunity in the system of values and principles of contemporary international law" and "The absolute or restricted nature of immunity and in particular the role that international crimes play or should play"; this step-by-step approach was praised by some members, see Mr. Hmoud, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165: 65th session* (2013), p.3.

662 Compare C. Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/673 (2014), FN 15 and 21.

663 Ibid., paras. 12-13.

664 Ibid., paras. 14-16.

the exercise of governmental authority"[665], indicating her intention to limit the scope of immunity *ratione materiae*.

4. 2015: The Fourth Report – Bipartisan criticism

The Special Rapporteur's initial summary of the progress of the topic in the ILC and in the Sixth Committee, reviewing the reactions to the Third Report and to the proposed draft articles, allowed for a picture halfway between approval and rejection to emerge. The view prevailing in the ILC and in the Drafting Committee had been that the concept of official and the subjective scope of immunity *ratione materiae* cover *all* officials independently of their function. Ms. Escobar Hernández' suggestion to limit this type of immunity already on the subjective level by including only those officials exercising governmental authority was disregarded.[666] This broad subjective scope meant the task of delimitation was moved to the material scope of immunity *ratione materie*: the acts performed in an official capacity, the core of this "*eminently functional*" type of immunity, by some even considered the only relevant concept deserving definition[667], were analysed in Ms. Escobar Hernández' Fourth Report. The report investigated the characteristics of an act performed in an official capacity, pursuing the intention to restrict the scope of immunity *ratione materiae* regardless of eventual exceptions. She dedicated much attention to the issue of attributability to the State and the latter's eventual responsibility. These considerations were summarised in three points, some of which triggered vivid criticism: "(i) *The act is of a criminal nature; (ii) The act is performed on behalf of the State; (iii) The act involves the exercise of sovereignty and elements of the governmental authority*."[668]

5. Evaluation: The Quinquennium 2012-2016 - Postponement

The Special Rapporteur had ended her Fourth Report by announcing her intention to approach, through a systematic analysis[669] the most eagerly awaited issue, exceptions to State official immunities[670], in her Fifth Report. The translations of the original report, written in Spanish, into the other working languages had not been terminated in due time to allow its detailed analysis by the members. Therefore, the report was only provisionally discussed, and some members refused to deliver statements.[671] Members expressed their discontent, both generally with the unnecessary delay in

665 Ibid., para. 146.

666 For this restrictive suggestion advanced by the Special Rapporteur, see in particular ibid., paras. 144 and 147-149.

667 This account of the positions voiced in the debates was given by the Special Rapporteur, see C. Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/686 (2015), para. 22.

668 See ibid., para. 95.

669 In her own words, the analysis had to take "*due account of the fact that international law is a complete legal system whose rules are related and interact with each other*", ibid., para. 138.

670 Underlining the issue's importance, the Special Rapporteur referred to the extensive reviews of the topic in recent legal literature. Further complexity was in her view added by the judgements of the European Court of Human Rights in the *Al-Adsani* and *Jones* cases, the judgment of the ICJ in the *Jurisdictional Immunities of the State* case and the judgement of the Italian Constitutional Court concerning the application in Italy of that ICJ judgment, see ibid., para. 137.

671 See the Report of the ILC to the General Assembly, 2016: "*At the time of its consideration, the report was available to the Commission only in two of the six official languages of the United Nations. Accordingly, the debate in the Commission was preliminary in nature, involving members wishing to speak on the topic, and would be continued at its sixty-ninth session. In these circumstances, it was understood that the consideration of the report at the present session was exceptional and was not intended to set a precedent. The Commission underlined that the debate at the current session was only the beginning of the debate and that the Commission would*

the Commission's efforts, as well as specifically with the issue that the quinquennium would have ended without a proper discussion of Ms. Escobar Hernández' views on exceptions.

IV. The Quinquennium 2017-2021: Change?

In the elections in 2016, voices defending immunities were confirmed in office and eventually joined by energic others, like Mr. Rajput. However, the distinctive feature of the quinquennium 2017-2021 was a wave of newly elected academics, frequently with expertise backgrounds in human rights or international criminal law like Mr. Grossman Guiloff and Mr. Jalloh. These new entries need to be seen in a comprehensive perspective, including the re-election of academics with a similar expertise background like Mr. Tladi, Mr. Peter and Mr. Petrič, and the support of prominent human rights-friendly practitioners, like Mr. Saboia and Mr. Wako. Around this core, a majority of members in favour of a changing approach to State official immunity formed in the quinquennium 2017-2021. In consonance with the Ms. Escobar Hernández, these members pushed for a formulation of State official immunity recognizing exceptions. Opposition to this approach remained fierce, primarily building up around Mr. Kolodkin, Mr. Murphy, Mr. Nolte and Mr. Wood.

3. 2017: The Fifth Report - Escalation

In introducing her Fifth Report, Ms. Escobar Hernández summarized the arguments advanced so far by members during ILC meetings[672] and delegates in the Sixth Committee[673], anticipating her conviction that only a minority in both institutions denied that exceptions to State official immunity exist at all. Within the majorities approving of exceptions, agreement was lacking on the extent of these exceptions *de lege lata* and *de lege ferenda.*[674] After an extensive analysis of practice, Ms. Escobar Hernández concluded that State officials do not enjoy immunity for international crimes, the "territorial tort exception" and crimes related to corruption. However, in her view, the analysed limitations and exceptions only applied to immunity *ratione materiae.* In practice, the immunity *ratione personae* of incumbent members of the troika had almost always been recognized, even in cases of the aforementioned crimes excluding immunity *ratione materiae.*[675] These mechanisms could be justified on the basis of the temporary nature of immunity *ratione personae.* once the members of the troika leave office, they enjoy immunity *ratione materiae*, subjecting them to the same immunity regime as any other official.[676]

The proposed draft article 7, stating the inapplicability of immunity ratione materiae to a list of international crimes including genocide, crimes against humanity, war crimes, torture and enforced disappearances, triggered a deep scission in the plenary. Some members strongly disagreed that the

provide to the General Assembly a complete basis of its work on this report only after the debate is finalized at the sixty-ninth session", *Report of the International Law Commission, A/71/10: 68th session* (2 May-10 June and 2016).

672 C. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/701 (2016), paras. 15-19.

673 Compare ibid., para. 20.

674 See in particular ibid., paras 19 (a) and (g); 20 (a) and (f).

675 Ibid., para. 234.

676 Ibid., para. 241.

proposed draft article constituted either positive law, a clear trend or a desirable solution.[677] Several other members voiced their strong approval of the provision as an expression of progressive development.[678]

After several heated debates characterised by an adversarial attitude, as consensus could not be reached, a recorded vote was called to decide on the provisional adoption of draft article 7. 21 members voted in favour, 8 members against and 1 member abstained.[679] In the course of the vote, it became visible how several supporters of draft article 7 though disagreed with the list of crimes to which immunity shall not apply; in particular, it was considered that the crime of aggression should have been included.[680] Exceptions and limitations referring to corruption related crimes, initially contained in draft article 7, had been deleted in the Drafting Committee.[681]

4. 2018: The Sixth Report

The Sixth Report of Ms. Escobar Hernández contained issues regarding procedural aspects of State official immunity. These issues regarded (1) the appropriate moment for the consideration of immunity issues in the forum State (2) the procedural measures precluded by State official immunity and (3) the organs of the forum State competent to determine whether a given official enjoyed immunity.[682] These issues were however relative uncontroversial: in the light of the provisional adoption of draft article 7 many comments regarded in particular the urgency of procedural safeguards against arbitrary exercises of foreign criminal jurisdiction or abusive invocations of State official immunity[683], to be included in Ms. Escobar Hernández' Seventh Report, due for the ILC sessions in 2019.[684]

C. Positions – Points of Contention in the Commission

The following sections will elaborate and analyse both widely shared and relatively isolated positions regarding State official immunity emerging from the interplay of the different reports of the

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677 Inter alia Mr. Wood, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360: 69th session* (2017), p. 13; Mr. Murphy, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362: 69th session* (2017), p. 4; Mr. Rajput, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363: 69th session* (2017), p. 8.

678 See for instance Mr. Park, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*, p. 8; Ms. Galvâo Teles, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361: 69th session* (2017), p. 9; Mr. Vázquez-Bermúdez, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 3.

679 In favour: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez; against: Mr. Huang, Mr. Kolodkin, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Rajput, Sir Michael Wood; abstention: Mr. Šturma, see ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378* p. 13.

680 See the explanations of vote by Mr. Tladi, Mr. Hmoud, Mr. Jalloh, Mr. Murase, Mr. Cissé, Mr. Hassouna, Mr. Ouazzani Chahdi, Mr. Park and Mr. Nguyen, ibid., pp. 13-16.

681 Ibid., Statement of the Chairman of the Drafting Committee, p. 3.

682 C. Escobar Hernández, *Sixth report on the immunity of State officials from foreign criminal jurisdiction* (2018).

683 See inter alia Mr. Murase, ILC, *Provisional summary record of the 3438th meeting, A/CN.4/SR.3438*, p. 7; Mr. Šturma, ILC, *Provisional summary record of the 3439th meeting, A/CN.4/SR.3439*, p. 13; Mr. Ruda Santolaria, ILC, *Provisional summary record of the 3440th meeting, A/CN.4/SR.3440*, p. 7.

684 Ms. Escobar Hernández, ILC, *Provisional summary record of the 3438th meeting, A/CN.4/SR.3438*, p. 3.

two Special Rapporteurs and the reactions they triggered in the Commission's plenary. These positions are grouped into four categories: fundamental issues (I.), issues relating to the scope of State official immunities (II.), issues relating to limitations and exceptions of the latter's scope (III.) and issues relating to the procedural aspects of State official immunity (IV.). The views of the second Special Rapporteur, advantaged by her subsequent term of service, had a greater leverage on the discourse in the Commission than the ones of Mr. Kolodkin, despite his efforts were highly praised by several members. Apart the influence of chronology, these differences in impact seem due to a combination of factors such as the respective choices of Mr. Kolodkin and Mrs Escobar Hernández against and for the formulation of draft articles, as well as the growing support in the plenary for proposals containing more limited formulations of State official immunity.

I. The Commission's Mandate

Not all the difficulties the Commission met in the context of State official immunity were to be attributed to the topic as such. The competing understandings of the Commission's mandate in tackling the topic added to the underlying complexities. How was the ILC's mandate delineated, when and why were progressive development or codification considered (in)appropriate?

Article 1 of the Statute of the International Law Commission declares that the "*International Law Commission shall have for its object the promotion of the progressive development of international law and its codification*". When drafting article 13 (1) (a) of the Charter of the United Nations at the San Francisco Conference, containing the competences of the General Assembly in the furtherance of the international legal order, an explicit reference to whether the General Assembly should initiate studies and make recommendations encouraging the "revision" of existing international rules was taken into consideration. This expression was however abandoned at the advantage of the term "progressive development". The goal was to establish a balance between stability and change. It was felt that this balance could be achieved through the notions of "codification" and "progressive development", whereas "revision" would have implied to much drive towards change.[685]

Codification and progressive development are hence the expression of intrinsically contradictory expectations the ILC is facing: achieving contemporarily adequate levels of stability and change is difficult, as the two objectives pull into antithetical directions. The tension between the will to preserve the *status quo* and the pressure to incorporate future-oriented trends appears inescapable. Ideally, these contradictions trigger however productive dialectics developing through the interplay of codification and progressive development, resulting in balanced outcomes.[686]

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[685] Compare *Document 848; II/2/46, The United Nations Conference on International Organization: vol. 9* (1945) "*In support of the use of the words "progressive development",* […] *it was said that, juxtaposed as they were with codification, they implied modifications of as well as additions to existing rules. It was also argued that the first alternative draft,* [containing the expression "revision", note from the author] *virtually obligated the Assembly to proceed to revision of international law, an inappropriate task for a political body. Progressive development would establish a nice balance between stability and change, whereas "revision" would lay too much emphasis on change*." On a vision of international law being able to reconcile stability and change, see J. Brunnée and S. J. Toope, 'International Law and the Practice of Legality: Stability and Change', *Victoria University of Wellington Law Review* 49/4 (2018).

[686] This productive relationship between the two parts of the mandate was aptly described by Mr. Petrič, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p.13: "*The essence of codification was to turn existing customary law into a draft treaty. The existence of customary rules, which were to be found in State practice and opinio juris, was a sine qua non*

According to article 15 of the Statute, the concept of progressive development is meant to describe – "for convenience" - the drafting of a convention on subjects so far unregulated by international law or underdeveloped in State practice. This concept was juxtaposed to the idea of codification, representing the systematisation and formulation of the rules of international law in fields characterised by extensive State practice, precedent and doctrinal elaboration.[687] A draft convention, mentioned in the context of progressive development in article 15, is one of several possible outcomes of the Commission's efforts. As laid down in article 23, in the context of codification, the publication of the ILC's report or a resolution of the General Assembly taking note of or adopting the report are alternative outcomes. The distinction between the two components of the mandate continues throughout the Statute, prescribing different procedures for progressive development (articles 16 and 17) and codification (articles 18 to 23).

A question arising in many instances at this regard was whether the views stated by ILC members were to be classified as expressing positive customary international law (*lex lata*), suitable for codification, or as normative proposals (*lex ferenda*), requiring progressive development. According to several members, codification and progressive development were to be neatly distinguished from the concepts of *lex lata* and *lex ferenda*[688], although this view appeared as "dovetailing" to others[689]. The ILC members had contrasting views on how to handle the dualism of *lex lata* and *lex ferenda*. Whilst the application and generation of international law was considered a prerogative of the ICJ, the mandate of the ILC covered more than stating *lex lata*.[690]

Disagreement was frequent over whether progressive development was required to tackle the topic of State official immunity, or whether codification would suffice. Intense discussions over the preferability – to some, unavoidability – of either of the two operations broke out (1). The argumentative effort was noteworthy: there was a broad spectrum of views on how to approach the topic, ranging from strict codification to unleashed progressive development, revealing deep cleavages about the legitimate role of the Commission in shaping international law (2).

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for any codification exercise. Progressive development should go hand in hand with codification and should transcend existing customary law. That did not, however, mean that such an exercise should be wilful or have no limits. It must be relevant and take account of trends in international law, developing human values and the realities of the international community. The progressive development of international law could be one step ahead of existing international customary law, but it had to be a cautious step that accommodated the need to regulate some new aspect of relevance to the international community and to individual States, while at the same time furthering cooperation between them, their coexistence and their common interests. […] *Accordingly, the Commission should look not only at existing rules of customary law on the immunity of State officials but also at the needs and expectations of the international community, at values and trends in legal science and at the needs of human society. While codification of the topic was tied to existing State practice, progressive development should be forwardlooking and anticipate problems that might arise in the future."*

687 Compare further the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1,* para. 7.

688 Statement of Mr. McRae, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145: 64th session* (2012), p. 6, referring to similar views voiced by Mr. Murase and Mr. Tladi.

689 Statement of Mr. Kamto, ibid., p. 18.

690 Mr. Brownlie, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 14; Mr. Pellet, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 13; Mr. Wisnumurti, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 12; Mr. Hassouna, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 18.

1. Progressive Development or Codification?

The vivid debates sparked by the question how the topic of State official immunity should be approached in the light of the Commission's mandate were triggered from the very beginning by the clear preference for codification expressed by the first Special Rapporteur, Mr. Kolodkin. He justified his scepticism on the desirability of progressive development in the context of State official immunity with the frictions between developed and developing countries following attempts to rely on universal jurisdiction, the practical shortcomings of prosecutions and judgments *in absentia*, and the dangers of selective, politicized justice. In other words, the worries voiced by Mr. Kolodkin's regarded the viability and desirability of foreign national prosecution, rather than the concept of progressive development as such. His conclusion was however that the Commission should limit itself to codification, enhancing the uniform application of immunity rules by national judges, rather than venture into progressive development.[691]

This position was echoed in the plenary.[692] Whilst the reasoning of some reaffirmed Mr Kolodkin's concerns about the enhancement of politically inopportune foreign criminal prosecution, other statements on the undesirability of progressive development reflected a more profound criticism of the concept as such. Expressing his discomfort with the current academic debate over immunities[693], Mr. Brownlie did not hide his scepticism about progressive development, voicing worries about the declining role of practice in the ILC's efforts if the goal was progressive development[694]. Similar concerns about progressive development being insufficiently grounded in State practice and case law were later voiced by his successor, Mr. Wood. Denouncing "*a certain amount of wishful thinking*" as characteristic for the issues at stake, his claim was that limited importance should be attached to civil society initiatives and academic writing.[695] Approaches of this kind usually came with a preference for a focus on *lex lata*.[696]

The fundamental dimension of the focus on either codification or progressive development was highlighted vigorously by the opponents of Mr. Kolodkin's approach. To Mr. Dugard, codification was in the context of State official immunity a fruitless endeavour: "*In either case,* [the Commission] *would be engaging in progressive development, for it could not hide behind the fig leaf of codification as an excuse for retaining the old law which had existed before the International Criminal Court, before the human rights movement*

691 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 91-93; ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 7.

692 See in particular the statement of Ms. Xue, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 28-29. Further, see inter alia in the quinquennium 2012-2016 the statements of Mr. Huang, ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143: 64th session* (2012), p. 10 and ILC, *Provisional summary record of the 3220th meeting, A/CN.4/SR.3220: 66th session* (2014), p. 11; Mr. Gevorgian, ILC, *Provisional summary record of the 3146th meeting, A/CN.4/SR.3146: 64th session* (2012), p. 12.

693 In the view of Mr. Brownlie, „*Much of the literature was a curious mix of talk about international crimes and talk about the distinction between immunity ratione materiae and immunity ratione personae.*", ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 15.

694 Ibid., p. 14. He was criticized sharply for this "conservative" approach by Mr. Dugard, see ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 17

695 ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 9.

696 Statements of Mr. Wood, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p. 15; Mr. Gevorgian, ILC, *Provisional summary record of the 3146th meeting, A/CN.4/SR.3146*, p. 12; Mr. Huang, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 4.

and before current demands for accountability".[697] On a similar note, Mr. McRae affirmed that unrestricted immunity could be as much legally argued as the establishment of exceptions, depending on one's adherence to one of the two narratives delineating.[698] He considered the matter to be essentially an issue of premises and perspectives. In his words, "*The debate, then, was about policy, but he was not sure that the essential policy question could be answered by saying that one approach was right as a matter of law and one was wrong*".[699] He opposed the view that affirming immunity was a position based on customary international law, whilst the suggestion of exceptions thereto should be considered an exercise of progressive development. He was not convinced "*that at the present stage the Commission could concede the point that there was no basis in customary international law for exceptions to immunity*".[700] The ILC should not preclude itself from eventually accepting that there should be exceptions, making progressive development necessary.[701]

Other members agreed with these calls for progressive development, considering the uncertain *status quo* in the field. In the view of Mr. Murase, "*Given the inconclusive nature of international judicial precedents and domestic and treaty practice, the Commission must engage in the progressive development of international law, rather than its codification."*[702] A similar view transpires from the words of Mr. Tladi, claiming that the area *"had not been sufficiently developed in the practice of States and was thus fit for progressive development."*[703] From this perspective, favourableness to an approach involving *lex ferenda* was affirmed.[704]

In contrast to this polarisation, numerous members expressed their preference for a balanced approach to the Commission's mandate. They doubted the apparently compelling nature of the invoked priority of either codification or progressive development, as both exercises were valid and viable. In their view, a combination of codification and progressive development was necessary and advisable.[705] Mr. Vasciannie's premise for instance was that the ILC should evaluate whether

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697 ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, pp. 9-10, referring to the American judge Felix Frankfurter. This view was appreciated by several members; see inter alia the words of Mr. Caflisch: "*Mr. Dugard had said that the Commission must choose between a solution that was no longer entirely accepted and one that was not yet entirely accepted. In his own view, that stage had been reached, or had been more or less, and in contemporary international law, an official who argued that he was acting on behalf of his State and who committed an act contrary to the most elementary precepts of humanity could no longer take refuge in immunity. In any event, even if the law had not yet progressed to that stage, the Commission would be duty-bound to develop it in that direction.*", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 4.

698 He described the two polar opposites in the Commission as represented by the "static" approach of Mr. Kolodkin, and the take of Mr. Dugard, invoking a stand on the Commission's preference for either impunity or accountability regardless of the actual content of customary international law. ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 19-20.

699 Ibid., p. 20.

700 Ibid., p. 21.

701 Ibid., p. 22.

702 Compare ILC, *Provisional summary record of the 3275th meeting, A/CN.4/SR.3275: 67th session* (2015), p. 15.

703 ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164: 65th session* (2013), p. 7.

704 See *inter alia* the statement of Mr. Saboia, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144: 64th session* (2012), p. 12.

705 See in the statements of Mr. Melescanu, asking for both codification and the recognition of exceptions, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 13; Mr. Saboia, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 33; Mr. Wako, claiming the necessity of both progressive development and codification, ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987: 60th session* (2008), pp. 3-7; and ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 11; Mr. Petrič, underlining that progressive development and codification go necessarily hand in hand, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 13; Mr. Hmoud, criticising the categorising of findings on the basis of the relevance to codification or progressive development, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*,

it wanted to put the emphasis on codification or on progressive development. To him, there were sound policy reasons both in favour of the current legal arrangements, which had been exposed by Mr. Kolodkin, and against them.[706] Given the fine balance of these policy arguments, they should be developed more fully to evaluate the advisability of either approach. If progressive development met the resistance of States, that was not enough a reason to dismiss the opportunity. Specific attention should be dedicated to trends connected to human rights.[707]

The indistinguishability and complementarity of codification and progressive development in the context of the topic of State official immunities was highlighted by these members.[708] As Mr. Petrič formulated the issue, "[…] *the aim of the Commission's work on the topic under consideration was not only to reaffirm and codify the existing immunity of State officials under customary international law, but also to ascertain the limitations on immunity based on emerging State practice, even if the latter was insufficient to turn such limitations into customary rules. That was why it was inadvisable to tackle the codification and progressive development of the law separately. The two approaches had to proceed simultaneously* […]".[709] Despite occasional claims that *lex lata* could not be considered without a prior reflection on the advisability of *lex ferenda*[710]*,* Ms. Escobar Hernández' suggestion to begin with *lex lata* at the outset, integrating *lex ferenda* at a later moment if considered appropriate, was approved by the proponents of such intermediary views.[711]

These views matched the insights gained by the Commission itself in the course of its past efforts. The practice of codification and progressive development was acknowledged to reveal that a neat distinction of these operations cannot be upheld, as the work on many topics required a combination of the two. Therefore, the ILC considered the distinction between the two processes "*unworkable* [..]. *Instead the Commission has proceeded on the basis of a composite idea of codification and progressive*

p. 16; Mr. Wisnumurti, supporting a methodological approach combining progressive development and codification, ILC, *Provisional summary record of the 3167th meeting, A/CN.4/SR.3167: 65th session* (2013), p. 4; Mr. Candioti, claiming that all codification is essentially progressive development, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168: 65th session* (2013), p. 4; ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 33

706 To the first category belonged in his view the idea that immunity promotes positive relations between States, the risks inherent in the subjective component of the prosecution of one man's freedom fighter by States to whom that same man was a terrorist, the problems connected to extraterritorial prosecution, and the risks of frequent politically motivated trials. "*With increasing emphasis placed on human rights promotion and protection*", speaking against immunities were the anomaly of officials escaping prosecution for the most heinous crimes, in particular in the light of the limited jurisdictional range of the ICC, and the resulting necessity for alternative means of promoting justice, see ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 18.

707 Ibid., pp. 18-19.

708 See *inter alia* the statement of Mr. Candioti, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 4: "*The Commission's mandate under its Statute was the promotion of the progressive development of international law and its codification, and it had always worked on the basis that the two were complementary. All codification was essentially progressive development, although the latter implied taking account of new trends in the law*."

709 ILC, *Provisional summary record of the 3167th meeting, A/CN.4/SR.3167*, p. 5.

710 Mr. Comissário Afonso, ibid., p. 3.

711 Statements of Mr. Kittichaisaree ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 12; Mr. Park, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, pp. 3-4, Mr. Murphy, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 5; Ms. Jacobsson, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 15.

development."[712] The ILC hence considered its draft to "*constitute both codification and progressive development of international law in the sense in which those concepts are defined in the Statute, and has found it impracticable to determine into which category each provision falls*".[713]

2. Underlying Cleavages – The Role of the ILC

The question whether progressive development or codification should be emphasised in the context of State official immunity[714] revealed the deep trenches dividing the ILC members regarding their evaluation of the Commission role in identifying and evolving State official immunity. The issue was highlighted by Mr. Pellet. Stressing that, "*in the Commission's mandate, progressive development preceded codification*"[715], he saw "*two conflicting concepts regarding the role of the Commission and even of international law itself coexisting* […]".[716] Mr. Dugard fervently reminded the Commission of its present and future responsibility. He underlined the necessary choices that the mandate of the ILC implied, and had no inhibition in calling the Commission's endeavour "law-making". To him, "*law-making was not an exercise in logic or dialectic, but an exercise in choice. The Commission therefore had to choose between accountability and impunity.*

In the same vein, affirming his views on the ILC's role, Mr. Dugard "*wished to point out that two opposing cultures met head-on in the approach to immunity: the culture of State officials, i.e. the culture of seeing legal issues through the spectacles of State interest, and the culture of practising and academic lawyers and of nongovernmental organizations, who were not blinded by the interests of States.* […] *it did seem that the Special Rapporteur was placing himself in the camp of State officials rather than in that of lawyers, whereas the members of the Commission were first and foremost lawyers* […]. *The Commission would therefore have to show wisdom in appointing a new Special Rapporteur. It would be wrong to appoint an activist […] but it would be equally wrong to give the topic to a State official".*[717]

The invocation of the ILC's prerogatives of making choices as a lawmaker motivated several ILC members to energetically disagree, highlighting the risks of a similar approach. In the view of Mr. Nolte, "*The Commission was not a lawmaker […] because it did not have the unquestioned authority of a national legislature or a national judge. Of course, law and its interpretation involved choices, including of a political nature, but such choices were limited. The law was evolving constantly, but that did not justify taking shortcuts by invoking moral imperatives*".[718]

On a similar line of argument, Mr. Wood rejected the idea that those supporting *lex lata* lived in the past, and recalled that the ILC members should in fact, as highlighted by Mr. Dugard himself,

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712 *The work of the International Law Commission*, p. 47, referring to *Yearbook of the International Law Commission*, paras-13-16, and *Yearbook of the International Law Commission*, paras. 147 (a) and 156-159.

713 *The work of the International Law Commission*, pp. 49-50 and FN 209, with further references.

714 Describing the choice between these options, each coming with respective advantages and disadvantages, see Mr. Wood, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p. 15.

715 Ibid., p. 16.

716 Mr. Pellet, ILC 2011b, p. 10.

717 ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13.

718 Mr. Nolte, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 17. The same thought was expressed by Mr. Wood, a British member of the Commission elected after the resignation of Mr. Brownlie. In his words, "*the Commission was not a lawmaker; its role was to propose texts. Others would take them up and decide whether to turn them into law*" see ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 14.

be lawyers, not activists for a particular cause.[719] In his last statement as a Special Rapporteur, Mr. Kolodkin invited his colleagues to reflect carefully about the role the ILC should play. Rather than the frequently raised worries about the Commission's reputation, his primary concern was the ILC's responsibility as part of the subsidiary sources of international law.[720]

The rhetorical escalation of these opposed views on the ILC's mandate and its role in shaping the topic of State official immunity made members speak up against the risks of polarising positions. In the words of Mr. Wood, "*it hardly assisted the debate to speak […] of good and evil, accountability or impunity*".[721] Nevertheless, the divergences were conspicuous, revealing hardly reconcilable differences.

The disagreement on how to overcome these divergences carried noticeable risks in the view of some members who had expressed their preference for codification. According to Mr. Nolte, the ILC's authority was at stake: *"The Commission usually considered all State and other practice, and it did not postulate a rule as* lex lata *simply on the basis of an abstract principle. However, should the Commission decide to change its position, it would probably be difficult to maintain the consensus, which was the basis of the authority which its work enjoyed"*[722]. To the proponents of a turn towards change through progressive development, this risk was justified if the goal was to "*adapt the immunity of State officials to contemporary society* […] and *expectations of behaviour*".[723]

Describing the dualism of codification and progressive development as a matter of choice rather than as two complementary operations carried the risk of conflating methodological dialectics with the divergent views on the *status quo* and trends in State official immunity. Proceeding without preconceptions on methodology seemed to be imperative to exhaust the ILC's scope of action for the sake of adequately tackling the topic of State official immunity. As Mr. Forteau put it, "*Care would have to be taken not to turn the distinction between codification and progressive development into two opposing notions of the law on immunity, one of which would be conservative and the other progressive. As everyone realized that there was some uncertainty as to the law in that area, some progressive development would be unavoidable*."[724]

Despite these warnings, the Commission struggled to keep the controversies over divisive aspects of State official immunity separated from the debate over the methodological issues coming with codification and progressive development. The positions expressed by members on the latter issues seemed to be significantly influenced by the divergent priorities they gave to the various objectives pursued in the field of State official immunity. The focus on either worries about the smoothness of international relations or the accountability of perpetrators of international crimes overshadowed the confrontation over what aspects were subject to codification or progressive development.

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719 ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 9.

720 ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p. 10.

721 ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 9.

722 Ibid., p. 17. The same point, although with a diametrically opposite conclusion, was made by Mr. Petrič, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 18; Mr. Nolte's remark was later echoed by Mr. Wood: "*It had been asserted at the previous meeting that the Commission's reputation could be at stake if it failed to adopt a certain approach to the topic. On the contrary, the Commission was more likely to damage its reputation by adopting unrealistic positions, pandering to the more extreme views of certain campaigning bodies.",* see ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p.15.

723 Statement of Mr. McRae, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, pp. 7-9.

724 ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 7.

More than once, the debates were characterised by deadlocked polarisation and oversimplification. Openness towards reducing State official immunity seemed to be identified with a preference for progressiveness and progressive development, whilst reluctance to limit State official immunity appeared to imply conservativism and a penchant for codification. To some extent, this controversiality might have been due to the uncertain nature of the issues discussed, and might not have been impossible to handle within the Commission's mandate. In fact, the Commission itself had expressed the view it had "*developed a consolidated procedure to its methods of work and applied that method in a flexible manner making adjustments that the specific features of the topic concerned or other circumstances demand.*"[725] However, the adversarial approaches coming with the described polarisation did not benefit the aspired goal of progressing consensus on the issues discussed.

II. Foundational Issues of State Official Immunity

Some basic issues regarded not the substance of State official immunities in detail, but rather the general perspective from which substantive questions were to be tackled. Although they were discussed primarily in the beginning of the terms of service of the two Special Rapporteurs, these issues continued to arise throughout the quinquennia. They regarded the general approaches to the topic, the rationales of immunities primarily relied on, and the methodologies considered appropriate to deal with the topic (1.), as well as the sources to be taken into consideration (2.) and issues pertaining to the boundaries of the topic (3.). Despite the concordance on many aspects, the contrasting views of the two Special Rapporteurs on several of these basic questions already contain the seeds of the future divergences characterizing their respective perspectives, and the plenary's reactions revealed a corresponding deep division within the ILC.

1. Approaches, Rationales and Methodology

The clearly stated intention of the first Special Rapporteur, Mr. Kolodkin, was to establish the scope of immunities *de lege lata*, according to positive international law.[726] In general, his reports showed awareness of the practical implications of State official immunity, and caution with their political dimension. In his view, *"factual aspects*" and "*reality*" and not the "*desirable*" needed to be the necessary starting point, if "*realistic results*" were to be obtained.[727] His fundamental premise was that State official immunity was an established rule, whilst eventual exceptions to this rule needed to be proven.[728] Whilst rationales for immunities and eventually even for the expansion of their scope were given, rationales speaking against immunities, or at least in favour of their limitation, were initially not discussed by Mr. Kolodkin.[729] Except one quote[730], the expression "impunity",

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725 *The work of the International Law Commission*, p. 47, referring to *Yearbook of the International Law Commission*, paras-13-16, and *Yearbook of the International Law Commission*, paras. 147 (a) and 156-159.

726 International Law Commission, Sixty-third session (first part), Provisional summary record of the 3086th meeting, 10 May 2011, doc. A/CN.4/SR.3086, p. 3.

727 Ibid., para. 15.

728 Ibid., para. 18. The Special Rapporteur highlights and defends the ICJ's approach in the *Arrest Warrant* case to investigate the existence of evidence for the absence of immunity, rather than for the existence of immunity.

729 For a criticism of this take of the Special Rapporteur see the reactions in the plenary, *infra.*, Section B. I. 2. a.

730 The quote, to be found at Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 66, is taken from the Arrest Warrant judgment: "*the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign*

symbolizing a widely claimed justice issue to be countered through *inter alia* a new approach to State official immunity, was mentioned not even once in his First Report.

This approach was heavily criticised in the plenary. Classifying the report as both "*questionable and well-drafted*", Mr. Pellet considered the "*general tone of the report […] problematic",* as Mr. Kolodkin seemed to be "*favourably predisposed to the idea of immunity of State officials*".[731] Another member expressing his strong opposition to Mr. Kolodkin was Mr. Dugard. He highlighted the opportunity the ILC was confronted with, stating that the topic "[…] *was one of the most important and exciting topics facing contemporary international law."*[732]

Despite the harsh criticism encountered, Mr. Kolodkin cautioned "*against formulating abstract proposals on what international law should be, and against moving beyond the scope of the law in force and operating without reference to manifestations of existing international law*".[733] He defended himself against accuses of adopting a "*legalistic approach*".[734] Albeit showing traces of self-criticism[735], the Special Rapporteur reaffirmed his conviction of a lacking space for the ILC to depart from the *Arrest Warrant* decision, and underscored his scepticism regarding the existence of rules restricting immunity *lex lata*, and their viability.[736]

However, the powerful criticism addressing the Special Rapporteur in turn triggered reactions warning against excessive activism in the dismantling of State official immunity. Mr. Brownlie for instance raised the issues of universal jurisdiction[737] and of the "material" inequality of differently powerful States. "*Thus, if immunity were done away with, some would pay the price and others not*".[738] Other concerns voiced regarded the stability of international relations; in this context, the stability pursued by immunity would promote human rights enjoyment.[739] Finally, worries connected to the potential shortcoming of national prosecutions were expressed.[740]

Others highlighted the necessity of finding a middle ground between the two emerging narratives. In the view of Mr McRae, the task of the ILC was to strike a balance between the reasons speaking

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Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed" (see I.C.J. Reports 2002, p. 25, para. 60).

731 ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, p. 3.

732 Ibid., Statement of Mr. Dugard, p. 13.

733 ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, p. 15.

734 ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p. 4.

735 Inter alia, he admitted it had been a mistake to use the term "absolute" immunity with regard to immunity *ratione personae*, given its time-bound nature, ibid., p. 7, and acknowledged other lacunas in his reports, p. 10.

736 Ibid., p. 6-7.

737 The importance of this aspect of the topic was inter alia as well underlined by Mr. Vasciannie, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 15.

738 ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 16; this point was inter alia backed by Mr. Vasciannie, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 19, and Ms. Xue, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 30.

739 As Mr. Nolte claimed, "[…] *the stability of inter-State relations was not just important in securing technical cooperation between Governments, but was also essential for securing the human rights of individuals and, in some situations, for ensuring that force was not used within and between States. The rules on immunity therefore protected not only the "egoistical" sovereign interest of a particular State, but also the very community values that were safeguarded by human rights and by the principle that there should be no impunity for international crimes*". See ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 20-21.

740 The potential shortcomings of national prosecutions were in inter alia highlighted by Ms. Xue, ibid., p. 30, and Mr. Nolte, see ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 16.

for solid State official immunity, and those speaking for their limitation[741]. He saw no inherent constraints pre-determining this balancing exercise.[742] He was convinced that the key to overcome these "*seemingly polar opposites*" could be a comprehensive systematic approach.[743]

This call for a systematic approach seems to have been internalized by the second Special Rapporteur, Ms. Escobar Hernández. From the very beginning, she clearly formulated her priorities: a structured debate, to meet, "*effectively and efficiently*", the expectations of the international community.[744] In her view, "*the Commission was requested to promote greater consistency in international law and to strike a balance between the need to preserve stability in international relations and the need to avoid impunity for serious crimes of international law*".[745] Ms. Escobar Hernández considered the topic as embedded in the context of international criminal responsibility and jurisdiction, and generally "*the development of appropriate mechanisms for combating impunity for the most serious international crimes*".[746]

Mrs Escobar Hernández' approach, based on systematic-teleological evaluations, emerged clearly in a heart piece of her analytical endeavours. In her Fifth Report dedicated to the issue of exceptions and limitations, after the study of practice[747], she went on to investigate "*methodological and conceptual issues*"[748]. Her theoretical evaluations regarding the legal nature of immunity, immunity in national and international courts and the concept of limitations and exceptions are explicitly based on a view of international law as a "*genuine normative system"*. A systemic approach required in her view to analyse immunity within the context of the different relevant values and legal principles to be respected. The latter included the sovereign equality of States, but also the States' right to exercise jurisdiction, as well as the impact entire fields of international law such as human rights and international criminal law. The priority of the Commission in dealing with the issue of exceptions should be not to "*produce negative effects*" or "*imbalances in significant sectors of the international legal order*" having developed in recent decades.[749]

The emerging narrative was one of positive developments not to be endangered, resulting in a purposeful analysis of the issues at stake. Although the theoretical insights following from an approach based on the constructivist logics of international law as a balanced comprehensive system were presented in an impartial manner[750], they resulted from a certain predisposition, as shown by the comparison with the previous Special Rapporteur: Mr. Kolodkin, looking at largely identical legal materials through a different lens, came to quite the opposite result. The criticism was expressed that Ms. Escobar Hernández' methodological and theoretical approach implied substantive

741 A similar "equilibrist" position regarding the issue of exceptions was expressed by Mr. Perera, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 7.

742 Although Mr. McRae declares his preferences by invoking the opportunity of abolishing immunity *ratione personae* altogether, see ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 8.

743 Ibid., p. 9.

744 Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, para. 5; see further, paras. 51-52.

745 Ibid., para. 48.

746 Ibid., para. 49.

747 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 22-140.

748 Ibid., paras. 141-176.

749 See ibid., paras. 141-142.

750 The Special Rapporteur concluded most of her reflections with "*factors the Commission should take into account*" and similar formulations, see inter alia ibid., paras. 152, 169.

conclusions.[751] The idea of relying on the "values of the international community" was met with scepticism because of the vagueness of the concept and the fear of imposition of Western values on the rest of the world.[752] Others however greeted the intention to consider issues of State official immunity from a systematic perspective as embedded in a wider context of values.[753]

Whilst Mr. Kolodkin clearly expressed his focus on practice, Ms. Escobar Hernández showed more openness to combine insights from the analysis of practice with deductions from legal principles. Nevertheless, these methodological divergences were not as clear-cut as they appeared. Whilst in Mr. Kolodkin's first two reports his focus had been on "*deduction from an analysis of sources*", he acknowledged a greater reliance on "*extrapolations of logic*" in the context of procedural aspects of State official immunities, due to the scarcity of sources.[754]

These statements demonstrate the intrinsic difficulties of the Commission in properly codifying and progressively developing customary international law exclusively on the exclusive basis of practice without recurring to abstract reflections of legal principle. The two Special Rapporteurs nevertheless positioned themselves on two quite distant positions regarding the weight to be attached to these two sources of insight. Both got criticised for the shortcomings and potential risks of their respective perspectives. In conclusion, there were two main differences emerging between the two Special Rapporteurs: their general predispositions with regard to the role of State official immunity in the perceived tension between sovereignty and impunity, and their openness towards the integration of insights based on reflections of legal principle. These perspectives, and the reactions they triggered strongly impacted the Commission's efforts in the respective quinquennia.

Both Special Rapporteurs expressed the motivation to give practical guidelines to national decision-makers. Purporting the preference of national judges to apply domestic rather than international law, Mr. Kolodkin claimed that, as immunity issues centrally regarded inter-state relations, they should be regulated by international law, whilst domestic law should play only a subsidiary role. National decision-makers should be assisted in their application of the rules of international law they might be little familiar with.[755] Ms. Escobar Hernández thought it was important to offer practical solutions to national authorities, although she considered it premature to provide detailed guidance to prosecutors.[756] This intentions met frequent acceptance in the plenary.[757] The view was

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751 Statement of Mr. Nolte ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 7, Mr. Hmoud, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 15.

752 See inter alia the statements of Mr. Nolte ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 7; Mr. Murase, ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 12; Mr. Wood, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 14 and ILC, *Provisional summary record of the 3167th meeting, A/CN.4/SR.3167*, p. 6.

753 See inter alia the statements of Mr. Saboia, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 10; Mr. Hassouna, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 14; Mr. Šturma, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 3; Mr. McRae, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 5; Mr. Forteau, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 8; Mr. Kamto, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 18; Mr. Hmoud, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, pp. 3-4.

754 ILC, *Provisional summary record of the 3111th meeting, A/CN.4/SR.3111*, p. 11.

755 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 41-42.

756 ILC, *Provisional summary record of the 3174th meeting, A/CN.4/SR.3174: 65th session* (2013), p. 6.

757 See for instance the statement of Ms. Jacobsson, ILC, *Provisional summary record of the 3220th meeting, A/CN.4/SR.3220*, p.4; explicitly welcoming these intentions, see Mr. Wako, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 10.

however voiced that the goal of providing guidance to national law-appliers made it more fundamental than usual to clearly distinguish *lex lata* and *lex ferenda*.[758] Indirectly addressing national law-appliers appeared a strategy pursued by some members to circumvent governments, focused on the stability of international relations and reluctant to formally accept evolving State official immunity.[759]

2. Sources of State Official Immunity

As described in its mandate, the Commission deals with crucial issues of customary international law which would profit significantly from codification and progressive development. The centrality of the concept of customary international law as the main source of State official immunities was highlighted by Mr. Kolodkin.[760] Ms. Escobar Hernández as well outlined the Commission's understanding of this concept. Investigating whether positive customary law recognized international crimes as a limitation or exception to State official immunities, Ms. Escobar Hernández referred to the ILC's own standards for the identification of customary international law: State practice of any form can constitute custom, if it is sufficiently widespread, representative, and consistent, and undertaken with a sense of legal right or obligation (*opinio juris*). Due attention had to be paid to factors like the overall context, the nature of the rule at stake and the specific circumstances; decisions of international courts and tribunals are only subsidiary means for the determination of practice, but not practice themselves.[761]

Although on paper a profound investigation of State practice seemed hence predestined to play the central role in the analysis of issues of State official immunity, the endeavours of the two Special Rapporteurs only partly met the expectations of the plenary. Despite both Special Rapporteurs dedicated wide attention to the practice of States on the individual (national jurisprudence, legislative activities etc.) and collective (treaty practice etc.) level, they were criticised by fellow members for the perceived shortcomings of their respective analysis. Highlighting that the issue at stake was immunity under *international* law, both Special Rapporteurs showed a tendency to downplay the impact of national regulations regarding the immunity of foreign State officials. Ms. Escobar Hernández explicitly stated that, in the light of the differences between national legislations, domestic law would be irrelevant for the definition of acts performed in an official capacity; "*it should serve simply as a complementary interpretive tool*".[762] This choice was generally accepted, although some members expressed criticism in the plenary.[763]

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758 This view was expressed several times by Mr. Nolte, see inter alia ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 7.

759 Outspokenly expressing disregard for the primary focus of States on international relations, Pellet, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 27.

760 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 27-34.

761 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 183, referring to the conclusions drafted by Mr. Wood in the context of the topic "Identification of customary international law", see *Identification of customary international law - Text of the draft conclusions provisionally adopted by the Drafting Committee: doc. A/CN.4/L.872* (2016).

762 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 32.

763 See for instance the statement of Mr. Park, underlining that ultimately immunity cases were decided by domestic judges on the basis of domestic law, ILC, *Provisional summary record of the 3273rd meeting, A/CN.4/SR.3273: 67th session* (2015), p. 3.

The analysis of national jurisprudence was not without difficulties. With few exceptions, Ms. Escobar Hernández reviewed mainly the judicial practice of courts of WEOG-States.[764] This phenomenon might have been enhanced by factors such as language knowledge, the complexity of getting access to decisions (amongst others due to the limited preparedness of States to inform the ILC about their practice), and the increased public attention the decisions from specific jurisdictions receive compared to others. Nevertheless, the western-centric perspective professed was an example for the intrinsic difficulties of delivering on the universalistic promises of codification and progressive development within the ILC, and was considered a shortcoming of the report.[765] Consequently, in later reports, Ms. Escobar Hernández' analysis focused on exposing the emerging general lines of national judicial practice, rather than outlining single decisions in detail, apparently attempting to pre-empt accuses of dedicating too much attention to specific national legal orders.

Mr. Kolodkin's approach to national jurisprudence was equally criticised; for instance, although he acknowledged recent national court decisions like the *Samantar* case[766], he was accused of dedicating little attention to the most prominent national case, the *Pinochet* case, which had brought the issue to the global attention.[767]

Insights were further drawn from other materials not constituting sources of customary international law such as the analysis of the Secretariat Memorandum[768], other relevant materials as the resolution on immunities of the Institute of International Law[769], and prominently, previous works

764 The few examples of cases discussed outside States belonging to the WEOG-Group included the decisions *Italy v. Union of India and Massimiliano Latorre et al. v. Union of India* (Supreme Court of India, 18 January 2013); *Fujimori* (Supreme Court, Chile, 11 July 2007); *Special Prosecutor v. Hailemariam* ILDC 555 (ET 1995) (Federal High Court, Ethiopia, 09 October 1995); *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others.* (High Court of South Africa, Gauteng Division, Pretoria, 23 June 2015); *The Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre and Others* (Supreme Court of Appeal, South Africa, 15 March 2016); *Sesay (Issa) and ors v. President of the Special Court for Sierra Leone and ors,* (Supreme Court, Sierra Leone, 14 October 2005); *Prosecutor v. Hissène Habré* 125 ILR 571 (Court of Appeal of Dakar, Senegal, 04 July 2000); *Prosecutor v. Hissène Habré* 125 ILR 577 (Court of Cassation, Senegal, 20 March 2001).

765 Criticism of this kind was inter alia voiced by Mr. Tladi, ILC, *Provisional summary record of the 3272nd meeting, A/CN.4/SR.3272: 67th session* (2015), p. 14.

766 *Samantar v. Yousuf* (United States Supreme Court, 01 June 2010).

767 The fact that the *Pinochet* cases were not discussed in detail was criticized inter alia by Mr. Dugard, see ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, p. 12. See further the vivid debate on the role of national jurisprudence as practice for the scope of evidence of custom: ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 35-38. However, Mr. Kolodkin later dedicated significant attention to the Pinochet decisions, see Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, paras. 58-59.

768 Secretariat of the International Law Commission, *Immunity of State officials from foreign criminal jurisdiction*. Mr. Kolodkin underlined the importance of the Secretariat Memorandum for his work: International Law Commission, Sixty-third session (first part), Provisional summary record of the 3086th meeting, 10 May 2011, doc. A/CN.4/SR.3086, p. 3.

769 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 14; See *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes: Naples session, 2009* (2009). Other relevant resolutions include: *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law: Vancouver session, 2001* (2001); *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes: Krakow session, 2005* (2005); *Universal Civil Jurisdiction with regard to Reparation for International Crimes: Tallinn session, 2015* (2015), cfr. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 12, FN 28.

of the ILC itself in related fields. Although both Mr. Kolodkin[770] and Ms. Escobar Hernández[771] highlighted recent scholarly debates revolving around the most controversial issues of State official immunities, the analysis of academic publications played only a minor role. Of crucial importance was the jurisprudence of international courts and tribunals, above all the ICJ. Despite in theory only a subsidiary source for the identification of practice, the ICJ was considered the most qualified institution to express authoritative views on the topic.[772] Mr. Kolodkin's reports accorded an important role to the *Arrest Warrant* decision and considered the case regarding *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*[773] as a principal precedent on procedural issues. Ms. Escobar Hernández as well invested considerable efforts into the analysis of international judicial practice. Besides the European Court of Human Rights with the cases *Al-Adsani v. the United*

770 Mr. Kolodkin referred to a range of articles published in 2008 and 2009, including K. R. O'Donnell, 'Certain Criminal Proceedings in France - Republic of Congo v. France - and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain', *Boston University International Law Journal* 26 (2008), 375; M. M. Penrose, 'The Emperor's Clothes: Evaluating Head of State Immunity under International Law', *Santa Clara Journal of International Law* 7 (2009), 85; Lutz E. L. and Reiger C. (eds.), *Prosecuting heads of state* (Cambridge: Cambridge Univ. Press, 2009); G. P. Buzzini, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case', *Leiden Journal of International Law* 22 (2009), 455–83; T. Rensmann, 'Impact on the Immunity of States and their Officials' in M. T. Kamminga and M. Scheinin (eds.), *The impact of human rights law on general international law* (Oxford: Oxford Univ. Press, 2009), pp. 151–70; A. Colangelo, 'Universal Jurisdiction as an International "False Conflict" of Laws', *Michigan Journal of International Law* 30 (2009), 881–925; N. Roht-Arriaza, 'Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala', *Chicago Journal of International Law* 9 (2008); M. Summers, 'Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Law Rule in Congo v. Belgium?', *Michigan Journal of International Law* 16 (2007), 459–73; K. Ambos, 'Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the Torture Memos Be Held Criminally Responsible on the Basis of Universal Jurisdiction', *Case Western Reserve Journal of International Law* 42 (2009), 405–47; W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', *Michigan Journal of International Law* 30 (2009), 927–80; D. McGoldrick, S. Williams and M. Alderton, 'Immunity for Heads of State acting in their private capacity — Thor Shipping A/S V The Ship 'Al Duhail', *International and Comparative Law Quarterly* 58 (2009), 702–11; K. Gallagher, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture', *Journal of International Criminal Justice* 7 (2009), 1087–116, compare Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 14, FN 23.

771 Ms. Escobar referred to a range of mainly monographies published since the Pinochet cases on the subject, including: A. Bellal, *Immunités et violations graves des droits humains* (2011); A. Borghi, *L' immunité des dirigeants politiques en droit international* (Genève: Helbing & Lichtenhahn, 2003); J. Bröhmer, *State immunity and the violation of human rights* (The Hague: Nijhoff, 1997); S. Canadas-Blanc, *La responsabilité pénale des élus locaux* (Paris: Johanet, 1999); M. Frulli, *Immunità e crimini internazionali: L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali*, Studi di diritto internazionale (Torino: G. Giappichelli, 2007), vol. 11; M. J. Kelly, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein* (New York: Lang, 2005); L. Otshudi Okondjo Wonyangondo, *L'immunité de juridiction pénale des dirigeants étrangers accusés des crimes contre l'Humanité* (Paris: Publibook, 2009); R. Pedretti, *Immunity of heads of state and state officials for international crimes* (Leiden, Boston: Brill Nijhoff, 2015); Y. Simbeye, *Immunity and International Criminal Law* (Abingdon, Oxon, New York, NY: Routledge, 2016); R. van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*, Oxford monographs in international law (Oxford: Oxford Univ. Press, 2008); J. Verhoeven and O. Beaud, *Le droit international des immunités: Contestation ou consolidation ?*, Bibliothèque de l'Institut des Hautes Etudes Internationales (Paris: LGDJ, 2004), as well as to J. Foakes, *The position of heads of state and senior officials in international law*, Oxford International Law Library, 1. ed. (Oxford: Oxford Univ. Press, 2014) and H. Fox and P. Webb, *The Law of State Immunity*, Oxford International Law Library, 3rd ed. (Oxford: OUP Oxford, 2013), Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 12, FN 27.

772 Expressing this opinion speaking as member after he re-joined the Commission: Mr. Kolodkin, ILC, *Provisional summary record of the 3274th meeting, A/CN.4/SR.3274: 67th session* (2015), p. 10.

773 Another ICJ source the Special Rapporteur relied on frequently regarding procedural issues is the advisory opinion in the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Right* I. C. J. Reports 1999, p. 62. (International Court of Justice, 29 April 1999).

Kingdom[774] and *Jones and others v. the United Kingdom*[775], and the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia with the case *Prosecutor v. Tihomir Blaskic*[776], her principal focus was as well the ICJ and its recent jurisprudence.[777]

3. Boundaries of the Topic of State Official Immunity

The views of the two Special Rapporteurs on the appropriate boundaries of the topic were in many regards close, and their take was widely appreciated by the plenary. Mr. Kolodkin and Ms. Escobar Hernández affirmed that the topic should be confined to immunity from national (not international) criminal (not civil or administrative) jurisdiction of foreign States (not the jurisdiction of the official's own State) under international law (excluding immunities granted according to international comity or domestic law). Not to be considered were further immunity regimes under international law for specific categories of State officials, such as diplomats.[778]

Despite the immunity of officials from foreign civil jurisdiction was not covered by the topic, due to the frequent involvement of foreign State officials in civil proceedings, this immunity constituted an important auxiliary source.[779] Other issues invoked in connection to State official immunities where excluded from the scope, like the matter of recognition, indirectly emerging in the issue of the status of officials of unrecognized States, and the issue of immunity of family members of State officials.[780] Further, specific issues did not get the explicit priority treatment demanded by some members, like the immunity of members of the armed forces, *de facto* officials and contractors.[781] The positive and negative approaches to the scope of the topic were laid down by Mrs Escobar

774 *Al-Adsani v. United Kingdom,* Report of Judgments and Decisions 2001-XI (European Court of Human Rights, 21 November 2001).

775 *Jones and others v. United Kingdom* (European Court of Human Rights, 02 June 2014).

776 *Prosecutor v. Tihomir Blaskic* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 29 July 2004).

777 Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, para. 49.

778 Compare Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 103-105 and Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, Section III, paras. 19-32.

779 See Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 55; Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 109.

780 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 122-129. This suggestion was followed by the Commission; the issues were not treated.

781 For instance, the jurisdiction over armed forces operating in foreign territory in cases of armed conflict was according to Mr. Kolodkin not part of the topic, see Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 86.

Hernández in two draft articles.[782] Upon recommendation of the Drafting Committee, these draft articles were reworked into one provisionally adopted draft article.[783]

The concordant choices of the two Special Rapporteurs, widely appreciated by the plenary, were expression of the desire to establish an adequate but manageable scope of the topic. Excluding issues of purely domestic law, civil and administrative jurisdiction, international comity and the explosive issue of recognition contributed decisively to promoting a practicable scope. This finding does not imply that at least indirectly, there was as well severe disagreement over what issues should be given consideration in what way in the context of the topic.

The most controversial of these issues was the role to be accorded to immunity from international criminal jurisdiction. The main positions at regard were accurately described by Ms. Escobar Hernández, claiming the existence of two approaches to the relationship between national and international criminal jurisdiction. Some members claimed that the establishment of international criminal justice had no bearing on national criminal justice. The jurisdictions were different in nature, particularly regarding the principle of sovereignty, and subject to different immunity regimes. Others claimed that the common principles and objectives pursued by both jurisdictions meant that the same parameters should be applied in the context of immunity. The inapplicability of immunity before international criminal courts should imply that immunity cannot be invoked before domestic criminal courts either.[784]

Although Mrs Escobar Hernández declared both approaches to be highly theoretical and incomplete,[785] her reflections give proof of vicinity to the second perspective. She announced her intention to consider international criminal jurisprudence as a supplementary tool of interpretation.[786] Later she highlighted the interconnections between national and international jurisdictions within a system for the division of competences, especially under the principle of positive complementarity contained in the Rome Statute.[787] Ms. Escobar Hernández recalled the controversial role of

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782 See Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras. 33-34; the proposed draft articles read:

Draft article 1 - Scope of the draft articles

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

Draft article 2 - Immunities not included in the scope of the draft articles

The following are not included in the scope of the present draft articles:

(a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(c) Immunities established under other ad hoc international treaties;

(d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

783 See *Report of the International Law Commission, A/68/10: 65th session* (6 May-7 June and 2013), para. 48; the provisionally adopted draft articles read:

Part One - Introduction

Article 1 - Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

784 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 156-158.

785 Ibid., para. 159.

786 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras. 27-30

787 Ms. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 160.

domestic courts in the conflicts between the ICC, several African States and the African Union in the *Al-Bashir* case.[788] The capacities and successfulness of domestic courts in trying cases of international crimes played a key role in the pursuit of accountability, and the ILC should not ignore the need to assure their effectiveness.[789] Several members claimed that the insights coming from international criminal courts and their statutes played a role[790], expressing support for an approach encompassing both national and international jurisdiction[791]. The shortcomings of international criminal prosecutions were a further factor to be considered.[792]

Conversely, Mr. Kolodkin excluded that insights deriving from the analysis of international criminal jurisdiction could be of any relevance, underlining the different logics the two forms of jurisdiction were based on, which complicated the drawing of analogies.[793] This view appeared as exemplary for the radical exclusion of the movement promoting the reduction of immunities in the name of the fight against impunity from Mr. Kolodkin's account. His perspective was supported by several members. Some members made a sharp distinction between national and international efforts to combat impunity[794], highlighting the problematic legitimacy of certain States acting on behalf of the international community, and the consequential destabilizing potential[795]. Others challenged the logic of parallelism between the two jurisdictions. The existence of international criminal jurisdiction did to them not imply national criminal jurisdiction should be expanded as well. On the contrary, the development of international criminal law would render national jurisdiction in cases of competing competences less indispensable.[796]

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788 Ibid., paras. 162-167.

789 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 168-169.

790 See Mr. Dugard, ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, p. 11; Mr. Perera, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 3; Mr. Melescanu, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 14; Mr. Caflisch, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 3; Mr. Vázquez-Bermúdez, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 9, Mr. Gómez-Robledo, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 4.

791 See for instance the statement of Mr. McRae ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 9. A similar position was for instance voiced by Mr. Hmoud, see ILC, *Provisional summary record of the 2985th meeting, A/CN.4/SR.2985: 60th session* (2008), p. 15. Mr. Vázquez-Bermúdez as well approved of the idea that international criminal jurisdiction should be strengthened with regard to international crimes, whilst national criminal jurisdiction was, as expressed by Mr. McRae, a "second-best option", see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 10 as well as by Mr. Murase, ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 11 and ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 17.

792 Mr. McRae, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 22; Mr. Dugard, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p. 12.

793 Mr. Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 103.

794 See the statement of Mr. Nolte, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 16; Mr. Gevorgian, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 8.

795 Ms. Xue, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 30-31. Similar points were made by Mr. Wako, referring to the tensions between African and European States on the application of the principle of universal jurisdiction as an illustration, ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, pp. 3; 5 and Mr. Nolte, ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 7.

796 Mr. Nolte, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 21. This point was explicitly supported by Mr. Wako, ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, p. 4 and Mr. Niehaus, ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, p. 8. Making similar points, see Mr. Huang, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 4.

III. Issues Relating to the Scope of State Official Immunity

Whilst agreement could be observed between the two Special Rapporteurs and within the Commission on many, if not most, general issues relating to the definition of the topic and the approach to tackle it, disagreement prevailed on several divisive key issues. These issues regarded primarily the reading and the weight to be attributed to specific expressions of practice and to reflections of legal principle; the conflicting views on these fundamental questions anticipated the divergence on matters like the understandings of immunity and jurisdiction (1.), the personal scope of immunity *ratione personae* (2.), and the concepts of "*State official*" (3.) and "*act performed in an official capacity*" (4.) in the context of immunity *ratione materiae.*

1. Concepts of Immunity and Jurisdiction

Although numerous members preferred to avoid delving deep into the divisive definition of concepts beyond the strictly necessary in the context of the topic[797], the Special Rapporteurs and members in the plenary expressed their views on the closely related basic concepts of immunity and jurisdiction.

Mr. Kolodkin approached the concept of immunity through its close interrelation with jurisdiction, described as "*a manifestation of the sovereignty of the State and of its authoritative prerogatives […] to prescribe behaviour and to ensure that its prescriptions are carried out using all lawful means at its disposal*".[798] In accordance with the *Arrest Warrant* judgement[799], immunity arose only once a logically pre-existent –usually, but not necessarily, territorial- jurisdiction was established.[800]

Agreeing with Mr. Kolodkin that jurisdiction logically precedes immunity, Mrs Escobar Hernández described criminal jurisdiction in a proposed draft article as the competence of States to exercise their sovereign powers to establish individual criminal responsibility for behaviours criminalized under their legislation.[801] The two Special Rapporteurs agreed on further points: despite the "*inextricable link*" between jurisdiction and immunity, the concepts could and should be treated separately.[802] Defining immunity could be a desirable outcome of the works; defining jurisdiction, a

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797 Expressing this conviction, see inter alia Mr. Wood, ILC, *Provisional summary record of the 3218th meeting, A/CN.4/SR.3218: 66th session* (2014), p. 9.

798 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 44.

799 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*para. 46.

800 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 43-44.

801 See Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 42:

Draft article 3 - Definitions

For the purposes of the present draft articles:

(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

Upon recommendation of the Drafting Committee, the Commission decided to keep the draft article on definitions under scrutiny, in view of future action, Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 7.

802 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 61-62.

concept familiar to all legal systems but with different contents and meaning, would transcend the topic's scope.[803]

The "*nebulous legal concept*" of immunity from foreign criminal jurisdiction was formulated by Ms. Escobar in a draft article as describing the protection against exercises of - in principle established - criminal jurisdiction, enjoyed by certain State officials.[804] Several members underlined that the concept included the preclusion of all forms of criminal law enforcement, including pre-trial measures.[805]

Mr. Kolodkin chose a different approach to the concept of immunity.[806] Suggesting possible definitions, he outlined several negative formulations of immunity as a limitation to jurisdiction, an obstacle or exception to jurisdiction, an exclusion from jurisdiction or a defence against its exercise.[807] In open disagreement with the Special Rapporteur on the topic of jurisdictional immunities[808], Mr. Kolodkin stressed his strong preference for immunity as a positive right for the entity, individual or property enjoying immunity not to be subject to jurisdiction, corresponding to the State's synallagmatic duty not to exercise jurisdiction[809]. Exemplary for his approach, giving precedence to the concerns of potential perpetrators and their States over the initiatives of foreign States wanting to exercise their sovereign prerogatives, he emphasised the duties of the latter, rather than their rights.

The conclusions Ms. Escobar Hernández drew from the relationship between the two "*separate but necessarily interrelated"* concepts were significantly different. Ms. Escobar Hernández underlined that immunity was an exception to the sovereign power of jurisdiction itself and should be understood within the purposive terms dictated by the ends sought, to assure a balance between the rights and interests of the forum State and the State of the official.[810] Whilst Mr. Kolodkin hence focused primarily on the rights of the States indirectly enjoying immunity, Ms. Escobar Hernández aspired

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803 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 61, and Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras. 36-40. These approaches can be considered yet another expression of the pragmatic limitation of the potentially excessive scope of the topic, by avoiding an overload of complex issues of definition.

804 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 46; the text of the proposed draft article was:

Draft article 3 - Definitions

For the purposes of the present draft articles:

(b) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

Upon recommendation of the Drafting Committee, the Commission decided to keep the draft article on definitions under scrutiny, in view of future action, Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 7.

805 See inter alia the statements of Mr. Murphy, ILC, *Provisional summary record of the 3166th meeting, A/CN.4/SR.3166: 65th session* (2013), p. 4; Ms. Jacobsson, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 6.

806 For the sake of distinguishing State official immunity from related concepts, Mr. Kolodkin's preliminary report briefly discussed related concepts developed in legal cultures of the common law tradition: the "*non-justiciability rule*" and the "*act of State doctrine*". These principles are narrower than the rules on immunity, as they can be invoked exclusively in courts; as principles of domestic law, he considered them to be of secondary interest, Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 71-77

807 Ibid., para. 56.

808 Ibid., para. 57.

809 Ibid., para. 58.

810 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 144-147. Similar views on the relationship of jurisdiction and immunity transpired from the statement of Mr. Forteau, ILC, *Provisional summary record of the 3166th meeting, A/CN.4/SR.3166*, p. 6.

to find a middle ground between the interest of States claiming immunity and of those claiming jurisdiction.

Immunity from foreign criminal jurisdiction was considered to cover only *executive* and *judicial* jurisdiction, not exempting from *legislative* (prescriptive) jurisdiction; in other words, State officials were considered to be subject to the substantive laws of foreign States.[811] Only occasionally was this view challenged in the plenary. Underlining that any type of extraterritorial criminal jurisdiction, "*questionable under international law*", should not be endorsed, Ms. Xue claimed that immunity extended to legislative immunity, meaning that "*certain*" substantive criminal law does not apply to persons enjoying immunity.[812]

As described by Mr. Kolodkin and almost unanimously accepted[813], State official immunities are under positive international law categorized on the basis of the well-known analytical categories[814] of immunity *ratione personae* (also called personal immunity), a status-based type of immunity enjoyed only by the highest-ranking officeholders, and immunity *ratione materiae* (or functional immunity), covering a broad range of officials[815]. The parallel existence of different categories of officials to whom partially distinct regimes apply is all but new to international law.[816] Whilst immunity *ratione materiae* is limited to acts performed in an official capacity[817], the immunity *ratione personae* of senior officials covers both acts performed in an official and in a private capacity during the term of office[818]. Immunity *ratione personae* ceases after the term of office[819], whereas immunity *ratione materiae* for acts performed in an official capacity is enjoyed by all officials during and after office[820]. Ms. Escobar Hernández agreed that the distinction between the two types of immunity should be

811 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 45-47 and 64.

812 ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 29.

813 Mr. McRae invoked the possibility of abolishing immunity *ratione personae* altogether, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 8.

814 The concepts are not necessarily used in the official language of resolutions, see Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 83.

815 Ibid., para. 78-80. On officials enjoying immunity *ratione personae* in general, see Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 109-113; on the immunity *ratione personae* of ministers for foreign affairs, see para. 114-116.

816 See Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 57-58, referring to Art. 21 of the Convention on Special Missions, distinguishing between the troika and "*other persons of high rank*" on the one hand, and other officials on the other hand. Art. 50 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character contains a parallel provision, see Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 62. Art. 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents distinguishes two categories of protected persons, corresponding to the two categories envisaged by the Commission as enjoying respectively immunity *ratione personae and ratione materiae*; the same can be deduced from the provisions contained in the United Nations Convention on Jurisdictional Immunities of States and Their Property; Art. 4 of the Convention on the Prevention and Punishment of the Crime of Genocide finally distinguishes between "rulers" and "public officials". see Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 77.

817 To illustrate the scope of immunity *ratione materiae*, the Special Rapporteur mainly relied on the *Case concerning certain questions of mutual assistance in criminal matters* (*Djibouti* v. *France*), Judgment of 4 June 2008, I.C.J. Reports 2008, p. 177.

818 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 36.

819 Ibid., para. 37.

820 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 33. This very wide scope of immunity ratione materiae suggested by the Special Rapporteur, triggered some criticism in the plenary, formulated in particular by Ms. Escarameia, see ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 4-5.

kept, reflecting their intrinsic differences of context[821], formulating the sharp distinction in a draft article[822].

Closely connected to these analytical categorisations were reflections regarding the underlying rationales of State official immunity. The views expressed by the two Special Rapporteurs differed significantly. The categories of immunities and their scope were principally argued according to two rationales: the functional rationale, claiming the necessity of immunity for the State officials' fulfilment of functions, and the representative rationale, requiring the protection of State officials as personifications of the State itself.[823] Mr. Kolodkin considered these rationales to be complementary and justified by the maxim of the equal sovereignty of States and the principle of non-interference in internal affairs, requiring that among equals, one may not exercise sovereign will or power over the other (*par in parem non habet imperium*).[824] In his view, this doctrinal logic reflects the political motivation to ensure stability and predictability in inter-State relations.[825] Mr. Kolodkin's focus on the role of immunities in assuring the stability of international relations was by some considered excessive.[826] In contrast to her predecessor, Ms. Escobar Hernández focused much more on the functional rationale. In her view, the distinction between immunity *ratione personae* and immunity *ratione materiae* was without prejudice to the consideration that both categories of immunity have the same functional nature within the broader framework of the international legal order. In her view, the "*cornerstone of immunity*" was their role in assuring the unhindered exercise of functions by State officials' functions.[827]

2. The Scope of Immunity *Ratione Personae*

Whilst the concept of immunity *ratione personae* was not a point of contention, the same could be said about its subjective (who enjoys immunity *ratione personae*?) and substantive scope (is immunity *ratione personae* absolute or restricted?).[828] The personal scope of immunity *ratione personae* was an

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821 Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, para. 56.

822 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras 47-52; for the draft article, see Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para 53:

> *Draft article 3 - Definitions*
> *For the purposes of the present draft articles:*
> *(c) "Immunity ratione personae" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;*
> *(d) "Immunity ratione materiae" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".*

Upon recommendation of the Drafting Committee, the Commission decided to keep the draft article on definitions under scrutiny, in view of future action, Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 7.

823 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 84-97.

824 Ibid., para. 95, 97.

825 Ibid., para. 96.

826 See the statement made in response to Mr. Nolte, later in the plenary debate: "[…] *grave violations […] were of concern to the international community as a whole and an affront to the conscience of humanity. According immunity in that context would be repugnant and intolerable, and if that complicated a State's international relations somewhat, that was simply too bad*", see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 27.

827 Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, paras. 57-58.

828 Ibid., paras. 61-64.

issue under fire from two sides. Whilst the majoritarian view considered this type of immunity to be limited to the "troika" of incumbent Heads of State, Heads of Government and ministers for foreign affairs, Ms. Escobar Hernández recalled that both the exclusion of the latter category of office holders from this immunity regime[829] and its expansion to other senior officials had been advanced in the ILC and in the Sixth Committee[830].

Situating himself at one end of this spectrum, Mr. Kolodkin seemed not only favourable to the affirmation of immunity *ratione personae* enjoyed by ministers for foreign affairs; he further suggested the possibility that other high-ranking State officials could enjoy this privilege, however acknowledging the difficulties of finding suitable criteria for the establishment of this category.[831] This view showed his adherence to positions prioritizing the stability and efficacy of international relations over other issues. Ms. Xue supported the proposal to extend the category of officials enjoying immunity *ratione personae* through a set of appropriate criteria.[832] Other members as well appreciated Mr. Kolodkin's reflections on whether it could be appropriate to extend immunity *ratione personae* beyond the troika.[833] In contrast to this tendency, the opponents of Mr. Kolodkin criticized his endeavour to "*unduly broaden*" the scope of immunity *ratione personae*, super-elevating the role of State official immunity in assuring the stability of international relations.[834]

If Mr. Kolodkin's take on the scope of immunity *ratione personae* had hence been divisive, Ms. Escobar Hernández assumed a more intermediate position. She rapidly dismissed the view excluding ministers for foreign affairs from the beneficiaries of immunity *ratione personae* as "*unusual*" and incompatible with customary international law as reflected in the *Arrest Warrant* judgment of the ICJ.[835] Despite the opinion of numerous States[836] and several ILC members[837] that the category of officials enjoying immunity *ratione personae* should be expanded, the members of the troika were still the only ones to represent their States with full powers, "*automatically empowered to express the will and engage the responsibility of the State*"[838]. As reasons speaking against expanding the personal scope of immunity *ratione personae*, Ms. Escobar Hernández cited the restraint of the ICJ to expand the category when it had had the occasion[839] (despite the ambiguous language used in the preceding *Arrest*

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829 Speaking up against the immunity *ratione personae* of ministers of foreign affairs was in particular Mr. Tladi, see inter alia ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 15 and ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164*, pp. 7-8.

830 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras 57-58.

831 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 117-121.

832 ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 30.

833 See amongst others the cautious but favourable positions of Mr. Perera, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 3-6, Mr. Wisnumurti, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 13-14, Mr. Vasciannie, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986* p. 18, Mr. Wako ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, pp. 6-7, and Mr. Niehaus, ILC, *Provisional summary record of the 2987th meeting, A/CN.4/SR.2987*, p. 7.

834 See Mr. Pellet, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 27.

835 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 58.

836 Ibid., paras. 59-60.

837 Speaking up for a similar extension, see inter alia Mr. Huang, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 4, Mr. Petrič, ILC, *Provisional summary record of the 3167th meeting, A/CN.4/SR.3167*, p. 6, Mr. Singh, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 6; Mr. Gevorgian, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 8.

838 These words were used in Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 77.

839 She referred in particular to the case *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)para. 194*.

Warrant judgment[840], often invoked as speaking in favour of the expansion). Other elements supporting this view were recent national jurisprudence[841], the difficulties of establishing an exhaustive list or criteria to identify the other senior officials enjoying immunity *ratione personae*[842], and finally the alternative ways of granting senior officials immunity *ratione personae*, especially under the immunity regime for special missions[843]. Not tackling the definition of State official at this point, Ms. Escobar Hernández suggested a draft article limiting the personal scope of immunity *ratione personae eo nomine* to the troika[844]. In the light of the complexity of convincingly expanding the category of beneficiaries, this balanced position met wide-spread support.[845]

The material scope of immunity *ratione personae,* often referred to as "full", "total", "complete", "integral" or "absolute", was comparatively easy to establish. All acts of incumbent members of the troika, of official as well as of private nature, were considered to be covered[846], as explicated in a draft article proposed by Ms. Escobar Hernández[847]. The temporal scope of immunity *ratione personae* was described as equally uncontroversial, "*unequivocally temporary in nature and […] contingent on the term of office of the person who enjoys such immunity*"[848]. After office, the classification of the act becomes again relevant: while private acts are no longer covered by immunity, official acts continue to enjoy immunity *ratione materiae*, as the official acts of any other State official[849], without any need to recur to the idea of residual immunity of former troika officials[850]. The proposed draft articles were later reworked by the Drafting Committee and provisionally adopted.[851]

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840 See para. 51, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

841 The Special Rapporteur highlighted a judgment by the Swiss Federal Criminal Court, *A. v. Office of the Public Prosecutor of the Confederation (Nezzar)* (Federal Criminal Court, Switzerland, 25 July 2012)

842 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 64.

843 Ibid., para. 65.

844 *Draft article 4 - The subjective scope of immunity ratione personae*
Heads of State, Heads of Government and ministers for foreign affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

845 See inter alia the statements of Mr. Caflisch, considering the troika the "least wrong solution", ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 3; Mr. Hmoud, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 4; Mr. Wisnumurti, ILC, *Provisional summary record of the 3167th meeting, A/CN.4/SR.3167*, p. 4, Mr. Gómez-Robledo, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 4; Mr. Vázquez-Bermúdez, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 9.

846 See Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, paras. 69-74.

847 *Draft article 5 - The material scope of immunity ratione personae*
1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and ministers for foreign affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.
2. Heads of State, Heads of Government and ministers for foreign affairs do not enjoy immunity ratione personae in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

848 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 75, reiterating the position of the ICJ, judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), I.C.J. Reports 2002*, para. 54.

849 See the formulation of this approach in a proposed draft article:
Draft article 6 - The temporal scope of immunity ratione personae
1. Immunity ratione personae is limited to the term of office of a Head of State, Head of Government or minister for foreign affairs and expires automatically when it ends.
2. The expiration of immunity ratione personae is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity ratione materiae in respect of official acts performed while in office.

850 As an example of similar proposals, see the decision of the Swiss Federal Criminal Court, (Appeals Chamber) of 25 July 2012 (case No. BB.2011.140), paras. 5.3.1 and 5.3.2.

851 See *Report of the International Law Commission, A/68/10*, para. 48; the provisionally adopted draft articles read:

3. The Concept of "State Official" and Immunity *Ratione Materiae*

As with immunity *ratione personae*, the concept of immunity *ratione materiae* was undisputed, but there was much disagreement over the beneficiaries and the acts (not) covered.[852] Regarding the personal scope, Mr. Kolodkin suggested a focus limited to the immunity of senior State officials.[853] As acknowledged by Ms. Escobar Hernández, the majority of cases in the context of immunity *ratione materiae* regarded officials in the highest ranks of the States' civil or military structures, rather than officials simply carrying out the decisions taken by others.[854] Although his limited focus did not prevail, Mr. Kolodkin opted not to define the concept of State official, approaching the scope of immunity *ratione materiae* principally through the concept of an "act performed in an official capacity"; some members agreed that it was not fruitful to attempt to define the concept of State official.[855]

The principal endeavour to clarify the concept of State official, was undertaken by Ms. Escobar Hernández. The concept posed in her view two main difficulties: a substantive one, concerning the criteria to identify persons qualifying as "officials"; and a terminological one, regarding the preferable terms to describe the persons meeting these criteria, considering the criticism the term "official" and its equivalents in other working languages had triggered.[856]

Ms. Escobar Hernández analysis revealed the lack of a general definition of "official" under international law. Generally, the criteria allowing to identify a person as an official were not explicated by either national[857] and international courts[858], except for general references to the performance of public functions or to actions as a State's agent, in its name or on its behalf. In the treaty practice

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Part Two - Immunity ratione personae

Article 3 - Persons enjoying immunity ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.

Article 4 Scope of immunity ratione personae

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae only during their term of office.

2. Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity ratione personae is without prejudice to the application of the rules of international law concerning immunity ratione materiae.

851 Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 7.

851 Mr. Pellet even called Mr. Kolodkin's approach "*hyper-Westphalian*", see ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 10.

852 Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, paras. 65-68.

853 Mr. Kolodkin, Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, paras. 106 and 107 and *Report of the International Law Commission, A/63/10: 60th session*, Sixty-third session, Supplement No. 10 (5 May-6 June and 2008), para. 289.

854 Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 36-37.

855 Mr. Wood, ILC, 'Provisional summary record of the 3218th meeting, A/CN.4/SR.3218: 66th session' (8 July 2014), p. 9.

856 Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para.22.

857 Ibid., para. 38.

858 The review of international jurisprudence was limited to the ICJ with the cases *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters*, the European Court of Human Rights with the cases *Al-Adsani v. the United Kingdom* and *Jones and others v. the United Kingdom*, and finally the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v. Tihomir Blaskic.*

either dealing directly with the immunity of States and their officials[859] or establishing a legal regime around the concept of official[860], the concept was usually circumscribed through the special connection between categories of persons and States[861]. The ILC itself had on several occasions refrained from defining the concept.[862] Ms. Escobar Hernández hence extrapolated three criteria, to be evaluated on a case-by-case basis, for the identification of an official: the connection to the State (a.), the representation of the latter or the performance of official functions (b.) and the exercise of elements of governmental authority, acting on behalf of the State (c.).[863]

These criteria fed into two draft articles. One draft article described the general concept of an "official", based on the idea that there are different types of individuals subject to different immunity regimes.[864] The second draft article asserted to normatively describe the subjective scope of immunity *ratione materiae*, specifying what kind of connection between the State and the official could justify the latter's immunity. This normative prerequisite was considered to be met if "*the individual may act in the name and on behalf of the State, performing functions that involve the exercise of governmental authority*".[865] These nebulous criteria, to be determined on a case-by-case basis as dependant

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859 See the Vienna Convention on Diplomatic Relations of 1961, the Convention on Special Missions of 1969, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975, the Vienna Convention on Consular Relations of 1963, and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004.

860 See the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*; *Convention on the Prevention and Punishment of the Crime of Genocide* (1948)*;* the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); the *Rome Statute of the International Criminal Court* (1998); and the different universal and regional conventions against corruption adopted since the 1990s, compare Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 85-93.

861 Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 53; 59; 64; 68; 77; 84; 93; 96.

862 Both the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgments of the Tribunal* and the first *Draft Code of Offences against the Peace and Security of Mankind* of 1954 used the expression "responsible government official", without however defining the concept, see ibid., paras. 99-101. Article 7 of the *Draft Code of Crimes against the Peace and Security of Mankind* of 1996, states the irrelevance of the official position of an individual who commits a crime for the establishment of individual criminal responsibility. From the commentaries to these draft articles, it can be deduced that the individuals referred to have a connection with the State, in whose name or on whose behalf they act, exercising governmental authority, functions and prerogatives of varying kinds, compare Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 102-105. A comparable finding can finally be drawn from the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* of 2001, in particular those regarding the attribution of the conduct of persons to a State, see Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, paras. 106-110.

863 Compare Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 111:
"*(a) The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be de jure or de facto;*
(b) The official acts internationally as a representative of the State or performs official functions both internationally and internally;
(c) The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions."

864 See Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 144:
Draft article 2 (before 3) - Definitions
For the purposes of the present draft articles:
(e) State official means:
(i) The Head of State, the Head of Government and the Minister for Foreign Affairs;
(ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State.

865 Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, para. 146.

on a given State's peculiarities, were meant to exclude officials without functions involving the exercise of State prerogatives, like doctors and teachers.[866]

Ultimately, Ms. Escobar Hernández' efforts were geared to limit the scope of immunity *ratione materiae* by excluding categories of officials not exercising governmental authority. Although Ms. Escobar Hernández' input was welcomed, the draft articles provisionally adopted on the basis of the proposal of the Drafting Committee[867] were quite different from the version initially proposed[868]. Any reference to the "*exercise of elements of governmental authority*" or comparable notions as "*prerogatives of public power*", "*public functions", "sovereign authority*" or "*inherent functions of the State*" was replaced by more neutral formulations regarding the "*exercise of State functions*". This decision was motivated by the will to avoid any confusion between the concepts of "official" and their "acts".[869]

The recurrence to almost circular formulations like identifying the beneficiaries of immunity *ratione materiae* as the "*State officials acting as such*" partly reflected the difficulties of defining a concept strongly relying on each State's domestic law, which had induced some members to suggest refraining from defining the concept altogether. Whilst a definition of State officials for the sake of the draft articles was achieved, this definition was relatively generic, excluding officials from the category of the beneficiaries of immunity *ratione materiae* only to a limited extent. Nevertheless, as the definition of "State official" covered only individuals representing the State or exercising State functions, it was later declared by the ILC to have a delimiting effect.[870] The prevailing impression was however that the endeavour of limiting the scope of immunity *ratione materiae* was postponed to the discussion of the concept of "acts performed in an official capacity".

4. "Acts Performed in an Official Capacity" and State Responsibility

The term "act performed in an official capacity" had been used by the ICJ in the *Arrest Warrant* case.[871] The difficulty of nailing down the meaning of the notion is illustrated *inter alia* by the controversy caused by Ms. Escobar Hernández' view that one of the concept's characteristics was that

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866 Ibid., para. 148-149; See para 151 for the proposed draft article:
Part Three - Immunity *ratione materiae*
Draft article 5 - Beneficiaries of immunity *ratione materiae*
State officials who exercise governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction.

867 See *Immunity of State officials from foreign criminal jurisdiction, Text of draft articles 2 (e) and 5 provisionally adopted by the Drafting Committee on 15 July 2014: A/CN.4/L.850* (2014) and ILC, *Provisional summary record of the 3231st meeting, A/CN.4/SR.3231: 66th session* (2014).

868 The provisionally adopted draft articles read:
Article 2 - Definitions
For the purposes of the present draft articles:
…
(e) "State official" means any individual who represents the State or who exercises State functions.
Article 5 - Persons enjoying immunity ratione materiae
State officials acting as such enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction.

869 This was the explanation given by the Special Rapporteur, see Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 24; compare further paras. (9), (10) and (11) of the commentary to draft article 2 (e), *Report of the International Law Commission, doc. A/69/10: 66th session* (5 May–6 June and 2014), para. 132.

870 Statement of the Chair of the ILC, ibid., paras 104-105.

871 Ibid., paras 27-28; this decision to adopt this notion among the many used had been taken by the ILC the year before, see commentary to draft article 4, in particular paras. (3) and (4), *Report of the International Law Commission,*

"*the act is of a criminal nature*".[872] Reflecting the risks of misleading formulations rather than conceptual divergences, this statement triggered nevertheless almost unanimous criticism in the plenary.

The temporal scope of immunity *ratione materiae* did not give rise to much controversy. Unlike immunity *ratione personae*, immunity *ratione materiae* is of indefinite temporal nature and can be invoked at any time, whether the official is still in office or not, as long as the act in question occurred during the latter's term of office. Once they leave office, the former beneficiaries of immunity *ratione personae* do not continue to enjoy any immunity for acts performed in a private capacity while in office. As any other State official, they however continue enjoying immunity *ratione materiae* for the official acts they performed while in office.[873]

The most complex issues regarded the appropriate criteria to include or exclude specific types of acts from the scope of the concept of acts performed in an official capacity. The relevant practice was not uniform and unequivocal; most cases reviewed regarded one of three types of purported criminal conduct.[874] As emerged from practice, the attributability of the act to the State[875] and the issue of indeed "*acting within the scope of duties as organs of State*"[876] were core issues.

The main complexities arose in connection to acts involving means and authority inaccessible without State power, whilst being incompatible with the official's duties and general ideas of State functions. Should forms of conduct like international crimes or acts serving the official's personal enrichment be excluded from the scope of "acts performed in an official capacity" because of their underlying objectives and motivations, or should the appearance of Statehood prevail to include them?

In the context of determining the concept of "acts performed in an official capacity", considered to be the very own acts of the State merely carried out by the official, the relationship between the immunity and responsibility of the State on the one side and State official immunity and individual accountability on the other was touched upon. How did the responsibility of the State and of its

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A/68/10, para. 49. According to Ms. Escobar Hernández the relationship between acts performed in an official and private capacity would be one of "*negative or exclusionary meaning*", Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 32.

872 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 95. The distinction between lawful and unlawful acts would be irrelevant, as the acts at stake were per definition criminally unlawful; otherwise, "*there would be no cause for the exercise of the criminal jurisdiction of the forum State from which immunity is claimed*".

873 Ibid., paras. 128-131.

874 The first category consists of crimes under international law like "*crimes against humanity, war crimes and serious and systematic human rights violations*", committed through acts "*including torture, mass killings, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism*". Secondly, immunity has been claimed in cases involving other acts committed by armed forces and security services not amounting to international crimes, like "*ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement*". Finally, immunity became relevant in cases of personal enrichment through the "*diversion and illegal appropriation of public funds, money-laundering and other acts linked to corruption, as well as drug trafficking*", ibid., para. 50.

875 According to Ms. Escobar Hernández, ibid., para. 39, this requirement was indirectly referred to by the ICJ in the case *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* para. 196; on the question of attributability, see further *Prosecutor v. Tihomir Blaskic* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 29 October 1997), para. 38.

876 A similar condition was postulated by the ICJ in the case *ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, para. 191; on the issue of acting within official duties, see further the case of *Urechean and Pavlicenco v. the Republic of Moldova* (European Court of Human Rights, 02 December 2014).

officials relate (a.)? Should the criteria developed for State immunity be applied to identify "acts performed in an official capacity" (b.)? Did otherwise attribution to States for the sake of responsibility imply the official nature of the act (c.), or did any further State-related criteria restrict the concept of "act performed in an official capacity" (d.)?

a. The "Single Act, Dual Responsibility" Model

Both Special Rapporteurs adhered to the "single act, dual responsibility" model.[877] According to this view, the official's act may entail different types of responsibility: the personal criminal and civil responsibility of the individual, the civil responsibility of the State, or the responsibility of the State and its official concurringly.[878]

Citing an occasionally voiced view, Mr. Kolodkin declared he was not convinced that the attribution both to the State and to the official would have the side-effect of rendering the rules on State official immunity inapplicable.[879] On the contrary, he believed acts can be contemporarily attributed to the state and the official, without resulting in the exclusion of the latter's immunity.[880]

In the following, Mr. Kolodkin described three potential scenarios he considered to be legally pertinent in the light of the dual attribution of conduct to both the official and the State.[881] First, invocation of immunity *ratione materiae* would equal the recognition of the act in question as an act of the State itself, eventually laying the premises for the State's international responsibility. The official's State could invoke immunity, but it would have to accept the potentially heavy political and legal consequences of such a claim.[882] Secondly, the official's State could acknowledge the performance of the act in question in an official capacity, without contemporarily invoking the official's immunity.[883] Thirdly, the State could choose not to invoke the official nature of the act or declare that the official had acted in his private capacity, thereby depriving the official of immunity. A similar behaviour would not preclude the possibility of the forum State to contemporarily prosecute the official and raise the issue of the responsibility of the official's State.[884]

If the two Special Rapporteurs hence agreed in principle that acts performed in an official capacity could parallelly trigger the responsibility of the official himself and of the State, a further complexity regarded the criteria to be applied to define this category of acts: the criteria developed in the context of State immunity, those relating to State responsibility, or other standards?

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877 Compare Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, paras.58- 60; Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 153-155.

878 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 97-101.

879 Mr. Kolodkin referred to an argumentation expressed by the *Submission to the European Court of Human Rights: cases Jones v. United Kingdom and Mitchell and Others v. United Kingdom* compare ibid., FN 120.

880 Ibid., para. 62.

881 For the Special Rapporteur's view on principle of dual attribution see Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 58.

882 ILC, *Provisional summary record of the 3111th meeting, A/CN.4/SR.3111*, p. 13.

883 This approach was for instance chosen by France in the case of the incident involving the *Rainbow Warrior* 82 ILR 500 (France-New Zealand Arbitration Tribunal, 1990).

884 Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 60.

b. State Immunity and Immunity *Ratione Materiae*

State immunity and State official immunity were considered closely related concepts subject to different logics. State official immunity was widely considered an emanation of State immunity, constituting an expression of the significant protection granted to the State. For the sake of sovereign equality, immunity covered not only the State itself and the inviolability of its sovereign prerogatives, but as well the individuals representing the State and putting these prerogatives into action. The rights inherent in State official immunity were ultimately rights of the State, whilst the official itself was only a beneficiary.[885]

The once absolute concept of State immunity was considered to have gradually been reduced to apply only to *acta jure imperii* (acts of governmental or public nature), whilst *acta jure gestionis* (commercial activities) were no longer considered to enjoy immunity. Considering the proximity of the interconnected concepts of State immunity and State official immunity, to some the restrictions in the field of State immunity should be paralleled by comparable developments for the immunity of its officials.[886] The question emerged whether acts performed in an official capacity were in fact only acts that qualify as *acta jure imperii*, whilst immunity would be excluded for all acts qualifying as *acta jure gestionis*.

State immunity and State official immunity concern different types of actors and responsibilities: whilst the State incurs only civil liability, State officials can be held accountable under both civil and criminal law. Whilst it seems justified to limit the privileges of the State when the latter participates in business transactions as any private entity would do, it is not as obvious that officials should be held personally liable for *acta jure gestionis* they performed in the discharge of their functions. Deductions from the State's reduced immunity from civil jurisdiction were moreover of limited relevance in the context of the completely different rationales behind criminal jurisdiction. Both types of immunity were however awarded in the interest of the State, and the tendency to restrict the State's immunity could be taken into account as a guiding principle in the debates concerning the immunities of its officials. Nevertheless, the two concepts were not to be conflated.[887] The different legal regimes the official and the State are subject to could be observed in the context of immunity *ratione personae*; the troika's immunity for acts performed in a private capacity has no equivalent in the context of State immunity.[888] There was broad agreement that the conceptual couple of *acta jure imperii* and *acta jure gestionis* should therefore not be confused with the distinction between acts performed in a private or in an official capacity; the latter could include certain *acta jure gestionis* if they pertained to the discharge of the official's functions.[889]

885 Ibid., para. 15.
886 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, dissenting opinion of Judge Al-Khasawneh, p. 98.
887 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 102-103.
888 Ibid., paras 105; 109.
889 Ibid., para. 30.

c. Attributability to the State and Immunity *Ratione Materiae*

Considering the scarcity of insights that could be gained from the concepts of State immunity, it seemed more promising to examine the criteria used to attribute acts to the State in the context of State responsibility. Several topics dealt with by the Commission in the past had been concerned with issues regarding the responsibility of different entities and the official nature of their agents' behaviour.[890] Most pertinent appeared to be the standards contained in the articles on the responsibility of States for internationally wrongful acts.[891] Should these criteria be used to determine acts performed in an official capacity? Are all acts attributable to the State covered by the concept of acts performed in an official capacity? The main goal of the articles on State responsibility is to prevent States from evading responsibility for acts carried out for their benefit, eventually under their control or with their consent. This goal is pursued by defining the acts attributable to the State as broadly as possible, including, *inter alia*, acts performed in an apparently official capacity, acts *ultra vires*, acts carried out in the absence or default of official authorities and acts adopted by States as their own.[892]

Mr. Kolodkin had no doubts that the criteria established for the attribution of conduct for the purposes of State responsibility were to be applied in the context of State official immunity.[893] The resulting view on the scope of "acts performed in an official capacity" was a broad one, including illegal acts and acts *ultra vires.*[894] If acts were attributable to the State, regardless of whether they were considered *acta jure imperii* or *acta jure gestionis*, officials enjoyed immunity *ratione materiae.*[895]

In opposition to this view, Ms. Escobar Hernández doubted that applying the criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts was always appropriate in the context of individual immunity. If immunity *ratione materiae* was not to become a mechanism excessively hindering individual responsibility, not all acts potentially triggering State responsibility were necessarily acts performed in an official capacity. In the view of Ms. Escobar Hernández, acts performed with specific personal motives or generally *ultra vires* (article 7)[896], acts

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890 Compare ibid., paras 86- 94. The Draft articles on the responsibility of international organizations deal with the relevant concepts of "effective control", "on-duty conduct" and "discharge of official functions", paras 86-88, compare *Draft articles on the responsibility of international organizations*, Yearbook of the International Law Commission, 2011, vol. II, Part Two (2011). In the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, crimes under international law are defined in a manner highlighting the connection between the criminalized acts and the State; the eventually official nature of the act does not necessarily exclude the individual responsibility of perpetrators, para. 89. The draft Code of Offences against the Peace and Security of Mankind in its different version established individual responsibility independently of the official or private capacity of the perpetrators. In practice, the commitment of these crimes will usually require the participation of individuals invested with official status and governmental authority, paras 90-94.

891 *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, 2001, vol. II, Part Two (2001).

892 Articles 4 to 11 of the Articles, compare Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 80-82.

893 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 24. Referring to the draft articles on responsibility of States for internationally wrongful acts, he reconnected with the Commission's past practice, see para. 27.

894 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 29-31.

895 Ibid., para. 28.

896 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 113, acknowledging however that jurisprudence is not coherent regarding acts *ultra vires*.

of *de facto* officials (articles 8 and 9)[897], acts of insurrectional movements (article 10)[898] and acts acknowledged by the State to be its own without prior link between the two (article 11)[899] did not constitute acts performed in an official capacity. The relationship between the official and the State could not retroactively be constructed but must have existed at the time of the act. Protection to the State as the indirect beneficiary of immunity is only granted if the link with the official was intentionally established. In contrast, States should not be entitled to recur to immunity *ratione materiae* if they did not have direct control over events, for instance if either no mandate was granted, or the mandate was exceeded. She justified this narrow view by recurring to general considerations on the nature, foundations and objectives of immunity itself as an exception to jurisdiction.[900]

The conclusions of the two Special Rapporteurs differed hence significantly. Mr. Kolodkin considered the responsibility of the State and the immunity *ratione materiae* of its officials to march in parallel. Every act capable of engaging the State's responsibility as a consequence of attribution implied an entitlement of the involved State official to immunity *ratione materiae,* which the State could then choose to invoke or not. To him, State officials were comprehensively protected under the umbrella of immunity, at the cost of engaging the responsibility of the State. The State had broader shoulders than the official and incurred only civil liability.

For Ms. Escobar Hernández, rather than parallel, State responsibility and immunity *ratione materiae* were independent: an act could trigger State responsibility, without concurringly offering the protection of immunity to the official involved. Her approach aimed at maximising the accountability of both the State and the official; even if the State is considered responsible, this would not guarantee shelter to the official. If hence Mr. Kolodkin considered an act *ultra vires* to give rise to both State responsibility and the official's immunity *ratione materiae*, from Ms. Escobar Hernández' perspective only the first part of this statement was correct.

For the first of these points of view speaks the idea that State official immunity is exactly intended to avoid the destabilisation and embarrassment potentially resulting from the investigation of foreign authorities into the *ultra vires* nature of acts or the relationship between the foreign State and its officials. Ms. Escobar Hernández' approach was backed by the consideration that attributability in the context of State responsibility was geared to avoid the latter's evasion from responsibility, and consequently to be understood widely. Conversely, immunity *ratione materiae* hindered accountability; the defining criteria were hence to interpreted narrowly.

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897 Ibid., para. 114. The Special Rapporteur specified that cases of "agency of necessity" considered in article 9, could exceptionally qualify as having been performed in an official capacity if under a logic of need, some exercise of governmental functions was unavoidable, see para. 115.

898 Ibid., para. 116.

899 Ibid., para. 117.

900 See in particular ibid., para. 112. Mrs Escobar Hernández recurred also to two ICJ judgments which in her view established a restrictive understanding of attribution, which would ensure that immunity does not turn into a mechanism to evade responsibility, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (International Court of Justice, 26 February 2007); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (International Court of Justice, 03 February 2015).

d. Do Only Exercises of Governmental Authority Qualify for Immunity?

Through the back door, Ms. Escobar Hernández seemed to re-introduce the idea of limiting immunity to *acta jure imperii*. An additional teleological criterion needed to be applied to identify an act performed in an official capacity: since immunity *ratione materiae* intended to protect the principle of sovereign equality, only manifestations of the safeguarded sovereignty were protected.[901] Only the performance of State functions through the "*exercise of elements of governmental authority*" entailing sovereign power could trigger immunity *ratione materiae*.[902]

According to Ms. Escobar Hernández, courts had considered sovereign acts, performances of public functions or exercises of governmental authority to comprise, among others, the following acts: activities inherent to sovereignty like military and police authority, legislature, acts relating to foreign affairs and diplomacy and the administration of justice, as well as activities occurring during the implementation of States policies involving the exercise of sovereignty.[903] A comparable picture emerged in her view from the analysis of treaty practice. Under international conventions dealing with immunities, the functions protected were all to be qualified as exercises of governmental authority, closely linked to State sovereignty.[904]

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901 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 118.

902 According to the Special Rapporteur, ibid., para. 38, the functions of the minister for foreign affairs are described by the ICJ as an example of a similar exercise of governmental authority, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*paras. 51 and 53. Furthermore, similar references to the exercise of sovereign power were made although in the context of *acta jure imperii* and State immunity, by the ICJ in the case *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, paras. 60 and 61 and by the ECtHR in the case *McElhinney v. Ireland* Report of Judgments and Decisions 2001-XI (European Court of Human Rights, 21 November 2001), para. 38.

903 See Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 54, referring inter alia to the national decisions *Empire of Iran* (Federal Constitutional Court, Germany, 30 April 1963), *Victory Transport, Inc. v. Comisaria General* 35 ILR 110 (Court of Appeals, Second Circuit, United States), *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X* (Court of Cassation (Criminal Chamber), France, 23 November 2004), *Doe I v. Israel* (District Court for the District of Columbia, United States, 25 November 2005), *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.* (Supreme Court, State of New York, United States, 31 October 1988); *First Merchants v. Argentina,* (Court of Appeals, Second Circuit, United States), *Youming Jin v. Ministry of State Security* (District Court for the District of Columbia, United States, 03 June 2008) and *Holland v. Lampen-Wolfe* (House of Lords, United Kingdom, 20 July 2000).

904 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 61-64, with further references. With regard to the *Vienna Convention on Diplomatic Relations,* a systematic reading of the provision reveals that acts performed in an official function, although not specifically identified, are acts occurring in "*the exercise of the functions*" of diplomatic agents and the administrative, technical and service staff of diplomatic missions, to be examined on a case-by-case basis, compare article 37 and article 38 of the convention. The functions of the diplomatic mission, to which the acts performed in an official capacity must be closely linked, are defined in article paragraphs 1 and 2 (*"(a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. It may also perform consular functions."). Ex negativo*, acts explicitly excluded from the otherwise full immunity *ratione personae* of diplomatic agents are acts performed for the officials' private benefit, like actions regarding private immovable property, successions or professional and commercial activities performed outside official functions and not on behalf of the sending State, see article 31 para. 1 and article 42 of the convention. Comparable provisions are contained in the *Vienna Convention on Special Missions*, in the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* and in the *Vienna Convention on Consular Relations*, although the latter does not accord immunity from criminal jurisdiction of consular officers.

A crucial issue in this context regarded the question whether international crimes could be considered acts performed in an official capacity, involving the exercise of governmental authority.[905] Two arguments spoke against a similar classification: perpetrating international crimes was not a State function, and international crimes were peremptorily prohibited as they undermine the core values and principles of the international legal system.[906]

The reactions of the two Special Rapporteurs to this suggestion were unalike, although their ultimate conclusions did not differ much. Mr. Kolodkin disapproved of disqualifying acts amounting to international crimes as official acts, as he saw no convincing reason to alter the qualification of acts because of their gravity. Even illegal acts and acts *ultra vires* qualified in his view as official acts. The exclusion of acts constituting grave crimes seemed "*artificial*" and "*non-legal*" to him.[907]

In contrast to this clear-cut disapproval, Ms. Escobar Hernández recognized the merits of an approach excluding international crimes from the category of acts performed in an official capacity, although she ultimately disagreed as well. In her view, a similar construction would clearly be at odds with facts. Firstly did international crimes like torture, extrajudicial killings, genocide, crimes against humanity and war crimes frequently include the participation of State officials in their definition. Secondly, they were also committed "*using the State apparatus, with the support of the State, and to achieve political goals that, regardless of their morality, are those of the State*".[908] It seemed difficult to imagine these atrocities being committed without any participation or at least the consent of the State. Under the universal and regional conventions in the field of international criminal law, the criminalized conduct was committed by "*agents of the State or by persons or groups of persons acting with the*

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905 This possibility was denied by the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*,para. 85. In the view of the Special Rapporteur, Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 45 and 46, quite the opposite was stated by the ECtHR in the cases *Al-Adsani v. United Kingdom*,, and *Jones and others v. United Kingdom*, para. 206, acknowledging acts of torture as "acts performed in an official capacity".

906 Compare Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 122; In Mr. Kolodkin's understanding, this opinion was *inter alia* voiced by three judges in the Arrest Warrant case, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*,Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51 and 85. Both Special Rapporteurs underlined how the Law Lords had been of divergent views regarding this issue in the cases *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 1)*and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet No. 3),* compare Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, FN 129 and 132 and Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 56. Other national decisions arguing along similar lines, usually concerning cases of alleged torture, include the decisions *FF v. Director of Public Prosecutions* (High Court of Justice, United Kingdom, 07 October 2014); *Pinochet* 119 ILR 349 (Court of First Instance of Bruxelles, 06 November 1998); *Bouterse* (Court of Appeal of Amsterdam, Netherlands, 20 November 2000); *A. v. Office of the Public Prosecutor of the Confederation (Nezzar)*; for a similar argument being made in the context of State immunity, see *Prefecture of Voiotia v. Federal Republic of Germany* (Court of First Instance of Livadia, Greece, 30 October 1997).

907 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 61.

908 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 123-124. Provisions corroborating this observation are for instance contained in the *Rome Statute of the International Criminal Court*. Crimes against humanity under article 7 can only be "*committed as part of a widespread or systematic attack directed against any civilian population, […] pursuant to or in furtherance of a State or organizational policy to commit such attack*". The crime of aggression under art. 8 bis is "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression […]", art. 8 bis para. 1; an "act of aggression" is "*the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*", art. 8 bis para. 2.

authorization, support, or acquiescence of the state" or "*constitutionally responsible rulers, public officials or private individuals*".[909]

From the explicit nomination of this categories of State organs, Ms. Escobar Hernández deducted that under certain circumstances, these crimes could be considered acts performed in an official capacity. Moreover, the exclusion of international crimes from the category of acts performed in an official capacity could in her view unintentionally undermine the attributability to the State, as the impression could arise that international crimes were acts attributable exclusively to the perpetrator. A similar understanding would be incompatible with the principle of the concurrent dual responsibility of the State and the individual.[910] At the end of the day, Ms. Escobar Hernández hence considered that the issue of the effects of international crimes on immunity was best analysed in the context of exceptions to immunity.[911]

Under international legal instruments against corruption, the addressed acts aiming at obtaining undue advantages for the official himself or herself or another person or entity directly related to official functions.[912] Nevertheless were corruption-related acts characterized by overriding private interests and motives not to be considered exercises of governmental authority in Ms. Escobar Hernández' view.[913] In cases involving corruption, courts had often denied immunity, based on the reasoning that the misappropriation of public funds, money laundering and the like are distinguishable from the performance of State functions in the public interest.[914]

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909 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984 explicitly mentions the involvement of an "official or other person acting in an official capacity" as a defining element of torture, see art. 1, para. 1; compare further the reference to orders coming from "a superior officer or a public authority", art. 2, para. 3. Although the participation of a State official is not included in the definition of torture, other provisions of the *Inter-American Convention to Prevent and Punish Torture* of 9 December 1985 prove that the involvement of a public official is necessary condition for an act to be recognized as torture, see art. 3 of the convention. Other relevant conventions include the *Convention on the Prevention and Punishment of the Crime of* Genocide of 9 December 1948, *International Convention for the Protection of All Persons from Enforced Disappearance*, the *Inter-American Convention on Forced Disappearance of Persons*, and most prominently the *Rome Statute of the International Criminal Court* of 17July 1998.

910 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 125.

911 Ibid., para. 126.

912 This is the finding resulting from the analysis of the relevant provisions contained in the *Convention against Corruption* (2003), the *Inter-American Convention against Corruption* (1996), the *Criminal Law Convention on Corruption* (1999)*Council of Europe Criminal Law Convention on Corruption* of 27 January 1999 and Lastly, the *Convention on Preventing and Combating Corruption* (2003)see Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 74-77.

913 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 119.

914 See ibid., para. 58. Particular attention was dedicated to the case *Teodoro Nguema Obiang Mangue* (Court of Appeal of Paris, France, 13 June 2013; 16 April 2015); other decisions not recognising immunity for acts of personal enrichment referred to included the cases *United States v. Noriega* (Court of Appeals, Eleventh Circuit, United States, 07 July 1997); *Jungquist v. Sheik Sultan Bin Khalifa al Nahyan* (District Court for the District of Columbia, United States, 20 September 1996); *Melleiro c. Isabelle de Bourbon, ex-Reine d'Espagne* (Court of Appeal of Paris, France, 03 June 1872); *Seyyid Ali Ben Hammond, Prince Rashid v. Wiercinski* (Tribunal civil de la Seine, France, 25 July 1916); *Ex-roi d'egypte Farouk c. s.a.r.l. Christian Dior* (Court of Appeal of Paris, France, 11 April 1957); *Ali Reza v. Grimpel* (Court of Appeal of Paris, France, 28 April 1961); *Trajano v. Marcos* 103 ILR 521 (United States Court of Appeal, Ninth Circuit, 1992); *Doe v. Zedillo Ponce de León* (United States Court of Appeal, Second Circuit, 18 February 2014); *Jean-Juste v. Duvalier* (District Court for the Southern District of Florida, United States, 08 January 1988); *Adamov v. Federal Office of Justice* (Federal Criminal Court, Switzerland, 22 December 2005); *In re Grand Jury Proceedings (Marcos)* (United States Court of Appeal, Fourth Circuit, 05 May 1987); *Republic of the Philippines v. Marcos and others* 81 ILR 581 (Court of Appeals, United States, Second Circuit,, 26 November 1986); *Republic of the Philippines v. Marcos and others (No. 2)* 81 ILR 608 (United States Court of Appeal, Ninth Circuit, 1987); *Republic of Haiti v. Duvalier* (Court

Mr. Kolodkin's assessment was came to a different conclusion. Conventions regarding corruption-related acts did not explicitly exclude the immunity of State officials for the acts at stake.[915] A resolution of the Institute of International Law denying immunity for acts that "*are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources*"[916] expressed to him a position *de lege ferenda*.[917] In several cases involving illicit enrichment, the immunity of the officials involved had not been invoked, or the issue of the act's official nature had not even arisen.[918] In his view, corruption-related acts could occur both outside or on occasion of official functions, with consequent effects on the classification of the act.[919]

e. Evaluation

Ms. Escobar Hernández had formulated her proposals for the definition of an act performed in an official capacity[920] and the scope of immunity *ratione materiae* in two draft articles[921]. These draft articles were provisionally adopted, but only after some significant modifications.[922] Most significantly, besides deleting the reference to the criminal nature of the act, the term "elements of the governmental authority" was replaced by the less restrictive notion of "State authority".

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of Appeal, United Kingdom); *Islamic Republic of Iran v. Pahlavi (1984), 81 ILR 557* (Court of Appeals, State of New York, United States, 1984).

915 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 87.

916 *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Article 13 (2).

917 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 89.

918 This was his reading of the cases *In re Grand Jury Proceedings (Marcos)*; *Marcos and Marcos v. Federal Office of Police,* 102 ILR 201 (Federal Criminal Court, Switzerland, 02 November 1989); *United States v. Noriega*.

919 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 88. According to his account, the same view had been held by the Russian Federation in the case *Adamov v. Federal Office of Justice*.

920 Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, para. 127:

Draft article 2 - Definitions

For the purposes of the present draft articles:

(f) An "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

921 Ibid., para. 132:

Draft article 6 - Scope of immunity ratione materiae

1.State officials, when acting in that capacity, enjoy immunity ratione materiae, both while they are in office and after their term of office has ended.

2.Such immunity ratione materiae covers exclusively acts performed in an official capacity by State officials during their term of office.

3.Immunity ratione materiae applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article.

922 See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 7; the Commission took note of the draft articles. For the considerations of the Drafting Committee, see further *Immunity of State officials from foreign criminal jurisdiction: Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session: A/CN.4/L.865* (2015) and ILC, *Provisional summary record of the 3284th meeting, A/CN.4/SR.3284: 67th session* (2015). The modified draft articles read:

Draft article 2 - Definitions

For the purposes of the present draft articles: …

(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Draft article 6 - Scope of immunity ratione materiae

1. State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.

2. Immunity ratione materiae with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity ratione personae in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

If hence a formulation allowing for some restriction of the acts considered to be performed in an official capacity was chosen, giving proof of the Commission's readiness to reduce the scope of immunity *ratione materiae*, the predominant impression was that in fact, not much actual limitation had been done. Ms. Escobar Hernández' own argumentative strategy contributed to this outcome. Whilst Mr. Kolodkin had clearly expressed his adherence to a broad concept of "act performed in an official capacity", Mrs Escobar Hernández had initially appeared to pursue a narrow understanding of the term, excluding above all acts *ultra vires*. However, she later significantly contextualised this impression: first, by not expressly excluding acts motivated by overriding private interests from the scope of immunity *ratione materiae* in the draft article; second and most significantly, by arguing that international crimes could be considered acts performed in an official capacity. If even these constellations - usually clearly exceeding the official's mandate - were covered, the question is legitimate what the residual significance of a clearly confined concept of "acts performed in an official capacity" should be.

The latter insights to some extent relativize two intuitive considerations. First, Ms. Escobar Hernández' positions appeared not as those of an anti-immunity activist but gave proof of a search for consensual approval. Second, her own aspiration to clarify issues through a systematic approach was not set in stone. Rather than following the strong systematic arguments to exclude international crimes from the scope of immunity *ratione materiae* as outside State functions and contrary to *jus cogens*, she opted for inclusion, adhering to widely shared perceptions dictated by the observation of facts and fears of undesired effects on State responsibility.

IV. Limitations and Exceptions to State Official Immunity

As emerged from the very first statements in the plenary debates, the issue of whether some categories of acts were to be excluded from the scope of State official immunities lay at the very core of the topic. As formulated by Mr. Dugard, "[…] *the key question was whether heads of State, heads of government, ministers for foreign affairs and senior State officials should be granted immunity in respect of international crimes. That was really the only issue that the Commission needed to discuss for the time being. The other issues were peripheral and covered by traditional rules of international law."*[923]

Before Mr. Kolodkin had even exposed his views at regard, he was already criticized for failing to encourage reflection on whether the extent of immunity should be differentiated according to the nature of the crimes committed.[924] In response, Mr. Kolodkin acknowledged he had "*unfortunately omitted*" to state that these issues would be discussed in his next report.[925] Mr. Pellet's criticism was echoed by Mr. Dugard, who found it "*to say the least, surprising that it was only in response to Mr. Pellet's remarks that the Special Rapporteur had stated his intention to address the question of derogations from the principle of absolute immunity*", expressing "*serious doubts*" regarding Mr. Kolodkin's approach.[926] Other members used less dramatic words to express for widely varying reasons their preference for more lim-

923 ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, Statement of Mr. Dugard, p. 13.
924 Ibid., Statement of Mr. Pellet, pp.8-9.
925 Ibid., Statement of Mr. Kolodkin, p. 9.
926 Ibid., Statement of Mr. Dugard, p. 9.

ited State official immunities, criticizing the Special Rapporteur's choice not even to mention exceptions to immunities in his preliminary report[927]. However, other voices highlighted the potential risks of opening the floodgates. Mr. Brownlie for instance warned of the consequences of progressive positions on exceptions. In his view, "[…] *if the general opinion of liberal lawyers were to be adopted, it would lead to the disappearance of immunity. It would be unrealistic to expect that, given an inch, a mile would not be taken* […]."[928]

The approaches of the two Special Rapporteurs differed significantly in terms of argumentative strategy. Mr. Kolodkin's approach was a rather topical on; he analysed the issue of exceptions through rationales speaking in their favour, which he ultimately rejected one by one. The strategy to argue against rationales affirmative of exceptions rather than to engage in a global evaluation of reasons speaking in favour and against limiting State official immunity indicated his negative inclination towards limitations and exceptions.

However, the engagement with State practice was, as admitted even by Mr. Kolodkin's opponents in the plenary, well-argued from a legal-technical viewpoint. As affirmed *inter alia* by Mr. Pellet, it was "*truly unfortunate* […], *that the report was such a good one, since it was based on erroneous premises.*"[929] Moreover, rationales in favour of exceptions differed extensively, and the confusion and disagreement regarding appropriate justifications for exceptions and limitations highlighted by Mr. Kolodkin[930] could be observed within the Commission itself[931].

Ms. Escobar Hernández opted to examine a wide array of practices according to the different categories they belong to (treaty practice, international and national jurisprudence, national legislation, previous works of the ILC), to then conclude her examination with a deductive-analytical section exposing her conclusions. Conversely, Mr. Kolodkin chose to extrapolate and analyse specific examples of practice he considered particularly relevant. In favour of this approach speaks the finding that the issue of exceptions to State official immunity has decisively been shaped by some landmark decisions, above all the *Pinochet* and *Arrest Warrant* cases. However, the feeling arose that the cases picked to illustrate his views had to some extent been an instrumental choice, giving particular weight to practice denying the existence of exceptions.

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927 See ibid., Mr. Gaja, p. 15, and Mr. Petrič (speaking of a "*misunderstanding*"), p. 19. See also Ms. Escarameia (believing that the Special Rapporteur had made some assumptions too readily, while other aspects had been completely overlooked, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p.3; she agreed with most points raised by Mr. Dugard, highlighting the impact of the Commission's statements on the topic); Mr. Melescanu, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984*, p. 10-14; Ms. Jacobsson, (acknowledging the "[…] *perfect clarity of the Special Rapporteur's logic and reasoning*" she thought that "[…] *reasoning could be perfectly valid and yet founded on erroneous premises")*, ILC, *Provisional summary record of the 2985th meeting, A/CN.4/SR.2985*, p. 3; Mr. Fomba, ILC, *Provisional summary record of the 2985th meeting, A/CN.4/SR.2985*, p. 9 and Mr. Saboia (in favour, *"[…] in the light of his own attachment to and previous work in the field of human rights, […] of working, by way of progressive development, towards establishing exceptions to and limitations on the granting of immunity in the case of serious international crimes*"], ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 33.

928 This concerns were echoed by Mr. Perera, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 6.

929 ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 10.

930 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 80

931 See for instance the disagreement between Mr. Pellet and Mr. Dugard, both advocating limitations to immunities, but on the basis of different rationales: ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, p. 13. Exemplar for this problem was to some extent as well the disagreement on the question which crimes would justify exceptions to immunity, see ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*.

In contrast, Ms. Escobar Hernández' analysis often focused on exposing the emerging general lines of practice, rather than outlining single cases in detail. This approach was not above all criticism either, as implying the temptation to construct linear narratives where practice was in fact heterogenous. This choice can however be understood as an attempt to prevent eventual accuses of dedicating too much attention to specific national legal orders. Whilst her approach aspired to suggest a systematic and, as far as possible, comprehensive analysis of practice, her choices regarding the expressions of practice she relied on were not above criticism.[932] An impression that could not entirely be dismissed was that both Special Rapporteurs exercised some discretion in their focus on specific examples of practice, and in their sometimes instrumental interpretations of the latter, corroborating their convictions on State official immunities.

1. Limitations and Exceptions to Immunity *Ratione Materiae* and International Crimes

As highlighted by Mr. Kolodkin, the discussions on exceptions to immunities regarded principally immunity *ratione materiae*, whilst immunity *ratione personae* was almost universally considered to be absolute.[933] In the view of both Special Rapporteurs, the review of practice confirmed this perspective. Ms. Escobar Hernández claimed that furthermore, this finding would be supported by the majority of publicists[934], a view shared by Mr. Kolodkin[935].

The most heatedly debated and practice-relevant constellation of potential exceptions to immunity *ratione materiae* regarded situations of alleged violations of *jus cogens*, first and foremost the prohibitions of international crimes. Ms. Escobar Hernández identified as such crimes offences that can give rise to criminal proceedings in international criminal courts, above all genocide, crimes against humanity, war crimes, torture, enforced disappearance and apartheid.[936] Excluded from this list due to its peculiarities was the crime of aggression.[937] The identification of the offences to be considered international crimes for the sake of the topic gave rise to not little controversy even among the supporters of exceptions of this kind.[938]

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932 See inter alia the criticism of Mr. Tladi, ILC, 'Provisional summary record of the 3272nd meeting, A/CN.4/SR.3272: 67th session' (21 July 2015), p. 14.

933 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 55.

934 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 239, referring in particular to the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*.

935 Mr. Kolodkin highlighted furthermore the resolution of the *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, and some examples of doctrinal writings, expressing widespread views among scholars (M. Frulli, 'Immunities of persons from jurisdiction' in A. Cassese (ed.), *The Oxford companion to international criminal justice* (Oxford: Oxford Univ. Press, 2009), p. 369; A. G. Hamid, 'Immunity versus International Crimes: the Impact of Pinochet and Arrest Warrant Cases', *Indian Journal of International Law* vol. 46 (2006), p. 511; K. Parlett, 'Immunity in Civil Proceedings for Torture: The Emerging Exception', *European Human Rights Law Review* (2006), pp. 49-66, p. 60).

936 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 218-224.

937 Ibid., para. 222. Among the reasons listed, the report mentions that this crime has huge political implications, resulting in the ICC's jurisdiction being optional; furthermore, there is a lack of national practice at regard.

938 See the disagreement emerging at the moment of provisionally adopting Draft Article 7 by vote, ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*.

a. Review of Practice

As shown by the widely varying conclusions drawn by the two Special Rapporteurs and the controversial plenary debates, the practice regarding exceptions to immunity *ratione materiae* in the context of international crimes was not unequivocal, as highlighted in detail in Part 3 of this study.

The analysis of international conventions was not a very fruitful endeavour in the context of limitations and exceptions. Conventions dealing directly with immunity were characterised by the provision of full immunity ratione personae for determinate categories of officials. Conversely, conventions in the field of international criminal law often established the principle of individual responsibility but remained however silent on issues of immunity.[939] The focus had hence to be put on national legislative practice and the decisions of international and domestic courts.

National legislation was not assessed in great detail by Mr. Kolodkin. He however underlined how most national laws providing for universal jurisdiction to prosecute international crimes contain merely implementations of the Statute of the International Criminal Court. Of the few national laws explicitly repudiating the immunity of State officials, some had in the meantime been adapted to conform with the existence of immunity under international law. This would in particular apply to the legislation of the forerunners of extraterritorial prosecution, Spain and Belgium.[940]

Ms. Escobar Hernández' detailed analysis of national laws categorised the relevant provisions in two groups: national laws expressly governing immunity issues, and laws touching upon immunity when regulating the State's jurisdiction over international crimes.[941] The first category of laws deals principally with the immunity of the State from civil jurisdiction, only occasionally containing limitations and exceptions in the context of criminal jurisdiction.[942] National laws directly addressing the issue of immunity for international crimes as well excluded only in very few cases the applicability of immunity for international crimes.[943]

International judicial practice, in particular the decision of the ICJ and the ECtHR, was analysed in detail by both Special Rapporteurs. Their analysis was in many regards similar; it was however their appraisal of these decisions that was considerably divergent. Mr. Kolodkin firmly stated the view that these decisions, in particular the *Arrest Warrant* decision of the ICJ, unequivocally denied the existence of limitations or exceptions to State official immunity in general, in conformity with positive international law.[944] Conversely, Ms. Escobar Hernández highlighted the limited scope of these judgments. In essence, whilst immunity *ratione personae* was in these decisions considered absolute, immunity *ratione materiae* was not even taken into consideration, hence not allowing for any conclusions regarding the applicability of functional immunity in the context of international crimes.[945]

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939 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 23-41.

940 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, paras. 13 and 74.

941 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 43.

942 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras, 44-53, highlighting the "terrorism exceptions" in the legislation of the United States and Canada, as well as the absence of immunity ratione materiae for international crimes under Spanish Legislation.

943 Ibid., paras. 54-59, underlining the example of the outright denial of immunity for war crimes and crimes against humanity in article 208.7 of the Penal Code of Niger.

944 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 18.

945 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 67; 95.

The perspective of the two Special Rapporteurs on the jurisprudence of international criminal tribunals was coherent with their general approach to the topic. Whilst Mr. Kolodkin saw no need to examine these expressions of practice in detail as issues relating to international criminal jurisdiction were not part of the topic[946], Ms. Escobar Hernández considered their analysis a useful resource, highlighting how international criminal courts had unanimously rejected the possibility that immunity could be claimed before them.[947]

The reading of national case law was a controversial issue. According to Ms. Escobar Hernández, some courts had either acknowledged the existence of exceptions to immunity ratione materiae or tried foreign officials without ruling on immunity issue. Other courts had considered immunity to apply.[948] She came to the conclusion that, in contrast to immunity *ratione personae*, the analysis of national judicial practice revealed a "majority trend to accept the existence of certain limitations and exceptions" in the context of immunity *ratione materiae*. National courts would either have relied on the gravity of crimes, contrary to jus cogens norms and fundamental values of the international community, or they would have refrained from considering the acts in question as having been performed in an official capacity.[949]

Mr. Kolodkin's view on national court practice was a diametrically different one. In his view, the review of national practice revealed that it was frequently attempted to exercise extraterritorial national criminal jurisdiction with respect to international crimes, and that these attempts were far from being always successful.[950]

Some previous works of the ILC were in the view of Ms. Escobar Hernández of particular relevance for the topic of State official immunity, in particular the *Draft Codes of Offences against the Peace and Security of Mankind* of 1954 and 1996, stating the principle of individual responsibility for the international crimes dealt with in the codes.[951] National criminal courts were in the view of Ms. Escobar Hernández to be considered primary addressees of the draft codes, as international courts were in the first place governed by their respective statutes.[952] In contrast, Mr Kolodkin highlighted how the draft principles and the draft code were conceptually related to the idea of an international criminal jurisdiction, and not principally intended to guide national courts.[953] The *Draft Articles on*

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946 Reaffirming that questions of international criminal jurisdiction were not covered by the topic, see Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 7 (g). However, Mr. Kolodkin did ultimately engage with international criminal jurisprudence, in particular with the cases of the ICTY, *Prosecutor v. Tihomir Blaskic* and *Prosecutor v. Radislav Krstic* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 01 July 2003), compare Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, FN 100.

947 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 108.

948 Ibid., paras. 109-120.

949 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*., para. 121.

950 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 71.

951 Cfr. the detailed analysis performed by the second Special Rapporteur, Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 123-140.

952 Ibid., para. 132.

953 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 11, referring to the views expressed by the Commission at regard, see *Draft Code of Offences against the Peace and Security of Mankind*, p. 27: "*Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment*".

the Responsibility of States for Internationally Wrongful Acts finally would shed light on the issue of exceptions from a rather conceptual angle, through its provisions regarding *erga omnes obligations* and the primacy of peremptory norms.[954]

Summing up, the two Special Rapporteurs examined roughly the same set of expressions of practice, although in varying depth. As their respective analyses showed, the practice on exceptions to State official immunity allowed for divergent perspectives. Based on their respective elaborations of practice, the two Special Rapporteurs examined the underlying rationales and formulated their conclusions regarding the *lex lata* and *lex ferenda* of exceptions in cases of international crimes.

b. Rationales in Favour and Against Exceptions and Limitations

Both Special Rapporteurs engaged intensively with the rationales speaking in favour and against eventual exceptions. The argumentations revolved mainly around three points: the relationship between the procedural rules of immunity and substantive rules of *jus cogens* (1), the availability of alternative means of redress (2) and the consequences of the establishment of (universal) jurisdiction by international conventions prohibiting international crimes (3).

(1) The first and foremost argument for exceptions was that international crimes were contrary to the fundamental values of the international community and ultimately violated non-derogable *jus cogens* norms of international human rights law and international criminal law at the basis of the fight against impunity.[955] As highlighted by Ms. Escobar Hernández, the academic debate on accountability, impunity and the relationship between immunity and international crimes, under both international criminal law and international human rights law, is a rich one.[956] The issue of *jus cogens* constitutes by now a topic under review by the ILC.[957]

The Commission had already dealt with the issue in the past, in particular in the context of the topic of State responsibility for internationally wrongful acts. In case there is a conflict between norms, no derogation from peremptory norms of international law is authorized. Closely connected to the concept of *jus cogens* is the idea of *erga omnes* obligations, entitling all States to invoke the responsibility of any other State in breach of "*substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values*".[958]

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954 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras 134-140; for the draft articles, see *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*.

955 *It is incontrovertible that international crimes are contrary to the fundamental values, norms and legal principles of the international community; this is admitted even by those who consider that immunity from foreign criminal jurisdiction can be applied in the case of international crimes. At any rate, this assertion constitutes the premise for the fight against impunity as one of the values and objectives of society and international law today.* See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 193.

956 See ibid., paras. 194-195.

957 The Special Rapporteur for this topic is Mr. Tladi; compare D. Tladi, *First report on jus cogens: doc. A/CN.4/693* (2016).

958 *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 264.

The question arises what consequences should be attached to a claim of immunity if the act at stake might constitute a breach of an obligation towards the international community as a whole[959], arising under a peremptory norm of international law. Many of the norms recognizing human rights and prohibiting certain conduct are considered peremptory norms of international law, in particular the crime of genocide, crimes against humanity, the most serious war crimes and torture.[960] In this context, one argument went that accountability described individual criminal responsibility for the violation of these norms, opposed to impunity as the opposite phenomenon of unaccountability, often induced by State official immunity.

The ICJ did not adhere to this narrative equating immunity to impunity. In the Court's view, immunity did not imply impunity; immunity as a rule of procedural nature did not affect individual criminal responsibility.[961] The essentially procedural nature of immunity was reiterated by the ICJ in the *Jurisdictional Immunities of the State* case.[962] As a principle safeguarding the sovereign equality of States, immunity needed to be balanced against the principle of territorial sovereignty and the jurisdiction flowing from it.[963] In the Court's view, immunity did not conflict with substantive rules of *jus cogens*, as the two sets of rules addressed different matters.[964] Under international law, "*a State's entitlement to immunity [is not] dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated*", even if the facts at stake constituted a serious violation of human rights or international humanitarian law.[965] In a comparable vein, the ECtHR did not recognize any exceptions to immunity from civil jurisdiction based on the violation of a peremptory norm under international law, despite affirming the *jus cogens* nature of the prohibition of torture.[966]

The majorities against exceptions in the mentioned cases were sometimes slim, and dissenting and joint separate opinions were issued.[967] Several judges expressed their disagreement with the majority in the *Arrest Warrant* case. The authors of these opinions invoked that the priorities of international relations had to be balanced against the need to combat impunity[968], and that *jus cogens* norms should prevail over the procedural rule of immunity[969]. Domestic courts as well had at times declined immunity *ratione materiae*, underlining the gravity of the acts and the higher hierarchical rank of *jus cogens* norms.[970]

Sparking vehement criticism, Mr. Kolodkin embraced the argumentations of the ICJ and of the ECtHR. Mr. Kolodkin considered immunity a procedural obstacle to prosecution (often arising at

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959 Describing the issue in comparable terms, see Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, in the beginning of para. 56.

960 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 199.

961 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, p. 25, para. 60.

962 *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 124, para. 58.

963 Ibid., pp. 123-124, para. 57.

964 Ibid., p. 140, para. 93.

965 Ibid., p. 137, para. 84.

966 *Al-Adsani v. United Kingdom,* paras. 58-59; *Jones and others v. United Kingdom*, para. 215.

967 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 92.

968 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, p. 88, para. 85.

969 Ibid., dissenting opinion of Judge Al-Khasawneh, p. 98.

970 Decisions affirming this view include inter alia the following: *Lozano v. Italy* (Court of Cassation, Italy, 24 July 2008); *A. v. Office of the Public Prosecutor of the Confederation (Nezzar)*, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 115, FN 235.

the pre-trial stage), not an exemption from material laws.[971] He firmly disagreed that peremptory norms like the criminalization of international crimes trumped the rules on immunity.[972] Mr. Kolodkin denied a possible conflict and a resulting hierarchy of the procedural rules of immunity and substantive rules of *jus cogens*[973]. Mr. Kolodkin considered cases frequently cited as references for exceptions like the *Guatemalan Genocide* case in Spain[974] to have ambivalent meanings. Decisions like the *Belhas v. Ya'alon* case[975] strengthened his view that not even the violation of *jus cogens* norms removed immunity. Mr. Dugard affirmed straightforward rejection of Mr. Kolodkin's approach.[976] Albeit based on different premises[977], criticism was as well voiced in strong terms by Mr. Pellet. He claimed that *"the Special Rapporteur drew highly questionable conclusions, making the report seem like a kind of special pleading rather than an impartial exposé of the facts*"[978]. Other members expressed similar scepticism.[979]

Ms. Escobar Hernández' views differed significantly from those of her predecessor. In principle, she agreed that the effects of immunity were procedural and had no bearing on individual criminal responsibility.[980] The widespread perspective on immunity as a purely procedural instrument not affecting substantive criminal responsibility and not leading to impunity[981] had in her view however to be nuanced. Although the procedural nature of immunity had been affirmed amongst others by the ICJ[982], in practice immunity had been invoked both as a procedural and as a substantive defence[983]. The timely unlimited nature of immunity *ratione materiae* in her view frequently resulted in a *de facto* substantive effect of immunity.[984]

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971 Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, para. 67.

972 This point was prominently raised by the minority in the European Court of Human Rights in the *Al-Adsani* case (*Al-Adsani v. The United Kingdom*, Application no. 35763/97, Judgment, 21 November 2001, Joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 3) and by the Italian Court of Cassation in the *Ferrini* Case (*Ferrini* v. *Republica Federale di Germania*, Corte di Cassazione, Joint Sections, Judgment, 6 November 2003-11 March 2004, n.5044, paras. 9, 9.1).

973 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 64; see further paras. 65-67: Mr. Kolodkin relied on the decisions of the British House of Lords in the *Jones* case (*Jones* v. *the Ministry of the Interior Al-Mamlaka Al-Arabia as Saudiya* (The Kingdom of Saudi Arabia), House of Lords Judgment 14.06.2006, [2006] UKHL 26), on the *Bouzari* case (*Bouzari* v. *Iran* [2002] O.J. No. 1624, Ontario Superior Court of Justice, Judgment) and on the German reaction to the Italian Ferrini decision (filing a case against Italy for violation of its immunity with the ICJ; the case has in the meantime been decided in favour of the Federal Republic of Germany, see *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99).

974 Tribunal Supremo, S.P., Judgment *No. 327/2003*, 25 February 2003.

975 Circuit Court for the District of Columbia, *Belhas v. Ya'alon*, 515 F.3d 1279, 1282 (D.C. Cir. 2008).

976 Mr. Dugard, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13.

977 As Mr. Nolte described the difference, Mr. Dugard advocated progressive development, whilst Mr. Pellet claimed that limited immunities were *lex lata*, see ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 17.

978 ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 10.

979 Compare the positions of Mr. Gaja, calling the Special Rapporteur's arguments "frustratingly one-sided", ibid., p. 16, and of Mr. Kamto, claiming that *"the Special Rapporteur had chosen a position, which he had sought to substantiate scientifically, perhaps too systematically, while ruling out anything that might contradict it or shift its emphas*is", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 21.

980 Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 45.

981 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 148-149.

982 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 60.

983 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 150.

984 Ibid., paras. 151-152. Invoking a substantive perspective on the procedural rules of immunity: Mr. Murase, ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164*, p. 6; in a similar vein, Mr. Hmoud, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, pp. 3-4; Mr. Kamto, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 5.

Consequently, she was convinced that the strong interpretative effects of peremptory norms of international law[985] required an adequate understanding of the rules regarding immunity.[986] As had been affirmed by the ILC in a commentary to the 1996 Draft Code of Offences against the Peace and Security of Mankind, it would be paradoxical if the official position did not exempt from responsibility but could be invoked to avoid the latter's consequences.[987] In her view, the notion of impunity described more than a mere paradoxon. Notwithstanding its undeniable sociological dimension, the concept "*has acquired a legal dimension because social values have taken on the character of legal norms […] through the proclamation under international human rights law and international humanitarian law of a set of obligations relating to rights that are inherent in human dignity both in times of war and in times of peace and which, if not respected, have legal effects both on the State and on individuals*."[988]

(2) Related to the arguments affirming or denying the purported clash between immunity and *jus cogens*, were arguments concerning the availability of other models to obtain redress. For some, if such alternative means existed, immunity did not amount to impunity. As a procedural tool, immunity bared the jurisdiction of foreign criminal courts, but the eventual competence of other judicial instances remained unaffected. This argument was made by the ECtHR: although a limitation to the right of access to justice, immunity was considered compatible with the guarantees enshrined in article 6 paragraph 1 of the European Convention on Human Rights as long as other means of redress were available.[989]

The argumentation of the ICJ in the *Arrest Warrant* case seemed to point in the same direction, as the Court highlighted the possibility of recurring *inter alia* to the courts of the official's State, to international criminal courts and to foreign criminal courts if immunity had been waived.[990] The reference to these alternative models of redress was criticised as not reflecting the reality of international relations and international criminal jurisdiction.[991] Nevertheless, the ICJ later further relativized the necessity of alternative means of redress in the *Jurisdictional Immunities* case, stating that immunity anyway did not depend on the availability of other forms of redress, and could not be limited even if no such alternative means existed.[992]

The *Jurisdictional Immunities* case represented a further reinforcement of immunity.[993] In terms as conciliatory as possible, Ms. Escobar Hernández attempted to relativize the clear-cut positions of

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985 According to the Commission itself, conflicts between peremptory norms and other rules of international law can often be solved through conforming interpretation to the strong interpretative principles generated by *jus cogens* norms, compare Escobar Hernández, Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 136, referring to para. 3 of the commentary to the article 3, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*.

986 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 201-202.

987 Ibid., referring to *Draft Code of Offences against the Peace and Security of Mankind*, pp. 26-27, para. 1 of the commentary to article 7.

988 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 195.

989 See *Al-Adsani v. United Kingdom,* paras 54-56; *Kalogeropoulou and others v. Greece and Germany* Report of Judgments and Decisions 2002-X. (European Court of Human Rights, 12 December 2002) and *McElhinney v. Ireland*, paras. 35-40; *Jones and others v. United Kingdom*, paras. 188-189.

990 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, p. 25, para. 61.

991 See inter alia ibid., dissenting opinion of Judge *ad hoc* Van den Wyngaert, pp. 153-159, paras. 34-38. In the Commission, similar criticism was inter alia voiced by Mr. Dugard, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 11.

992 *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp 141-143, paras. 99-101.

993 Classifying the ICJ jurisprudence in that sense, see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 82.

the Courts, though reiterating the criticism against the ICJ of turning a blind eye on the factual lack of prosecution of international crimes in many cases. The *Jurisdictional Immunities* decision had in her view not contemplated the differences between civil jurisdiction, knowing alternative channels of redress like the exercise of diplomatic protection, arbitration or negotiation, and the more restricted means of criminal jurisdiction.[994] The potential loss of the right of access to justice and the right to reparations of victims spoke in her view strongly in favour of exceptions to State official immunity.[995]

(3) The jurisdiction conferred by international conventions regarding the prevention and punishment of certain serious crimes did in the view of the majority of ICJ judges in the *Arrest Warrant* case not imply the absence of immunity, and even the obligation to prosecute or extradite a person for international crimes did not affect immunities.[996] Mr. Kolodkin shared these views; even if jurisdiction could be established, to him immunity remained opposable before foreign authorities.[997] Equally he was not convinced by the argument that immunity was not available in case an international convention imposed on States obligations of prosecution or extradition (*aut dedere aut judicare*).[998] Relying again on the passage of the *Arrest Warrant* decision already referred to, a similar obligation affected immunity in his view as little as the establishment of universal jurisdiction did.[999]

Against these arguments, it was claimed that universal or extraterritorial jurisdiction over the most serious crimes was incompatible with immunity *ratione materiae*.[1000] In accordance with this view, Ms. Escobar Hernández claimed that the obligation to prosecute international crimes contained in several treaties was to be interpreted as an implicit waiver of immunity for the crimes covered.[1001]

(4) Both sets of rationales could be convincing if their initial premises were shared. The arguments against an exception appeared at times as excessively technical, referring to hypothetical alternative solutions that *de facto* often do not exist. However, this point of view came with greater ease in strictly legal argumentation, whilst arguments for an exception, needed to recur to volatile justifi-

994 Ibid., paras. 203-205.

995 Ibid., paras. 206-214.

996 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, pp. 24-25, para. 59.

997 See Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*: after recalling the turn towards more "prudent" versions of national statutes on universal jurisdiction like in the case of Belgium (para. 74), Mr. Kolodkin refers to the report of the African Union-European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction (Council of the European Union document 8672/1/09 Rev.1, 16 April 2009), paras. 75-76. Then, he relies again heavily on the position of the majority in the *Arrest Warrant* case, citing a famous passage from the Judgment: "*It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity while absence of immunity does not imply jurisdiction.*", (*Arrest Warrant*, Judgment, para. 59), para. 77.

998 This occasionally advanced rationale for exceptions to immunities was for instance invoked by one law lord in the *Pinochet III* case, see ibid., FN 212 for further details.

999 Ibid., para. 79.

1000 According to Mr. Kolodkin, ibid., para. 73, this position was expressed inter alia by the International Law Association in 2000 (see *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, International Law Association, Committee on International Human Rights Law and Practice, London Session (2000), p. 14 ("*it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction*") and by some law lords in the *Pinochet III* decision.

1001 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 215-217.

cations like normative hierarchies and implicit waivers. The vehement affirmation of their "*unequivocal legal dimension*" betrayed the fear that impunity and the fight against it could be considered in fact "*merely non-legal or metalegal concepts*".[1002]

The preference for one of these argumentations often depended on underlying priorities: sovereign prerogatives in one case, fostering accountability through foreign criminal jurisdiction in the other. Both aspects described legitimate interests, that needed to be balanced.[1003] A comparable view clearly transpired from the words of Mr. McRae. As in his view both rules confirming immunity and rules establishing exceptions could be legally argued, depending on one's adherence to one of the two narratives delineating in the ILC[1004], he considered the matter to be essentially an issue of premises and perspectives. In his words, "*The debate, then, was about policy, but he was not sure that the essential policy question could be answered by saying that one approach was right as a matter of law and one was wrong*".[1005]

c. Limitations and Exceptions - *Lex Lata* or *Lex Ferenda*?

The ILC's works on the topic of State official immunity was hence the arena for the clash of two narratives, one claiming a conflict between the peremptory prohibition of international crimes and State official immunity and one denying it.[1006] Mr. Dugard, underlined that both were supported by sources, as – quoting Mr. Kolodkin's second report – "*the practice of States is […] far from being uniform in this respect*".[1007] Both Special Rapporteur aspired to evaluate whether the analysis of practice allowed to identify a rule of customary international law establishing an exception to immunity *ratione materiae* in cases of international crimes, or whether *de lege ferenda* a clear trend allowing for progressive development could be identified.[1008]

Mr. Kolodkin considered the issue from a position defensive of State official immunity. He reviewed eventual exceptions through rationales speaking purportedly in their favour. Mr. Kolodkin argued that the purported emergence of a rule of customary international law providing for an

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[1002] Against such a view and using these terms: ibid., para. 198.

[1003] This picture was eloquently delineated in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, para. 75: "*These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity.*"

[1004] He described the two polar opposites in the Commission as represented by the "static" approach of Mr. Kolodkin, and the take of Mr. Dugard, invoking a stand on the Commission's preference for either impunity or accountability regardless of the actual content of customary international law. ibid., pp. 19-20.

[1005] Ibid., p. 20.

[1006] Describing these perspectives: Mr. Hassouna, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 12.

[1007] ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13; the quoted passage was taken from Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 90.

[1008] The development of a similar rule was famously claimed by the ICTY in the *Blaškić* case (*Prosecutor v. Blaškić*, case No.IT-95-14, Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Issuance of Subpoenae Duces Tecum), 29 October 1997, para. 41) and by Belgium in the *Arrest Warrant* case (see ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Counter Memorial of the Kingdom of Belgium, 28 September 2001, paras. 3.5.13-3.5.151).

exception to immunity *ratione materiae* in cases of international crimes had not occurred, as immunity had in most cases examined either not been considered, not invoked or waived.[1009]

To him, in particular the *Arrest Warrant* and *Certain questions of mutual assistance in criminal matters* decisions of the ICJ denying the existence of exceptions expressed positive law in the field of State official immunities from foreign criminal jurisdiction.[1010] He denied the desirability of national criminal jurisdiction over foreign State officials as an expression of progressive development, doubting the convincingness of the rationales advanced. The Pinochet case had given an impetus to discussion, but these had not translated into a homogenous court practice.[1011] Progressive development was in his opinion inadvisable, as the priority should be given to friendly international relations and the principle of territoriality.[1012] Restrictions on State official immunities would in case have to be established through an international treaty between States.[1013]

Mr. Kolodkin's approach resulted being remarkably restrictive. Beyond excluding that any general exceptions to immunities constituted positive international law, he also denied that any trend toward the establishment of such a rule was observable[1014]. Ultimately, he conveyed the impression of considering the *lex lata* of State official immunities unambiguous, not requiring any action by the ILC.

Conversely, Ms. Escobar Hernández affirmed from the outset the equal importance of *lex lata* and *lex ferenda*.[1015] Preliminarily to the analysis of practice regarding international crimes giving rise to a limitation or exception to State official immunities, Ms. Escobar Hernández referred to the Commission's own standards for the identification of customary international law. [1016] Recapitulating these standards, in her view State practice of any form was capable of constituting custom if sufficiently widespread, uniform, representative and consistent, and undertaken with a sense of legal right or obligation.

Due attention was to be paid to factors like the overall context, the nature of the rule at stake and the specific circumstances; decisions of international courts and tribunals were only subsidiary means for the determination of practice, but not practice themselves. She hence opted to underline those features of the concept of customary international law crucial to her argumentation such as the subsidiary function of international jurisprudence, thereby laying the foundation for relativizing the weight the ICJ's opposition to exceptions. Mr. Wood, the Special Rapporteur on the topic of

[1009] The Special Rapporteur reviewed the frequently cited jurisprudence of the tribunals in Nuremberg and Tokyo, as well numerous cases from a variety of States, including France, Italy, the Netherlands, Spain, Sweden, Senegal, the United Kingdom and the United States of America, see paras. 69-70.

[1010] ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 3.

[1011] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 92.

[1012] Ibid., paras. 91-92, referring to the *Report* (2009).

[1013] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 93.

[1014] Ibid., para. 90: "[…] *it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm*."

[1015] ILC, *Provisional summary record of the 3147th meeting, A/CN.4/SR.3147: 64th session* (2012), p. 6.

[1016] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 183, referring to *Identification of customary international law - Text of the draft conclusions provisionally adopted by the Drafting Committee.*

"Identification of Customary International Law", explicitly disagreed that Ms. Escobar Hernández had complied with the standards in that context developed by the ILC.[1017]

Ms. Escobar Hernández discerned numerous affirmations of exceptions in the judicial and legislative practice of States, as well as in the 6th Committee and in the writings of publicists, based on the legal conviction that the recognition of immunity for international crimes contravened international law.[1018] Most of the practice against exceptions related in her view primarily to State immunity, not pertinent to the "*overall context, the nature of the rule, and the particular circumstances*" of State official immunity.[1019] The decisions of the ICJ and the ECtHR denying limitations and exceptions, moreover only in the context of immunity *ratione personae*, were only subsidiary means of determining custom.[1020]

Equally unconvincing to her were arguments based on the limited number of acts constituting State practice in favour of exceptions, and their purported lack of consistency and uniformity. Taking into consideration the peculiarities of international crimes, the volume of cases was necessarily limited compared to other crimes, *inter alia* due to the limited number of national legal orders allowing for the extraterritorial prosecution of international crimes. Consequently, even a reduced amount of practice could be enough to constitute international custom. The coexistence of divergent practices in the initial stages of the formation of the rule or in different regional areas would not foreclose the emergence of a new norm of international law. If a general practice giving rise to a new custom should not be recognized, "*it does not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom*", confirming full immunity *ratione personae*, whilst restricting immunity *ratione materiae*.[1021]

Ms. Escobar Hernández did not engage with cases involving the assessment of immunity by administrative authorities, or cases dropped at the pre-trial stage because immunity *ratione materiae* was granted. Rather than a shortcoming of Ms. Escobar Hernández, this issue illustrates the difficulties of identifying customary international law, as some instances of State practice have much more visibility than others: the widely publicised words of (certain) courts get almost inevitably more attention than the silence of prosecutorial offices does.[1022]

The central argument in favour of exceptions relied upon by Ms. Escobar Hernández was the contrariness of international crimes to the fundamental values of the international community, as they violate non-derogable *jus cogens* norms of international human rights law and international criminal law at the basis of the fight against impunity in particular the crime of genocide, crimes against humanity, war crimes and torture.[1023] The notion of accountability described in Ms. Escobar

[1017] ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*, p. 13. Doubts on the Fifth Report's evaluation were also voiced by Mr. Hassouna, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 11.

[1018] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 184.

[1019] Ibid., para. 186.

[1020] Ibid., para. 187.

[1021] Ibid., paras. 188-189.

[1022] Advancing this argument to explain the scarcity of practice, see inter alia Mr. Vasciannie, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 17-18.

[1023] *It is incontrovertible that international crimes are contrary to the fundamental values, norms and legal principles of the international community; this is admitted even by those who consider that immunity from foreign criminal jurisdiction can be applied in the case of international crimes. At any rate, this assertion constitutes the premise for the fight against impunity as one of the values and objectives*

Hernández' view individual criminal responsibility for the violation of these norms. Conversely, impunity describes what in legal terms can be called unaccountability.

The concept of impunity, notwithstanding its undeniable sociological dimension, had "*acquired a legal dimension because social values have taken on the character of legal norms […] through the proclamation under international human rights law and international humanitarian law of a set of obligations relating to rights that are inherent in human dignity both in times of war and in times of peace and which, if not respected, have legal effects both on the State and on individuals.*"[1024] Regardless of whether State official immunity was considered to apply to international crimes or not, a systemic analysis revealed strong arguments in favour of restricted immunity in these constellations. The message conveyed was clear: if the practice should be considered insufficient to codify limitations and exceptions *de lege lata,* their enhancement in the context of progressive development would be imperative. She formulated her views in the proposal of a Draft article 7 containing provisions on limitations and exceptions[1025], later amended by the Drafting Committee[1026].

The argumentations of both Special Rapporteur's regarding State official immunities *de lege lata* and *de lege ferenda* were at the end of the day not entirely convincing to the plenary. Members took issue with Mr. Kolodkin's allegedly one-sided perspective. As one member put it, already the requirement formulated by Mr. Kolodkin that the existence of exceptions had to be proven under customary international law set a very high standard.[1027] Mr. Kolodkin's affirmation of the unimpaired

of society and international law today. See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 193.

[1024] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 195.

[1025] Ibid., para. 248. The draft article read:

Draft article 7 - Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(ii) Corruption-related crimes;

(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;

(ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.

[1026] Article 7-

Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

[1027] Mr. McRae, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 19.

existence of State official immunities, combined with the firm denial of the desirability of exception *de lege ferenda* or any trend pointing in that direction, was incompatible with the opinion of many.[1028]

Conversely, Ms. Escobar Hernández' position was equally controversial. The vigorousness of the terms used by Ms. Escobar Hernández appeared as an attempt to conceal the consequent fragility of the affirmation of limitations and exceptions *de lege lata*. In the opinion of many, the position of the ICJ as expressed in the *Arrest Warrant* case expressed positive law.[1029] Ms. Escobar Hernández' construction of a rule of customary international law recognising *lex lata* exceptions to immunity *ratione materiae* in cases of international crimes overstretched the limits of possible readings of practice in the eyes of many. In this context, the most critical members, denying both the existence of a clear trend and the desirability of limitations and exceptions, voiced the claim that the rule suggested in draft article 7 was a proposal of entirely "new law".[1030] Mr. Kolodkin, underlining immunity's procedural nature, detected similarities between Ms. Escobar Hernández and Cato ("*Carthago delenda est*"), as she appeared in his view to be determined to destroy immunity.[1031]

Many other members greeted Ms. Escobar Hernández approach, agreeing with her identification of a clear trend, however mostly expressing an inclination to consider draft article 7 an expression of lex ferenda.[1032] Some members expressed their scepticism towards immunity with particular vigour.[1033] Eventually, they doubted the argument connecting immunity and stability, as international crimes could cause significant instability.[1034] Several of these members, although agreeing in principle with the proposal, criticised the list of international crimes to which immunity would not apply. In the Drafting Committee, it was therefore decided to include the crime of apartheid on

[1028] Instead of many, see the statements of Mr. Petrič, speaking of a report „too closely tied to lex lata" and advocating progressive development ibid., p. 13; Mr. Galicki, finding it "*paradoxical that the Special Rapporteur should have derived a sole, dangerous and not very optimistic conclusion from the extensive analysis of State practice and jurisprudence*", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 19.

[1029] Instead of many, see the support of the *Arrest Warrant* decision expressed by Mr. Vasciannie, stating that the majority position should be considered *lex lata*, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 16-18, and by Ms. Xue, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 30.

[1030] In this direction went the comments of Mr. Wood, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*, p. 13; Mr. Murphy, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 4; Mr. Rajput, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363*, p. 8; Mr. Laraba, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363*, p. 9; Mr Huang, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364: 69th session* (2017), p. 10; Mr. Nolte, ILC, *Provisional summary record of the 3365th meeting, A/CN.4/SR.3365: 69th session* (2017).

[1031] ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 6.

[1032] Views of this kind were inter alia expressed by Mr. Park, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*, p. 8; Ms. Galvâo Teles, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 9; Mr. Vázquez-Bermúdez, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 3; Mr. Šturma, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 8; Ms. Lehto, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 10; Ms. Oral, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 3; Mr. Cissé, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 6. Mr. Ruda Santolaria, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 12; Mr. Ouazzani Chahdi, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 15.

[1033] Mr. Peter, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363*, p. 10; Mr. Grossman Guiloff, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 4, Mr. Argüello Gómez, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 15.

[1034] Mr. Jalloh, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 11.

the list. To the disappointment of many, the frequently invoked though politically sensitive crime of aggression remained however excluded.[1035]

An alternative draft article suggested Mr. Nolte, containing in essence a duty for States to either prosecute their officials or waive immunity, triggered the irritation of several members, as they considered the proposal procedurally inappropriate: the moment for initiatives of this kind were the meetings of the Drafting Committee.[1036] A further moment of significant tension arose, as Mr. Murphy, against the habitual proceedings in the ILC, attempted to re-open the debate after the summary of discussions delivered by the Special Rapporteur; Mr. Murphy's initiative triggered in particular the vivid disapproval of Mr. Hmoud and Mr. Saboia. After a heated debate, it was decided by vote to close the debate, despite some members were still desiring to intervene.[1037]

The palpable tensions were not overcome in the Drafting Committee, as emerged from the statement of the latter's Chairman, Mr. Rajput.[1038] It did not seem possible to achieve consensus within the Commission. Although some members had underlined the importance of reaching consensus during debates[1039], others had straightforwardly expressed their readiness to recur to a recorded vote, if necessary: the idea of consensus, invented by the great powers to prevent "automatic majorities of the Third World, should not be an unsurmountable obstacle to decision-making.[1040] This comment triggered others, as Mr. Huang and Mr. Rajput underlined the tradition and the essentiality of consensus, whilst Mr. Murase and Mr. Hassouna affirmed that consensus translated neither into unanimity nor a veto power.[1041]

As the majority of members wanted a decision to be taken on the provisional adoption of draft article 7 despite the lack of consensus, a vote became unavoidable. The recorded vote affirmed the scission that had become visible during debates: 21 members voted in favour of provisionally adopting draft article 7 (Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez), 8 against (Mr. Huang, Mr. Kolodkin, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Rajput, Sir Michael Wood) and 1 member abstained (Mr. Šturma).[1042]

If argumentations invoking *lex lata* came often with an underlying intention of defending and stabilising the *status quo* against undue interventions, *lex ferenda* was the codeword for modifying existing rules through proposals describing change overdue to some, unjustified to others. Both Special

[1035] Explicit disappointment about the exclusion of the crime of aggression from the list was voiced in the explanations of vote by Mr. Tladi, Mr. Hmoud, Mr. Jalloh, Mr. Murase, Mr. Cissé, Mr. Hassouna, Mr. Ouazzani Chahdi, Mr. Park and Mr. Nguyen, ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*, pp. 13-16.
[1036] ILC, *Provisional summary record of the 3365th meeting, A/CN.4/SR.3365*, pp. 6-8.
[1037] ILC, *Provisional summary record of the 3365th meeting, A/CN.4/SR.3365*, pp. 16-18.
[1038] ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*, pp. 3-8.
[1039] See inter alia Mr. Huang, ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 9.
[1040] Mr. Gómez-Robledo, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363*, p. 5. and ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 4.
[1041] ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 12.
[1042] ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*, p. 13.

Rapporteurs did not find a mixture of these two dynamics harmonizing the different views in the Commission.

They deepened thereby the cleavages in the ILC on the topic, emerging first during the tenure of Mr. Kolodkin and mirroring his uncompromising views; they were later confirmed by the loss of consensus and the vote required to take a decision on exceptions, reflecting MS. Escobar Hernández equally polarising positions. Mr. Kolodkin's view was for many too focused on stability and too restrictive with regard to the tendencies of change *de lege ferenda*; conversely, Ms. Escobar Hernández' take was considered to focus too much on change, describing the process of limiting immunities as close to concluded, whilst this process was in the eyes of many desirable *de lege ferenda*, but not representative of positive customary international law. Whilst purposeful overstatements of the unequivocalness of positions and trends might be the product of strategic behaviour, the Special Rapporteurs' colleagues were not always persuaded by their elaborations of the *lex lata* and *lex ferenda* of State official immunities.

2. Immunity *Ratione Materiae* and Territorial Tort Exceptions

The territorial tort exception expresses the concept of granting criminal jurisdiction over acts of foreign State officials which would otherwise have enjoyed immunity if the act caused death, injury or damages to property, if the act occurred in the territory of the forum State, and if the perpetrator was present in the territory of the forum State at the time of the act.[1043]

This principle has at times been recognized in practice. Conventions concerned with the immunities of specific categories of officials frequently contain a territorial tort exception.[1044] The principle was further recognized by conventions dealing with the immunity of States from civil jurisdiction.[1045] Most national laws concerning the immunity of foreign States and their officials contain a territorial tort exception to State immunity if damages to persons or property occur in the forum State.[1046] More restrained were the views of international courts. Whilst not denying its existence, the ICJ affirmed that the territorial tort principle could not limit the immunity enjoyed by the *acta jure imperii* of the State.[1047] The ECtHR's understanding of the territorial tort exception was similarly

[1043] This exception was recognized by the previous Special Rapporteur, Mr. Kolodkin, who though identified in his analysis the further requirement that the forum State has jurisdiction only in case the foreign State official had been present in the territory of the forum State without the latter's express consent for the discharge of his or her official functions, compare.

[1044] Compare article 43, paragraph 2 (b) of the of the Vienna Convention on Consular Relations and Art. 60, para. 4 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character; see further Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 28.

[1045] See article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and article 11 of the European Convention on State Immunity, compare ibid., paras. 26-29.

[1046] Similar exceptions are contained in the following provisions, compare ibid., FN 123: Argentina, Jurisdictional Immunity of Foreign States in Argentine Courts Act, art. 2 (e); Australia, Foreign States Immunities Act, sects. 13 and 42 (2); Canada, State Immunity Act, sect. 6; Japan Civil Jurisdiction of Japan with respect to a Foreign State Act, art. 10; Singapore, , State Immunity Act, sect. 7; South Africa, Foreign States Immunities Act, sect. 6; Spain, Organic Act 16/2015, art. 11; United Kingdom, State Immunity Act, sect. 5; United States, Foreign Sovereign Immunities Act, sect. 1605 (a) (5).

[1047] *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 136-137, paras 83-84.

narrow, covering only "*insurable injury*" related to activities *jure gestionis,* whilst not applying to *acta jure imperii*.[1048]

Mr. Kolodkin was generally in favour of a territorial tort exception, though qualifying this view. If the forum State had agreed to the presence of the State official in its territory and to the official's activities whose conduct resulted in the alleged crime, the foreign official enjoyed immunity. Problematic were constellations in which the forum state had consented to the official's presence, but not to the conduct; the question was then how closely related the latter was to authorised activities. Only in situations where the forum State's consent to both the presence and the conduct was lacking could clearly be affirmed that immunity *ratione materiae* did not exist.[1049] In this context as in others, it seemed to be among Mr. Kolodkin's priorities not to recognises exceptions, preferring to speak of inexistence.

Although the ICJ and the ECtHR denied the existence of a territorial tort exception in cases of *acta jure imperii*, Ms. Escobar Hernández considered the practice affirming a similar exception in the context of national criminal jurisdiction sufficiently consistent.[1050] Before national courts[1051] and international criminal tribunals[1052], immunity had in similar constellations either not been recognised or not been asserted[1053]. Most treaties in the fields of human rights and international criminal law contained provisions requiring State parties under certain circumstances[1054] to establish jurisdiction, allowing to assume that these conventions establish some kind of territorial tort exception. The principle of territoriality, the preferability of the jurisdiction of the State in which the harm was caused and the redress offered to the victims of the harm caused spoke in her view in favour of this exception.[1055] Nevertheless, the territorial tort exception, criticised by many as not having

[1048] *McElhinney v. Ireland*, para. 38.

[1049] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, paras. 82-85.

[1050] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 229.

[1051] See for instance the case regarding the abduction of an Italian citizen by agents of the United States Central Intelligence Agency (CIA), P. Gaeta, 'Extraordinary renditions e immunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar', *Rivista di diritto internazionale* 89 (2006), 126–30, the *Rainbow Warrior* case, *R. v. Mafart and Prieur (Rainbow Warrior)* (High Court, Auckland Registry, New Zealand, November 1985), or the Greek and Italian decisions regarding crimes perpetrated by German soldiers in World War II, compare the decisions *Prefecture of Voiotia v. Federal Republic of Germany* and *Ferrini v. Germany* (Court of Cassation, Italy, 11 March 2004). Other cases referred to include the decisions *Letelier v. Republic of Chile* 79 ILR 561 (Court of Appeals, Second Circuit, United States, 20 November 1984); *Jimenez v. Aristeguieta* 33 ILR 353 (United States Court of Appeal, Fifth Circuit, 12 December 1962); *Jane Doe I, et al. v. Liu Qi, et al.* (District Court for the Northern District of California, United States, 08 December 2004); *Khurts Bat v. Federal Court of Germany* (England and Wales High Court, United Kingdom, 29 July 2011).

[1052] *Prosecutor v. Tihomir Blaskic*, para. 41.

[1053] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 227, FN 351.

[1054] This duty arises if the crimes were committed in territories under their jurisdiction and when the presumed perpetrator is located in any territory under their jurisdiction, compare ibid., para. 34, referring to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 1 (a) and 2; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 1 (a) and 2; the Inter-American Convention on Forced Disappearance of Persons, art. IV, first paragraph, subparagraph (a); Inter-American Convention to Prevent and Punish Torture, art. 12, first paragraph, subparagraph (a) and second paragraph, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 34.

[1055] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 226, 229.

been considered in sufficient depth or not belonging to the field of criminal law[1056], was ultimately deleted from draft article 7 in the Drafting Committee.[1057]

3. Exceptions to Immunity *ratione materiae* and Corruption-related Crimes

Another constellation of acts whose inclusion under the scope immunity *ratione materiae* was uncertain regarded corruption-related crimes aiming at illicit enrichment[1058], characterized by overriding personal motives and interests. Conventions criminalising acts of corruption and establishing the rights and duties in prosecuting acts of this kind contain no general provisions on immunity[1059], but usually touch upon immunity in one way or another[1060].

Corruption-related crimes represented in the view of Ms. Escobar Hernández not an overly complex issue, as usually being committed through acts carried out in the exclusive interest of the State official, not constituting acts performed in an official capacity. In the view of both Special Rapporteurs, in practice, the appearance of official capacity often complicated the distinction between official and private acts. Mr. Kolodkin underlined how illicit enrichment can for instance occur outside official functions, but as well as a result of abuse in the context of official activities.[1061]

In the light of the weight attached by the international community to the fight against corruption, and in line with the overwhelming majority of judicial practice denying immunity in instances of corruption-related crimes,[1062] Ms. Escobar Hernández suggested to include a provision explicitly

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[1056] See inter alia the statements of Mr. Nguyen, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*, p. 14; Mr. Tladi, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 3; ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 12; Ms. Oral ILC, *Provisional summary record of the 3364th meeting, A/CN.4/SR.3364*, p. 4.

[1057] Statement of the Chairman of the Drafting Committee, ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*, p. 3.

[1058] These crimes include embezzlement, diversion and misappropriation of public funds, money-laundering and other manifestations of corruption, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 230.

[1059] See Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*. As he put it, these conventions contain no limitation to immunity, if these treaties are not considered to contain an implicit waiver of immunity for the acts criminalized.

[1060] The perspectives as far as exceptions and limitations are concerned differ however widely, and the formulations partly regard immunities under national law protecting national officials, see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 37-41, referring to article 16 of the Council of Europe Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations *Treaty Series*, vol. 2216, No. 39391, p. 228, stating that the provisions of the Convention shall be without prejudice to other provisions regarding the withdrawal of immunity; article 30 paragraph 2 of the United Nations Convention against Corruption (New York, 31 October 2003), United Nations *Treaty Series*, vol. 2349, No. 42146, invoking an appropriate balance between immunity and the possibilities of prosecution; and article 7, paragraph 5 of the African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), *International Legal Materials* (ILM), vol. XLIII (2004), stating that any immunity granted to public officials shall not be an obstacle to the prosecution of the latter.

[1061] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 88 referring to the proceedings against the former President of the Philippines Marcos (*In re Grand Jury Proceedings*, 817 F.2d) and against the former Head of State of Panama Manuel Noriega (*USA* v. *Noriega* (117 F.3d 1206; 1197 U.S. app. LEXIS 16493), in which immunity had not been recognized; on the other hand, immunity had been claimed in the Swiss case against the former Minister of Atomic Energy of the Russian Federation Adamov, *Adamov gegen Bundesamt für Justiz*, Urteil vom 22. Dezember 2005, 1. Öffentlichrechtliche Abteilung (1A.288/2005/gij), para. 3.4.2.

[1062] The cases referred to in affirming this view include the following: *Adamov v. Federal Office of Justice*; *Fujimori*; *Teodoro Nguema Obiang Mangue*; *United States v. Noriega*; *Jungquist v. Sheik Sultan Bin Khalifa al Nahyan*; *Melleiro c. Isabelle de Bourbon, ex-Reine d'Espagne*; *Seyyid Ali Ben Hammond, Prince Rashid v. Wiercinski*; *Ex-roi d'egypte Farouk c. s.a.r.l. Christian*

identifying corruption as a constellation in which immunity cannot be invoked.[1063] Nevertheless, corruption-related crimes, considered by many to be either not corroborated by sufficient evidence to constitute an exception or not qualifying as acts performed in an official capacity[1064], were in the Drafting Committee ultimately excluded from the list of crimes to which immunity does not apply.[1065]

V. State Official Immunity, Procedure and State Responsibility

The procedural aspects of State official immunities did not get wide attention during the tenure of Mr. Kolodkin as a Special Rapporteur. Although he dedicated a separate report to the issue, the plenary focussed mainly on his controversial second report on the scope of State official immunities, presented concomitantly in 2011. Nevertheless, the procedural aspects of the topic are of considerable significance. The practical operability of State official immunity can hardly be achieved without determining appropriate rules for their invocation, waiver or denial. Procedural settings moreover represent an opportunity to fine-tune the necessary balancing process between the competing interests of States wanting to protect their officials and States willing to prosecute the latter. Both Special Rapporteurs considered therefor the area of procedural issues related to immunity as requiring clarification.[1066]

The acts of a state exercising jurisdiction precluded by immunity included, according to Mr. Kolodkin, all criminal procedure measures, not only the trial stage of the criminal process.[1067] However, in line with the jurisprudence of the ICJ, immunity would preclude according to Mr. Kolodkin[1068] exclusively those acts of the forum State constituting a "*subjection of [the official] to a constraining act of authority*"[1069], "*which would hinder him or her in the performance of his or her duties*"[1070]. The acts precluded entail the summons as a witness, an issue hotly debated in front of the ICJ.[1071]

Regarding former officials not performing duties anymore, ongoing protection through immunity is justified, as a risk of subsequent prosecution would limit the official in its independent performance of functions while in office.[1072] Immunities of State officials moreover have, in his view, a

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Dior; *Ali Ali Reza v. Grimpel*; *Trajano v. Marcos*; *Doe v. Zedillo Ponce de León*; *Jimenez v. Aristeguieta*; *Jean-Juste v. Duvalier*; *Republic of Haiti v. Duvalier*; *Republic of the Philippines v. Marcos and others*; *Republic of the Philippines v. Marcos and others (No. 2)*; *Islamic Republic of Iran v. Pahlavi (1984), 81 ILR 557*, compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 114-117.

1063 Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 234.

1064 See inter alia the statements of Mr. Park, ILC, *Provisional summary record of the 3360th meeting, A/CN.4/SR.3360*; Mr. Tladi, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 4; Mr. Hassouna, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 11; Mr. Lehto, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 10; Mr. Jalloh, ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*.

1065 Statement of the Chairman of the Drafting Committee, ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378*, p. 3.

1066 See for instance the statement of Ms. Escobar Hernández, highlighting this need: Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, paras 69-70.

1067 Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 38.

1068 See ibid., para. 40.

1069 *Djibouti v. France,* Judgment, para. 170.

1070 *Arrest Warrant,* Judgment, para. 54;

1071 *Djibouti v. France,* Judgment, para. 190-191; see Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 48-51.

1072 Ibid., para. 46.

wide territorial scope, protecting officials independently of whether they are abroad or in their home States, and independently of their domestic or international functions.[1073]

If no recurrence is made to constraints, other criminal procedure measures as the collection of evidence against the official are allowed. According to Mr. Kolodkin, these measures could clear the way for the future prosecution of the official, either in the state collecting the evidence (after a waiver of immunity), in the official's home state, or in front of international tribunals.[1074] With this remark, the Special Rapporteur expresses his preference for politically viable options of prosecution, not requiring the restriction of the rules on immunity.

Regarding the right to invoke or waive immunity, Mr. Kolodkin argued that all rights inherent in immunity were rights of the State, merely enjoyed by the official. Hence only the State could make legally meaningful declarations on immunity.[1075] To invoke or waive immunity, the official's State must be aware of planned measures, implying the forum State's duty to inform the official's State. In turn, the fulfilment of this duty by the forum State requires awareness about the involvement of foreign State officials.[1076] As Members of the troika of other States are generally well-known, in his view the forum State must raise the issue of their immunity *proprio motu.*[1077] Regarding officials enjoying immunity *ratione materiae*, the forum State can neither be expected to identify the individual in question as a State official, nor to know the official is acting in an official capacity[1078].

In Mr. Kolodkin's view, issues of immunity ought to be decided *in limine litis*, and consequently to be addressed at a preliminary stage of criminal proceedings, eventually at the pretrial stage.[1079] He deduced from the principle of sovereign equality that a State can invoke its official's immunity through diplomatic channels, without any duty to give evidence of immunity or to substantiate this claim in court.[1080] The waiver of the immunity of a member of the troika needed in his view necessarily to be express, whilst the waiver of immunities of other officials could be implicit, for instance taking the form of a renunciation to invoke an official's immunity.[1081]

According to Ms. Escobar Hernández' Sixth Report, the authorities of the forum State shall consider immunity issues at the earliest possible moment, eventually at the pre-trial stage.[1082] Furthermore the procedural measures precluded by State official immunity were examined.[1083] Finally, the organs of the forum State competent to determine whether a given official enjoyed immunity were included, including reflections on the contribution of the executive authorities of the forum State

[1073] Ibid., para. 52-53.
[1074] Ibid., para. 43.
[1075] Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 15. See further on the issue of waivers, Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, paras. 32-38.
[1076] Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 16.
[1077] Ibid., para. 19-22.
[1078] Ibid., paras. 17-18. Mr. Kolodkin believes the same logic applies to those State officials eventually enjoying personal immunity without being part of the "troika", Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 23.
[1079] Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, paras. 11-12.
[1080] Ibid., paras 24-31. This does not mean that the courts of the forum State have to blindly accept these claims, as the Special Rapporteur clarifies, referring to van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*, p. 166.
[1081] Kolodkin, *Third report on immunity of State officials from foreign criminal jurisdiction*, para. 55.
[1082] Escobar Hernández, *Sixth report on the immunity of State officials from foreign criminal jurisdiction*, A/CN.4/722, para. 57.
[1083] Escobar Hernández, *Sixth report on the immunity of State officials from foreign criminal juris-diction*, A/CN.4/722, paras. 64-96.

to the determination by courts.[1084] Another issue touched upon was the relevance in this context of immunity claims of the official's State.[1085] These issues were however relative uncontroversial: in the light of the provisional adoption of draft article 7 many comments regarded in particular the urgency of procedural safeguards against arbitrary exercises of foreign criminal jurisdiction or abusive invocations of State official immunity[1086], to be included in Ms. Escobar Hernández' Seventh Report, due for the ILC sessions in 2019.[1087]

VI. Conclusions

Despite the apparently almost diametrical opposition in terms of their general approaches, the positions formulated by the two Special Rapporteurs were not in all cases very distant. They both considered immunity *ratione personae* to be unlimited. Furthermore, they both agreed in principle on the existence of a territorial tort exception and that immunity did not cover constellations of corruption-related crimes, although Mr. Kolodkin's affirmation of the inapplicability of immunity in these circumstances was more nuanced and conditional than the views expressed by Ms. Escobar Hernández. The issue witnessing the greatest differences in their views and the greatest controversies in the plenary was the existence of an exception to immunity in situations of international crimes.

Having achieved a decision within the ILC on how to tackle the topic is not in itself an indicator of success. Whether the Commission will ultimately have formulated a convincing answer to the expectations contained in the mandate - to combine codification and progressive development, stability and change in an appropriate blend reflecting the peculiarities of the topic of State official immunities – will be tested by the reception of the Commission's output in practice and doctrine.[1088] The tumultuous decision in the ILC on exceptions to immunities, reached not by consensus as usual but by vote, suggests that the reactions will be as divided as the positions in the ILC had been, predicting an uncertain future to the draft articles and the whole subject of immunity of State officials from foreign criminal jurisdiction.

The necessarily complementary and to some extent indistinguishable nature of the two processes opened the works of the ILC up to some effects coming with indeterminacy. Identifying a singular proposal as falling exclusively under either of these categories appeared often as a fruitless endeavour. On the basis of these considerations, the necessity invoked sometimes to clearly identify specific proposals as constituting either codification or progressive development[1089] did not find much

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[1084] Escobar Hernández, *Sixth report on the immunity of State officials from foreign criminal juris-diction, A/CN.4/722*, paras. 97-108.

[1085] Escobar Hernández, *Sixth report on the immunity of State officials from foreign criminal jurisdiction*, para. 107.

[1086] See inter alia Mr. Murase, ILC, *Provisional summary record of the 3438th meeting, A/CN.4/SR.3438*, p. 7; Mr. Nolte, ILC, *Provisional summary record of the 3439th meeting, A/CN.4/SR.3439*, p. 4; Mr. Grossman Guiloff, ibid. p. 7; Mr. Saboia, ibid., p. 12; Mr. Šturma, ibid., p. 13; Mr. Ruda Santolaria, ILC, *Provisional summary record of the 3440th meeting, A/CN.4/SR.3440*, p. 7. Mr. Murphy, ibid., p. 12; Mr. Zagaynov, ibid., p. 18; Mr. Petrič, ibid., p. 19.

[1087] Ms. Escobar Hernández, ILC, *Provisional summary record of the 3438th meeting, A/CN.4/SR.3438*, p. 3.

[1088] As expressed by Mr. Wood, the effectiveness of the outputs of the ILC depends on the ability to attract wide participation, see ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 13.

[1089] See for instance the claim of Mr. Nolte that a similar clear designation was imperative as the ILC was attempting to draft articles guiding national courts, ILC, *Provisional summary record of the 3273rd meeting, A/CN.4/SR.3273*, p. 8.

appreciation[1090]. Whilst some invoked a clear distinction between considerations *de lege lata* or *de lege ferenda*[1091], others doubted a similar distinction was possible or necessary[1092]. However, in the context of draft article 7, the issue became increasingly controversial. The opponents of draft article 7 considered it imperative to clearly affirm that draft article did not constitute lex lata.[1093] The supporters of draft article 7 conversely firmly opposed this operation of explicit distinction.[1094]

The at least partial indistinguishability of progressive development and codification and the grey areas between *lex lata* and *lex ferenda* create the opportunity to favour the emergence of new norms. This asset has however as well the potential of turning against the ILC. At the end of the day, the ILC is not a lawmaker in the way a national legislator is; in case it wanted to act like one, it would have to reconsider some cornerstones of its working methods. Adopting decisions through consensus is a functional approach if the proposed solutions are close to well-established rules, punctually improved through progressive development. In that case, the decision expressed has the strong authority of being backed by the entire collective of a highly qualified expert body.

Moving away from widely shared views makes it harder to find solutions widely shared inside and outside the ILC. Beyond the decision to include exceptions to State official immunities in the draft articles, an instructive example of this phenomenon was the controversy over which offences should justify such exceptions. The discord at regard among the supporters of exceptions showed the risks the ILC faces if it is chosen to deliberate in areas not sufficiently pre-shaped by practice.

It cannot be excluded that this constellation results in a loss of authority. However, the argument that appearing as irresponsive to the expectations of consistent segments of the international community by "hiding behind the fig leaf of codification" might equally undermine the ILC's authority, is not easily dismissed. The Commission cannot escape the demands of reconciling change and stability, giving space to both progressive development and codification.

A focus on codification would allow the Commission to move on firmer ground, eventually at the price of being detached from the most pressing issues causing concern to the international community. If the ILC should decide to emphasise progressive development, where the better is the enemy of the good, the work within the Commission could turn more adversarial. The so far exceptional decision-making by vote could turn into a more frequent phenomenon, replacing consensual decision-making in many instances.

[1090] See the claim of Mr. McRae, underlining the indistinguishability of progressive development and codification, ILC 2012c, p. 6: […] *progressive development was a much more subtle process which could not be clearly distinguished from codification.* […] *the Commission was not in the habit of indicating what part of its work came under the heading of the codification of lex lata and what part amounted to progressive development."*

[1091] See in particular the Statements Mr. Nolte, ILC, 'Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143' (n 9), p. 10; ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, pp. 3-4; ILC, *Provisional summary record of the 3273rd meeting, A/CN.4/SR.3273*, p. 8.

[1092] Statements of Mr. Tladi, ILC, *Provisional summary record of the 3143rd meeting, A/CN.4/SR.3143*, p. 16; Mr. Wisnumurti, ILC, *Provisional summary record of the 3144th meeting, A/CN.4/SR.3144*, p. 12; Mr. Niehaus, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 12; Mr. Hmoud, ILC, *Provisional summary record of the 3165th meeting, A/CN.4/SR.3165*, p. 3; Mr. Candioti, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168*, p. 4.

[1093] See instead of many: Mr. Laraba, ILC, *Provisional summary record of the 3363rd meeting, A/CN.4/SR.3363*; Mr. Nolte, ILC, *Provisional summary record of the 3365th meeting, A/CN.4/SR.3365*, p. 5.

[1094] Instead of many: Mr. Tladi, ILC, *Provisional summary record of the 3361st meeting, A/CN.4/SR.3361*, p. 6; ILC, *Provisional summary record of the 3362nd meeting, A/CN.4/SR.3362*, p. 12.

The mandate allows for a similar shift; the question is one of opportunity. The ILC does not necessarily have to reform its working methods; sufficient would be a re-conceptualisation, opening affirmed mechanisms to less consensual and more forward-oriented approaches to topics. Suitable precautions would have to be taken to avoid throwing the baby out with the bath water by turning to excessive activism; a firm rooting in positive law and affirmed practice is an indispensable asset contributing to the ILC's authority, that should continue finding expression through codification. Nothing would be gained by simply transforming the ILC into yet another norm entrepreneur. Leaving the safe harbour of codification could however open new opportunities for gaining acceptance through a different kind of authority. Despite doubts whether a similar development would denature the ILC's function within the international legal order, the works on the topic of immunity of State official immunity from foreign criminal jurisdiction appear as a step in this direction; time will show what the outcome of this venture will be, and whether the ILC will choose to continue this path on other occasions.

D. Argumentations – Case Studies of Dialectical Constructions of Meaning

Observing the argumentative patterns within the ILC allows for a case study of how the meaning and authority of specific positions are constructed and reinforced within institutional settings geared at clarifying and advancing international law. Extrapolating issues in whose context recurring argumentative efforts emerged with particular clarity, this section aspires to selectively highlight how the finding and making of international law unfolds from the perspective of argumentative patterns.

As the following sections will attempt to highlight, many arguments have a binary structure. Depending on the (imaginary) complement chosen to construct the meaning of a notion, and on the preference for highlighting similarities, analogies, differences or other, everything and the opposite of everything can be sustained on the basis of the same notion (I.). Similar dynamics can be observed when ILC members try to locate their arguments on a timeline, justifying a specific view on the basis of an analysis of a concept's past, present and future. Depending on the view on past events resulting in a current *status quo* of State official immunities and eventual exceptions, any proposed solution can be justified as fitting into any identified, purportedly factual or at least desirable "trend" (II.).

I. Constructing and Deconstructing Dichotomies

An illustration of how meaning emerges from the juxtaposition of conceptual couples was Ms. Escobar Hernández' introduction to the legal nature of immunity, approached through a number of such dichotomies.[1095] The choice to approach the issue through a determinate set of dichotomies was a choice with important consequences for the entire topic; the boundaries of meaning emerge

[1095] These dichotomies were immunity and jurisdiction; immunity and responsibility; immunity of the State and immunity of State officials; Compare Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 143.

from the juxtaposition of what is inside and outside the topic, of what is considered related or unrelated. Through different conceptual couples, or a different analytical strategy altogether, different aspects could have been examined, or the same aspects from a different angle. The Special Rapporteurs delivered their interpretation of the insights deduced from practice relying on self-erected conceptual boundaries.

The assertions and implications of a given argument depended significantly on the premises of the author making the claim. The basis of most arguments could be turned upside down if utilized for the sake of a different perspective. Among the numerous examples of how ILC members coupled notions to argue a specific understanding of one term by drawing conclusions from another, purported to have a similar, different, opposite or identical meaning, the discussions around some key terms were particularly revealing.

The analysis of argumentative patterns shows how the Commission members used argumentation to claim or challenge hierarchies (2.), how they drew upon either the similarities or the differences of the same conceptual couple to make significantly different affirmations (3.) and how they frequently tried to deconstruct purported realities (4.). However, argumentation had in some circumstances to be suspended to pragmatically exit potential blind alleys (1.).

1. "Exceptions and Limitations" – Avoiding Methodical Stumbling Blocks

An example of the difficulties of nailing down a term's meaning was the uncertainty surrounding the related concepts of "exception" and "limitation". An intuitive reading of the two terms is that an outright exclusion of specific types of acts from the scope of immunity through the latter's limitation is a more fundamental limitation of immunities than the establishment of an exception for acts *prima facie* covered is. Although examining the issue in the wider context of the scope of immunity, Mr. Kolodkin's choice to consider any challenges to State official immunities under the heading "exceptions" appeared in this light as not entirely accidental.[1096]

Ms. Escobar Hernández in turn underlined the conceptual differences between limitations (the "internal" boundaries of the institution of immunity) and exceptions ("external" elements, belonging to other components of the international legal order and preventing the application of the institution of immunity), although this distinction would not neatly be reflected in practice[1097]. A categorical distinction would in her view however not be necessary for the topic of immunities, as both concepts lead to the same result: the non-applicability of State official immunity and consequent unrestricted jurisdiction of the forum State. She suggested to circumvent the theoretical complexity by establishing circumstances in which some immunities did not apply, without specifying whether the envisaged constellation should be considered a limitation or an exception – a solution already adopted by the ILC with regard to immunities of individuals in the past.[1098] Nevertheless, Ms. Escobar Hernández continued to use the two concepts distinctly, as they implied in her view methodological differences. Whilst limitations were in the first place to be determined

[1096] Compare Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, paras. 54-93.
[1097] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, paras. 170-171.
[1098] Ibid., paras. 172-174.

inductively on the basis of the normative elements of immunity, in the establishment of exceptions the deduction from other elements of the international legal order as whole played an important role.[1099] Ultimately, as underlined by her decision to consider acts constituting international crimes as acts performed in an official capacity, she seemed more prone to argue challenges to immunity as exceptions to the latter's scope, rather than as outright limitations – transmitting the impression that the arguments for an outright exclusion of this category of acts from the scope of immunity were not strong enough, and that a focus on exceptions could be a less controversial approach to a contentious issue.

Giving proof of the frequent structural proximity of their analytical approaches, both Special Rapporteurs hence opted to discuss the bulk of the issue under the notion of exceptions. Their approaches involved a certain degree of discretion in categorising the challenges to the extent of State official immunities. However, these choices also illustrated how the pragmatic drive for consensus and the achievement of progress legitimise the decision to abandon fruitless discussions of inextricable differences regarding issues of secondary practical relevance.

2. "Rules" and "Exceptions" – Affirming and Challenging Hierarchies

The practice of argumentation was used to create hierarchies between concepts or presumptions in favour of a specific position, trying to establish dynamics resembling (reversals of) burdens of proof in order to rebut purportedly well-affirmed concepts. Exemplar was the discussion of the concepts of "rules" and "exceptions".

In a preliminary remark to the issue of exceptions, Mr. Kolodkin pointed out that the Commission's task was to examine whether exceptions existed under customary international law, determined through the practice and *opinio juris* of States. The concept of exceptions was thereby qualified on a methodical level. To be recognised, exceptions themselves would need to constitute rules of customary international law. Eventual rules establishing exceptions were not to be conflated with the "*normal absence*" of immunity, for instance in cases of acts performed in a private capacity by officials outside the troika. The emerging impression was that Mr. Kolodkin attempted to create a strong presumption in favour of immunities. Instances denying immunity to State officials were not themselves explicitly classified as rules; the only rule explicitly affirmed and corroborated was the rule granting immunity. Affirming the existence of rules challenging immunity would have created a different setting than moving these instances in which immunity did not apply to the sphere of non-rules, certifying merely an absence.

In the view of Mr. Kolodkin, the indisputable, well-affirmed rule of immunity was challenged by uncertain "rationales" speaking in favour of exceptions. The momentum, or much rather the inertia his view on the fundamental legal settings implied was that the path towards the affirmation of exceptions was in fact a rocky road.[1100] He established a clear hierarchy between a strong rule and unconvincing rationales against it. This foundational perspective was heavily criticised by parts of the plenary. Mr. Pellet for instance challenged the logic of what he considered to be an absolute

[1099] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 175.

[1100] Mr. McRae highlighted that the exigence of proving the existence of exceptions under customary international law constituted a high threshold, see ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 19.

concept of sovereignty, making absolute immunity the rule, and absence of immunity the exception, as incompatible with the evolution of the concept of the international community and its prevailing interests[1101]. He could not dismiss that, strictly speaking, through the lens of positive law, not everything was speaking in favour of limited immunities. However, in opposition to the premises of Mr. Kolodkin, he highlighted the affirmation of the Nuremberg Tribunal that the (also responsible) State became transparent in the case of the most serious crimes, losing the ability to hold individual responsibility in check. To this absolute responsibility, there could in his view be no exception through immunity.[1102]

The conceptualisation of immunity constituting a rule challenged by questionable exceptions could finally be inverted if the notions of "exception" and "rule" were approached from the perspective of jurisdiction. From this viewpoint, the unhindered jurisdiction of sovereign States constituted a well-established rule preceding immunity. To this rule, immunity itself represented an exception. Restricting immunities appeared from that perspective as a mere limitation of the extent of the exception, thereby reaffirming the basic rule of jurisdiction.[1103]

3. "Reality" and "Wishful Thinking" – Selectively Affirming Practice

Another observable argumentative pattern was that wide-spread argumentations, mantra-like repeated by the proponents of a certain view and purportedly based on the "reality" of facts, were occasionally challenged by opposite perspectives on reality. The topic was considered to be characterised by "*a certain amount of wishful thinking*".[1104] Accuses of a lacking sense of reality were however bipartisan; if the proponents of limitations were indirectly blamed for suggesting utopic solutions, the counter side had to face the criticism of hiding behind excessive legal formalism. Constructing or denying the correspondence of a given claim and reality was just another way of hierarchising arguments.

One example of how argumentative patterns could be disrupted by erecting an alternative view on "reality" where the discussions regarding the circumstances in which State official immunities and foreign prosecution play out. For instance, the reality of the extraterritorial prosecution of international crimes, consisting in a factual absence of prosecution, was an argument frequently advanced by those criticising the referral to alternative ways to obtain redress.[1105] Depending on what facet of reality members focused on, the purported reality of such prosecutions could serve as well as an argumentative basis of those opposing exceptions. The factual basis for the assessment of "reality" was not to be limited to the lack of accountability but should include the eventual shortcomings of

[1101] ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 10-11.

[1102] ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 11-12. By stating that immunity does not exist, he explicitly distanced himself from the reasoning of other members, or the majority in the Al-Adsani case, claiming that *jus cogens* rules trump immunity; to him that would be confusing issues of competence and issues of substance.

[1103] Formulating conceptualisation pointing in this direction, see inter alia Mr. Murase, ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164*; Mr. Forteau, ILC, *Provisional summary record of the 3166th meeting, A/CN.4/SR.3166*, p. 6.

[1104] See the statement of Mr. Wood, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 9.

[1105] See *inter alia* the statement of Mr. Dugard, ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p.12.

national prosecutions. These faults, which could not be washed away by moral evaluations, were *inter alia* stressed by Mr. Nolte: "*If national jurisdictions were not considered to be impartial and reliable, that might lead to tensions, and restricting immunity would become counterproductive. Thus, the Commission must recognize today's realities, which must not be painted over by invoking high moral principles.*"[1106]

However, the proponents of exceptions to immunity were not the only ones making affirmations on the basis of purported realities. An argument commonly advanced in defence of State official immunities was that limiting them would cause severe tensions between States. This depiction of the reality of international relations was not undisputed. In the plenary, the argument that State official immunity benefitted the stability of international relations was reversed by some; in fact, the abuse of immunity could from that perspective have an opposite, destabilising effect. To Mr. Hmoud, "*sovereign equality and non-intervention could be used in certain circumstances as arguments against absolute immunity. When a State committed acts against the territory, population and national interests of another State in violation of international law and the national law of the latter State, it was violating the principles of sovereign equality and non-intervention. Thus, by invoking absolute immunity to shield its officials on the basis of the very principles that it was violating, a State significantly undermined its legal position.* […] *The Commission should take that into account and reach conclusions on the topic that ensured sovereign equality and protected against abuse.*"[1107]

Arguments based on the reality of circumstances appeared hence often as forceful, but not necessarily as conclusive. If the assessment of the past and present reality is already contentious, the evaluation of what impact the formulation of a specific rule could have on the reality of the future was often not less disputed.

4. The Dualism of Immunity *Ratione Personae* and *Ratione Materiae* – Discretional focuses on Differences or Similarities

Highlighting a specific aspect of the relation between two concepts to draw conclusions from the established connection, is a common practice in the Commission. These argumentations proceeded very selectively, as they tended to omit central aspects of the complex, multifaceted relations. Exemplar for this kind of patterns, both Special Rapporteurs drew upon the dualism of immunity *ratione personae* and immunity *ratione materiae* to legitimise the positions they supported.

In the view of Ms. Escobar Hernández, recognising the unconditional nature of immunity *ratione personae* was justifiable only on the basis of its temporary nature. Once the members of the troika leave office, they enjoy only immunity *ratione materiae*, becoming by then subject to the same regime as any other official.[1108] The limited nature of immunity *ratione materiae* was hence constructed as the necessary compliment of absolute immunity *ratione personae*. Whilst the latter could be accepted for the sake of respecting the sovereignty of other States, this acceptance was conditional on the

[1106] ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 16. Ms. Xue as well highlighted the difficulty of guaranteeing the legal standards of fair trial and due process, as she saw the risk that this kind of proceedings would often rather serve political purposes than the pursuit of criminal justice, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 31.

[1107] ILC, *Provisional summary record of the 3114th meeting, A/CN.4/SR.3114*, p. 5

[1108] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 241.

circumstance that after office, the imperatives of assuring prosecution were recognised. Her arguments hence rested upon the differences of the practical premises of the two concepts; the scope of one (immunity *ratione personae*) was argued based on the different, limited scope of the other (immunity *ratione materiae*). Whilst this argumentation does not necessarily imply exceptions to immunity *ratione materiae*, as it could merely hint at the possibility of prosecuting former members of the troika for acts performed in a private capacity, the underlying logic of limiting immunity *ratione materiae* emerges.

In contrast, Mr. Kolodkin utilised the dualism of immunity *ratione personae* and immunity *ratione materiae* in a reverse logic. On several occasions, he drew upon points unambiguously recognized in the context of immunity *ratione personae* to make parallel claims in the context of immunity *ratione materiae*. His argumentation was eventually advanced in an indirect way: if a rationale speaking in favour of exceptions was to be recognised in the context of immunity *ratione materiae*, why should this rationale not apply as well to immunity *ratione personae*, though recognized to be absolute?[1109] Rather than constructing the limitedness of immunity *ratione materiae* through the absoluteness of immunity *ratione personae* as Ms. Escobar Hernández had done, Mr. Kolodkin utilised the latter's absoluteness to affirm the same of the former. Whilst the argumentation of Ms. Escobar Hernández had hence highlighted the concepts' differences as a basis of her thoughts, Mr. Kolodkin's conclusions relied on their similarities.

Both argumentative approaches were plausible and thereby indirectly complementary. The respective counterarguments revealed the weaknesses of both approaches: the similarities between the concepts weakened arguments based on differences, as much as the differences challenged the idea of drawing analogies.

II. Genealogies of "Trends" – Sovereignty, Immunity and Impunity

Commission members recurred to the past of given concepts to argue their views on the *status quo* and likely or desirable future developments. A significant example of this genealogical approach to argumentation were the conflicting elaborations by Commission members of the "trends" characterising the issue of exceptions.

It was a recurring argumentative strategy to defend a position considered desirable as *lex lata* - unaffected by trends - whilst positions considered inopportune were downgraded to lex *ferenda* – expressions of dubious trends - eventually also invoking a neat separation of the two spheres.[1110] By the majority, the law was seen somewhere in between, subject to forces pushing and pulling into different directions, constituting the frequently invoked trends and countertrends.[1111]

[1109] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, paras 67; 77.

[1110] As an exemplar illustration of a similar argumentative strategy, see the position of by Ms. Escobar Hernández on the personal scope of immunity *ratione personae*. She did not consider an expansion of scope to reflect customary international law; in case the ILC should want a progressive development of this kind, it should be neatly distinct from the immunity *ratione personae* of the troika, reflecting *lex lata*. Compare Escobar Hernández, *Second report on the immunity of State officials from foreign criminal jurisdiction*, para. 68.

[1111] Compare the description of these different viewpoints and strategies delivered by Mr. Nolte, ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 17: "*The Commission was currently in a difficult situation, and three approaches were conceivable. The first was the one espoused by the Special Rapporteur, and which could be called the codification approach.*

The issue of exceptions had created a significant cleavage. Some described the situation as one of "*two conflicting concepts regarding the role of the Commission and even of international law itself coexisting*".[1112] Others spoke of two opposed narratives members adhered to.[1113] One expression of this cleavage were the different views on trends advocated in the ILC. Whilst some members affirmed clearly discernible trends towards more limited State official immunities from foreign criminal jurisdiction under customary international law (1.), others were unconvinced of the existence of similar trends, eventually underlining countertrends (2.).

1. Embracing Trends Towards Restricted Immunities

Several members expressed the conviction that practice revealed a clear trend towards limited immunities. In Ms. Escobar Hernández' reading, past events concerning the issue of exceptions allowed to identify a trend towards full immunity *ratione personae*, in opposition to the restrictedness of immunity *ratione materiae*. In her view, even the much-criticised judgments of the ICJ and of the ECtHR were acknowledging new trends. In the case *Questions Relating to the Obligation to Prosecute or Extradite*, her understanding was that the ICJ had "*introduced the argument that the combating of impunity is one of the objectives pursued by the international community*".[1114] The ECtHR had noted the emerging support for exceptions, declaring that "*in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States*".[1115]

Even stronger was the positive attitude of other members towards trends restricting immunities. In the words of Mr. Pellet, "*the ICJ's "eminently overcautious response to a clearly discernible trend towards withholding criminal immunity from political leaders in the case of particularly heinous crimes had needlessly […] curbed a promising trend.*[1116] He invited the ILC not to follow the *Arrest Warrant* judgment, but rather to consolidate the trend "*clumsily interrupted*" by the ICJ in 2002.[1117] He disagreed that the absence of immunity should merely be considered an exception, whose existence under customary international law could moreover not be proven. To him, "*that simple assumption was unacceptable, because it was tantamount to denying all the progress that had been made in international law since the end of the First World War and, in particular, since the Second World War with the advent of the idea of the international community and*

That risked to expose the Commission to the criticism that it was arresting an important development in customary international law. The second approach was the one defended by Mr. Dugard, who openly called for a progressive development approach. Such an approach risked creating a rift between, on the one hand, those States which felt justified in being able to rely on lex lata and, on the other, certain domestic courts which took the Commission's position as an encouragement to interpret the rules of immunity ever more strictly. That might result in more domestic prosecutions and a loss of authority of international law as a source of law. The third approach, suggested by Mr. Pellet, might be called the progressive development approach in the guise of lex lata, which was astute, but also problematic."

[1112] Mr. Pellet, ILC 2011b, p. 10.

[1113] Compare Mr. Dugard, ILC, *Provisional summary record of the 3086th meeting, A/CN.4/SR.3086*, p. 13. Mr. McRae described the two polar opposites in the Commission as represented by the "static" approach of Mr. Kolodkin, and the take of Mr. Dugard, invoking a stand on the Commission's preference for either impunity or accountability regardless of the actual content of customary international law. ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 19-20.

[1114] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 72.

[1115] *Jones and others v. United Kingdom*, para. 215.

[1116] ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, Statement of Mr. Pellet, p. 8.

[1117] ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 12.

the awareness, albeit limited, that there were higher interests that prevailed over the interests of the individual members of that community."[1118]

2. Trends Towards Restricted Immunity and Countertrends

In contrast to these views, others expressed doubts regarding the purported discernibility of an unequivocal trend towards limited State official immunity. One such view on relevant trends regarding State official immunities was exposed by Mr. Kolodkin. He did not deny that the issue was a dynamic one: the significant changes undergone by international law in general and by the concept of sovereignty in particular, as much as the observation that individual criminal responsibility and the fight against impunity had become facts of life, were "*truisms*" to him. However, "[*y*]*et it was also obvious, at least to him, that the development of human rights had deeply affected, but had not undermined, the principles of sovereign equality of States and of non-interference in their internal affairs*"[1119]. Several members disagreed with Mr. Kolodkin, criticising he had not considered alternative contemporary views on the concept of sovereignty[1120].

In the view of Mr. Kolodkin, there were distinct trends that needed to be distinguished. Whilst a trend against immunity from international criminal jurisdiction could be observed, this tendency needed to be differentiated from the situation regarding national jurisdictions[1121]. Another argument speaking against a trend towards limited immunity was that exceptions established through international treaties were not to be conflated with exceptions under customary international law[1122]. Not only did Mr. Kolodkin categorically exclude any trend towards the establishment of exceptions, he also doubted the desirability of similar developments.[1123]

The scepticism of Mr. Kolodkin was shared by other members. Mr. Nolte was concerned by the threat of a "*pre-emptive strike*" against immunities in the name of "*modern trends in human rights law*".[1124] Echoing Mr. Kolodkin's argument on the plurality of trends, Mr. Nolte inverted the trend argument, criticising the meanings often red into the *Pinochet* decisions, and claiming that the *Arrest*

[1118] ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 10.

[1119] He specified that "[*t*]*he problem that merited consideration was not the extent to which changes in the contemporary world and in international law had influenced State sovereignty in general, but more specifically, how the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular had been affected*", see ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p. 5.

[1120] See for instance the statement of Ms. Jacobsson, rejecting the Special Rapporteur's foundational premise, rather than his logic, as she claimed he had not taken into account the nature of sovereignty, which, although the concept was still at the heart of international law, had evolved over time; ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*; ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p.3. See further Mr. Murase, stressing in particular that "*the rationale for official immunity* [could not] *be based on the ambiguous concept of sovereignty, which had undergone considerable change since the latter half of the twentieth century. It was now conceived not only as a combination of prerogatives and rights but also as a set of obligations entailing a responsibility to ensure the welfare and security of a nation*". However, he also stressed the need of adequate safeguards to avoid abuse of prosecutorial discretion, ILC, *Provisional summary record of the 3113th meeting, A/CN.4/SR.3113*, p. 8.

[1121] ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p. 5.

[1122] Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 54.

[1123] Ibid., para. 90

[1124] ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 20.

Warrant decision might express a "*more recent countervailing trend*"[1125]. He disagreed with the purported necessity to limit immunities for the sake of human rights; in his view, the stability pursued by immunity promoted individual human rights enjoyment[1126].

3. Shortcomings and Benefits of Trend-Based Argumentations

The debate in the Commission did not revolve around where the law was coming from, and what direction it was in principle moving to – towards exceptions, and towards a broader scope of immunity *ratione personae*. In this context, argumentative strategies classifying proposals as either *lex lata* or *lex ferenda* were deployed to support or counter these tendencies. Opponents of restricting immunity eventually claimed that exceptions constituted *lex ferenda* rather than *lex lata*. Conversely, proposals claiming the absence of exceptions were by proponents of limited immunity not seen as *lex ferenda*, but rather as an outdated view on an evolving field of law.[1127] Divergences arose on whether the law had yet developed at all and if so, how far, and whether it was legitimate and desirable on the ILC's side to enhance the movement towards exceptions.

The reconstructions of trends depended on the individual member's premises and were consequently challenged by others with different views. These genealogical argumentations were not always helpful, as they were based on irreconcilable readings of the development of State official immunity over time. As claimed by Mr. Wood, "*it hardly assisted the debate to speak […] of good and evil, accountability or impunity*". He rejected the idea that those supporting *lex lata* lived in the past.[1128] Retracing the high consideration he had as many Germans of his generation of the contribution of the Nuremberg Trials, Mr. Nolte invoked that eliminating impunity was a common goal, and that "*therefore the Commission should avoid framing the debate as taking place between those who were empathetic and future-oriented, on the one hand, and those who were cold-hearted, backward-looking apologists of an outdated concept of State, sovereignty and international law, on the other.*"[1129]

Argumentations based on trends can highlight new developments that deserve acknowledgment and are capable of pushing the law towards change by introducing meta-legal reflections. Despite their hence potentially productive function, the argumentative construction of trends in the ILC was at times not only of limited convincingness but even counterproductive. Any purported trend could constitute a red rag to those not sharing the same understanding of the tendencies at stake,

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[1125] Ibid., pp. 21-22. In a similar vein, see the support of the *Arrest Warrant* decision expressed by Mr. Vasciannie, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 16-18, and by Ms. Xue, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 30.

[1126] As Mr. Nolte claimed, "[…] *the stability of inter-State relations was not just important in securing technical cooperation between Governments, but was also essential for securing the human rights of individuals and, in some situations, for ensuring that force was not used within and between States. The rules on immunity therefore protected not only the "egoistical" sovereign interest of a particular State, but also the very community values that were safeguarded by human rights and by the principle that there should be no impunity for international crimes*". See ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 20-21.

[1127] The statement of Mr. Fomba, that the assertion of the inexistence of exceptions without any substantiation would constitute progressive development appeared rather as an argumentative twist than as a serious suggestion, compare, ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115*, p.3.

[1128] His views were echoed powerfully by Mr. Nolte, urging the Commission to "*avoid framing the debate as taking place between those who were empathetic and future-oriented, on the one hand, and those who were cold-hearted, backward-looking apologists of an outdated concept of State, sovereignty and international law, on the other*", ILC, *Provisional summary record of the 3088th meeting, A/CN.4/SR.3088*, p. 16.

[1129] Ibid., p. 16.

sparking virulent controversy. This phenomenon can be reconnected to the simplifying function of the concept of trend. Through this notion, complexity is reduced by identifying a red line in a variety of events. If the events contradict each other and no prevailing direction can consensually be agreed on, the intended simplification risks being comprehended as a partial and deliberate ignorance of conflicting views – an accuse the proponents of trends could not always entirely be absolved from.

III. Intertextuality – Constructing Authority Through Reference

Through the prism of intertextuality, all texts – whether legal, literary or political – are a product of other, pre-existent texts, which, both consciously and unconsciously, give a shape to the author's thoughts. "*Any text is constructed as a mosaic of quotations; any text is the absorption and transformation of another*".[1130] This section focuses on some of the most frequently quoted texts, employed by the actors to discursively construct authority to validate and underpin the claims made.

As emerged from the analysis above, both the judgments of the International Court of Justice and the dissenting opinions of some judges distancing themselves from the views of the majority, were particularly influential in shaping the actors' positions. The adherence to specific opinions formulated either by the majority of ICJ judges or by the dissenting minorities frequently signalled a preference for certain views, in particular on issues of exceptions. Authority was hence constructed by reference to the views of one of the most esteemed collectives of recognised experts of international law. Conversely, it could be observed that views considered unconvincing were labelled as advocated by activists from the civil society sector.[1131]

Significant attention was furthermore dedicated in the Commission to institutions situated outside the structures of the United Nations but involved in the codification and progressive development of international law, like the resolutions of the *Institut de Droit International*.[1132] The recurrence to this sets of texts revealed how the Commission is looking for allies in the codification and progressive development of the international legal order. The underlying assumption appeared to be that in the eyes of the Commission members, the most reliable and qualified allies were other institutionalised international actors, despite their practice did not constitute a primary source in the identification of customary international law.

Most noteworthy in the context of intertextuality were however the references made by ILC members to the Commission's own previous work. Although previous Commissions can in a way be considered different actors, the attitude to refer extensively to the Commission's own previous works had a touch of auto-referentiality. The functions pursued through this habitus appeared to be at least threefold.

[1130] J. Kristeva, *Desire in language: A semiotic approach to literature and art*, European perspectives (New York: Columbia University Press, 1980)., p. 66.

[1131] Mr. Kolodkin for instance referred frequently to a submission of three non-governmental organisations to the ECtHR (*Submission to the European Court of Human Rights*) as advocating minority viewpoints, see inter alia, Kolodkin, *Second report on immunity of State officials from foreign criminal jurisdiction*, para. 56.

[1132] See in particular the considerable attention dedicated to the work of the Institute by Mr. Kolodkin, Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, paras. 25-26.

First, a resulting effect was a stabilising self-restriction. Comparably to the elaboration of precedents in judgments in common law systems, the way towards making affirmations out of the blue is barred. Reconnection with the past becomes necessary, relevant precedent statements of the ILC are to be taken into consideration and are not easily dismissed. By way of example, Mr. Kolodkin produced a significant argumentative effort when he affirmed his express disagreement with a previous Special Rapporteur dealing with a related topic.[1133]

Second, reference to the Commission's own standards is a way of accelerating the progress of work whilst contemporarily pre-empting potential criticism. An example of a reference of this kind to previous findings of the Commission was Ms. Escobar Hernández' recourse to the standards for the identification of customary international law, developed by the Commission in a parallel project.[1134] With this move, she avoided entering lengthy and potentially controversial debates of the most suitable take in the identification of customary international law.

Third, referring to its own previous works can increase the ILC's institutional standing. It seems intuitive that the authority accorded by other actors to the Commission's output begins with the authority the ILC itself attributes to its own past achievements. Any invocation of the Commission's previous works constitutes a reverence to the Commission's authority.

[1133] Mr. Kolodkin disagreed with the understanding of "immunity" formulated by Mr. Sucharitkul, who had been the Special Rapporteur for the topic "Jurisdictional immunities of States and their property". In Mr. Kolodkin's view, Mr. Sucharitkul's definition of immunity, not including any duty of the forum State corresponding to the right of the official's State, based the concept of immunity de facto in courtesy rather than in law. Compare Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, paras. 57-59.

[1134] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 183, referring to the conclusions drafted by Mr. Wood in the context of the topic "Identification of customary international law", see *Identification of customary international law - Text of the draft conclusions provisionally adopted by the Drafting Committee*.

Part 5
The Addressees – The Efficacy and Legitimacy of the ILC's Discursive Practices

The efforts of the ILC are geared at increasing the impact of its output on the international legal order. Some key addressees are central – most crucially the State representatives in the 6th Committee (A.) and the International Court of Justice (B.).

A. The ILC and the International Court of Justice

The international judiciary, above all the International Court of Justice, are important allies of the ILC in the evolution of international law. Moreover, judges at international courts and tribunals are recruited from the same legal communities as the ILC members. For the international lawyers serving on the ILC, being appointed to the bench of an international court was a frequent subsequent career step (1.)

However, there were noteworthy divergences between the positions voiced by the respective majorities in the ICJ and the ILC regarding issues of State official immunity. This divergence came with virulent criticism of the Court in the Commission – a development sparking worries among both ILC members and States, resulting in attempts to mitigate the cleavages (2.).

I. ILC Members and Careers in the International Judiciary

Being elected to the ILC comes with considerable prestige – and financial benefits in the form of payments for travel expenses and a daily subsistence allowance at a generous rate. However, Commission membership is a part-time function, and beyond the daily subsistence allowances, members receive little financial and institutional support for their efforts. This underfunding affects above all special rapporteurs. Some ILC members, in particular those of a relatively young age, might aspire to full-time positions with a better remuneration and greater organisational resources within the international legal system.[1135]

Being called to sit on the bench of an international court or tribunal seems to be a valid opportunity in this regard. As of 2018, four current[1136] and two former judges[1137] of the International Tribunal for the Law of the Sea were elected to the bench while[1138] or after[1139] having served on the ILC.

[1135] However, the opposite might be true as well: considering the multiple professional commitments of ILC members, many of them would for instance not be interested in membership if it was a full-time function. The part-time model hence has an impact on who competes for membership.

[1136] Mr. Kateka (Tanzania), Mr. Kittichaisaree (Thailand), Mr. Kolodkin (Russian Federation) and Mr. Pawlak (Poland) are currently ITLOS judges.

[1137] Mr. Eirikson (Iceland) and Mr. Yankov (Bulgaria) are former ITLOS judges.

[1138] In the case of Mr. Kateka (ILC membership between 1997 and 2006, ITLOS judge since 2005) the two functions overlapped.

[1139] Mr. Eirikson (Iceland; ILC membership from 1987 to 1996, ITLOS judge from 1996 to 2002), Mr. Kittichaisaree (Thailand; ILC membership from 2012 to 2016, ITLOS judge since 2017), Mr. Pawlak (ILC membership from 1987 to 1991, ITLOS judge since 2005) and Mr. Yankov (ILC membership from 1977 to 1996, ITLOS judge from 1996 to 2011) were elected to the ITLOS bench after their service with the Commission.

Former ILC members have as well subsequently been elected to the International Criminal Tribunal for the former Yugoslavia[1140] and the European Court of Human Rights[1141]. Conversely, previous experiences as an international judge are a rare phenomenon among ILC members. Only occasionally had the ILC members assessed in this study served as full-time judges of international courts and tribunals before joining the Commission.[1142] Moreover, being a former or current international judge does not guarantee election; three candidates coming from the international judiciary failed to succeed in the elections in 2016.[1143]

After ILC membership, the careers of members continue eventually in different national or international institutions, or they return to focus principally on academic assignments. Alternatively, in the segment of the international legal order institutionalized within the United Nations, becoming one of the 15 ICJ judges is one of the most prestigious positions available for international law experts. A full-time position on the ICJ for a renewable term of 9 years is hence an attractive option, proven by the frequent election of former ILC member to the Court's bench. Having former ILC members serving as ICJ judges is perceived as strengthening the ties between the two bodies.[1144] The judges themselves feel that the presence of former ILC members on the bench contributes significantly to the Court's work.[1145]

Since the two institutions were created, as of 2018, 36 international lawyers served both on Commission members and on the bench of the ICJ.[1146] As of 2018, almost half the ICJ bench is composed of judges with a past in the Commission.[1147] It is not uncommon that ILC members get elected to the ICJ in the midst of a quinquennium; they need to resign from the ILC due to the requirements contained in the statute of ICJ[1148], and a new member is elected to fill the vacancy.

During the quinquennia looked at in this study, the election of current ILC members to the ICJ happened twice. The resigning members were replaced with fellow countrymen.[1149] ILC Members

[1140] Mr. Bennouna (Morocco) got elected to the ICTY in 1998.

[1141] Mr. Ferrari Bravo (Italy) got elected to the ECtHR in 1998.

[1142] Mr. Caflisch (Switzerland) was an ECtHR-judge from 1998 to 2006 before joining the ILC.

[1143] These candidates were Mr. Koffi Afande (Togo), judge at the ICTY from 2013 to 2016; Mr. Ventura Robles (Costa Rica), judge at the Inter-American Court of Human Rights; and Mr. Ugirashebuja, President of the East African Court of Justice (EACJ) since 2014.

[1144] Statement of Mr. Hassouna, ILC, *Provisional summary record of the 3274th meeting, A/CN.4/SR.3274: 67th session* (2015), p. 9; tracing back the close relationship between the two bodies at least partly to the fact that a significant number of ICJ Judges were former Commission members, see *The work of the International Law Commission*, 8th ed. (New York: United Nations, 2012), p. 81, FN 334.

[1145] Statement of Judge Abraham during his visit to the Commission, ILC, *Provisional summary record of the 3274th meeting, A/CN.4/SR.3274*, p. 10.

[1146] Considering the total number of judges ever having been elected to the ICJ bench so far is 107, more than one third of them (33,6%) have as well served on the Commission. These 36 members are: Mr. Ago; Mr. Al-Khasawneh; Mr. Bedjaoui; Mr. Bennouna; Mr. Cordova; Mr. Crawford; Mr. El-Erian; Mr. Elaraby; Mr. Elias; Mr. Evensen; Mr. Ferrari Bravo; Mr. Fitzmaurice; Mr. Gaja; Mr. Gevorgian; Mr. Gros; Mr. Ignacio-Pinto; Mr. Jiménez de Aréchaga; Mr. Koretsky; Mr. Koroma; Mr. Krylov; Mr. Lachs; Mr. Lauterpacht; Mr. Padilla Nervo; Mr. Rau; Mr. Robinson; Mr. Ruda Santolaria; Mr. Schwebel; Mr. Sepulveda Amor; Mr. Sette-Camara; Mr. Simma; Mr. Singh; Mr. Spiropoulos; Mr. Tomka; Mr. Vereshchetin; Mr. Waldock; Ms. Xue.

[1147] Current judges who previously served in the ILC are Judge Bennouna (Morocco); Judge Crawford (Australia); Judge Gaja (Italy); Judge Gevorgian (Russian Federation); Judge Robinson (Jamaica); Judge Tomka (Slovakia) and Judge Xue (China).

[1148] Compare Art. 16 of the Statute of the ICJ: "*1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.*"

[1149] Judge Xue (China; judge since 2010) was replaced by Mr. Huang; Judge Gevorgian (Russian Federation; judge since 2015) was replaced by Mr. Kolodkin.

become eventually ICJ judges, a mechanism usually not working *vice versa*: 35 members served first on the Commission and later on the ICJ, whilst only one former ICJ judge was subsequently elected to the ILC.[1150]

Although it occasionally happens that Commission members have experienced the Court's innards as *ad hoc* judges or registrars, serving ILC members will usually not have experienced the perspective of an ICJ judge.[1151] Hence, most ILC members have not been socialised by the institutional ethos and personal relationships that would have come with previous service on the ICJ bench.[1152]

II. Divergences with the ICJ on State Official Immunity

The relationship between the ILC and ICJ is one of close cooperation, as highlighted by the regular visits of the ICJ President to the annual sessions of the ILC.[1153] Commission members underlined the distinct, complementary tasks: whilst the ICJ operates with positive law, expressing *in concreto* judgments binding upon the parties, the ILC formulates abstract rules transcending the sphere of *lex lata*.[1154]

This division of competences would suggest that ILC members comment cautiously on ICJ judgments even in case they disagree with the Court's positions. Nevertheless, there was no lack of harsh criticism of the Court's judgments voiced in the ILC plenary, regarding above all the *Arrest Warrant* decision. To Mr. Pellet, "*the ICJ's "eminently overcautious response to a clearly discernible trend towards withholding criminal immunity from political leaders in the case of particularly heinous crimes had needlessly […] curbed a promising trend."*"[1155] He later reiterated the invitation directed at his colleagues not to follow the *Arrest Warrant* judgment, "*one of the most regrettable decisions of the Court since 1923*", but rather to consolidate the trend "*clumsily interrupted*" by the ICJ in 2002.[1156]

Much of the criticism of the efforts of Mr. Kolodkin was the consequence of his choice to adhere, with "*reverential respect*", to the position of the majority in the *Arrest Warrant* case, judged a "*disastrous decision*" by both Mr. Pellet and Mr. Dugard.[1157] This vehement condemnation of the ICJ caused

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[1150] Mr. Ferrari Bravo (Italy) joined the Commission in 1997 after having been an ICJ judge from 1995 to 1997; he left shortly afterwards as he was elected to the ECtHR in 1998.

[1151] Mr. Dugard, Mr. Gaja and Mr. McRae have been *ad hoc* judges with the ICJ; Mr. Valencia-Ospina has been the registrar of the ICJ from 1987 to 2000. Apart this "insiders", numerous members have "externally" participated in court proceedings as agents or counsels of various States.

[1152] This does not exclude institutional affinities and personal acquaintances resulting from other professional and academic interconnections within the international legal community.

[1153] The President is invited to present recent activities and cases before the Court, followed by an exchange of views with ILC members, *The work of the International Law Commission*, p. 81.

[1154] See the statements of Mr. Brownlie, ILC, *Provisional summary record of the 2984th meeting, A/CN.4/SR.2984: 60th session* (2008), p. 14; Mr. Pellet, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087: 63rd session* (2011), p. 12; Mr. McRae, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145: 64th session* (2012), p. 6; Mr. Murase, ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164: 65th session* (2013), p. 6; Mr. Tladi, ILC, *Provisional summary record of the 3164th meeting, A/CN.4/SR.3164*, p. 6; Mr. Šturma, ILC, *Provisional summary record of the 3166th meeting, A/CN.4/SR.3166: 65th session* (2013), p. 5.

[1155] ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983: 60th session* (2008), Statement of Mr. Pellet, p. 8.

[1156] ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, p. 12.

[1157] ILC, *Provisional summary record of the 2983rd meeting, A/CN.4/SR.2983*, Statements of Mr. Pellet, p. 5, and Mr. Dugard, p. 10.

the equally vehement reaction of other members, taking issue with calling the *Arrest Warrant* decision "*a disaster*"[1158], as they considered the decision an expression of *lex lata*.[1159]

Ms. Escobar Hernández' take on the jurisprudence of the ICJ was a prudent one. From her first report, she accorded significant weight to the ICJ and its recent jurisprudence[1160], above all to the case *Jurisdictional Immunities of the State: Germany v. Italy: Greece intervening*. This choice indicates that despite eventual critiques, the Commission does not easily depart from the Court's jurisprudence, trying to construct as much common ground as possible, and to respect the principles set by the Court.[1161] By way of example, opting for the expression "act performed in an official capacity" among the many terms suggested, the Commission decided to stick to the terminology developed by the ICJ in the *Arrest Warrant* case.[1162]

Even if in disagreement with the ICJ on the issue of exceptions, Ms. Escobar Hernández' analysis faithfully reflected the Court's reluctance to accept limitations and exceptions, culminating in the significant reinforcement of immunity in the *Jurisdictional Immunities of the State* case.[1163] However, Ms. Escobar Hernández deployed a twofold argumentative strategy to relativize the ICJ's clear-cut position.

On the one hand, she dedicated great attention to widely echoed alternative argumentations brought up by several judges in the *Arrest Warrant* case.[1164] The claims advanced by the latter were that international crimes cannot be considered official acts,[1165] that the requirements of international relations have to be balanced against the need to combat impunity,[1166] that individual immunity should be restricted parallelly to the developments in the field of State immunity, that *jus cogens* norms should prevail over the procedural rule of immunity,[1167] and that the suggested alter-

[1158] For an energic criticism of this terminology, see the statement of Mr. Nolte, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986: 60th session* (2008), p. 20. His statement triggered a heated exchange of opinions, involving in particular Mr. Nolte and Mr. Pellet, as well as Mr. Brownlie, Mr. Hmoud, Ms. Jacobsson and Mr. Petrič, see ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, pp. 25-28.

[1159] See for instance the statement of Mr. Huang, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 4; Mr. Wood, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 15.

[1160] C. Escobar Hernández, *Preliminary report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/654 (2012), para. 49.

[1161] Openly invoking to avoid turning against the ICJ, see Mr. Hmoud, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 25; invoking consistency with the ICJ decisions: Mr. Gevorgian, ILC, *Provisional summary record of the 3168th meeting, A/CN.4/SR.3168: 65th session* (2013), p. 8; see however as well the statement of Mr. Petrič, who considered it unwise the ICJ that the position of the majority in the Arrest Warrant case regarding the personal scope of immunity *ratione personae* had been followed, ILC, *Provisional summary record of the 3275th meeting, A/CN.4/SR.3275: 67th session* (2015), p. 7.

[1162] C. Escobar Hernández, *Fourth report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/686 (2015), paras 27-28; this decision had been taken by the Commission the year before, see commentary to draft article 4, in particular paras. (3) and (4), *Report of the International Law Commission on the work of its sixty-fifth session*, A/68/10, para. 49. For a further example of how the ILC tried to be faithful to the wording of the ICJ, see Mr. Tladi (speaking as the Chairman of the Drafting Committee), ILC, *Provisional summary record of the 3174th meeting, A/CN.4/SR.3174: 65th session* (2013), p. 6.

[1163] Classifying the ICJ jurisprudence in that sense, see C. Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/701 (2016), para. 82.

[1164] See ibid., paras. 68-70.

[1165] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* I.C.J. Reports 2002, p. 3 (ICJ, 11 April 2000), separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78, para. 51.

[1166] Ibid., separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, p. 88, para. 85.

[1167] Ibid., dissenting opinion of Judge Al-Khasawneh, p. 98, para. 7.

native models of redress do not reflect the reality of international relations and international criminal jurisdiction.[1168] In the plenary, the choice to highlight the dissenting and joint separate opinions was greeted by some members. In the context of the ILC's efforts, dissenting opinions could in their view be as important as majority positions, decisive was the quality of reasoning.[1169]

On the other hand, Ms. Escobar Hernández vigorously advocated the limited scope of all the discussed judgments. The *Arrest Warrant* case would regard only the immunity *ratione personae* of incumbent Ministers for Foreign Affairs.[1170] Equally circumscribed was in her view the case *Certain Questions of Mutual Assistance in Criminal Matters* case, as the ICJ affirmed the immunity *ratione personae* of the incumbent President of Djibouti, but avoided to address the issues connected to the equally invoked immunity of the *Procureur de la République* and the Head of National Security.[1171] In the case regarding *Questions Relating to the Obligation to Prosecute or Extradite*, her reading was that the ICJ had "*introduced the argument that the combating of impunity is one of the objectives pursued by the international community*".[1172] The *Jurisdictional Immunities of the State* case did in her opinion only touch on the State's immunity from civil jurisdiction, as the ICJ had explicitly excluded issues relating to immunity in criminal proceedings against State officials from the judgment's scope.[1173] Finally, the ICJ had in her opinion not considered that immunity could in fact turn from a procedural into a substantive bar, if no other national or international court was competent to judge the crime at stake.[1174]

The Special Rapporteur pursued a straightforward strategy. Desiring to avoid an open rupture with the ICJ, she embraced the unlimited nature of immunity *ratione personae* powerfully underlined by the ICJ on several occasions. Concurrently, she attempted to exclude immunity *ratione materiae* from this discourse, depicting this form of immunity as a neatly distinct tool potentially subject to exceptions. Her interpretation of the ICJ decisions, to some extent counterintuitive, gave example of the reluctance of ILC members to openly disavow their most important ally at UN level in the endeavour of developing the international legal order.

Avoiding an open rupture between the ILC and the ICJ and according a key role to the Court's jurisprudence ultimately also constituted a predominant desire of numerous 6th Committee delegations. Despite the general emphasis on the importance of domestic law, it was claimed that priority should be given to the practice of international tribunals, above all to the judgments of the ICJ. The Court was considered by several delegation to be better suited to consider the issues at stake than national courts with their natural allegiances.[1175]

Eventually reflecting these tendencies, references to national landmark cases like the *Pinochet* case dropped in the quinquennium 2012-2016 compared to previous years, whilst the ICJ decisions on

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[1168] Ibid., dissenting opinion of Judge *ad hoc* Van den Wyngaert, pp. 153-159, paras. 34-38.
[1169] Statement of Mr. McRae, ILC, *Provisional summary record of the 3145th meeting, A/CN.4/SR.3145*, p. 6.
[1170] See Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 67, referring to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, p. 21, para. 51.
[1171] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 71.
[1172] Ibid., para. 72.
[1173] Ibid., para. 85, referring to *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* I.C.J. Reports 2012, p. 99 (International Court of Justice, 03 February 2012), p. 139, para. 91.
[1174] Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 205.
[1175] This point was highlighted by Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24: 70th session* (2015), para. 65; Islamic Republic of Iran, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25: 70th session* (2015), para. 11; Sudan, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 91.

immunities and the approach they convey continued to be frequently cited.[1176] The at times harsh criticism of the ICJ in the Commission might have contributed to the frequent invocation of the ICJ, indicating that States oppose the potential rupture between two central institutions of the international legal order.

B. The Interaction with States in the 6th Committee

Articles 17 of the Commission's Statute provides for the consideration by the ILC of proposals or drafts directly submitted by member States of the United Nations. In practice, this situation has never occurred. According to articles 16, 21 and 22 of the Statute, governments are involved in the activities of the ILC through the supply of data, comments and observations. This interaction should in theory play a "*fundamental and basic role*"[1177] in the efforts of the ILC. In practice, the data and comments provided have often been limited in quantity. Most of the interaction with States is mediated through the General Assembly, usually in the 6th Committee.[1178]

The 6th Committee, dealing on behalf of the General Assembly with issues relating to international law, is the forum for States to direct the works of the ILC and to comment on the latter's progress. As an interface between the experts codifying and progressively developing international law and the community of states, the interaction with the 6th Committee is an essential part of the ILC's uniqueness, legitimacy and authority. Over time, well-established working relationships have formed between the General Assembly, above all the 6th Committee, and the Commission. The delegates of the 6th Committee are not present during the works of the ILC. The Chairman of the ILC and Special Rapporteurs attend the 6th Committee. The Chairman presents the ILC's progress on the topics on the agenda through a report considered during the annual sessions of the General assembly, held in autumn in New York.[1179] The comments of the delegates are consequently based on the mediated account they get of the ILC's works.[1180] The ILC adopted guidelines for the preparation and content of its reports to make the latter more accessible. Conversely, the 6th Committee

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[1176] Compare the statements of the delegates of Norway, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20: 67th session* (2012), para. 97; Republic of Korea, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21: 67th session* (2012), para. 16; Belarus, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 26; Switzerland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 36; Ireland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 44; Republic of the Congo, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 61; China, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 77; South Africa, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 122; Jamaica, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22: 67th session* (2012), para. 3; India, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, paras. 12-13; United Kingdom, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 33; Belgium, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 45; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 51; Spain, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 75; Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 95; Japan, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23: 67th session* (2012), para. 1; Ghana, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 5; Islamic Republic of Iran, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 21.

[1177] *The work of the International Law Commission*, p. 71.

[1178] On the direct interaction with governments, see ibid., pp. 70-72.

[1179] Ibid., pp. 73-74.

[1180] As a counter-measure against this lack of direct interaction, it was invoked to hold parts of the annual ILC sessions in New York, see *Sixth Committee, Summary record of the 29th meeting, A/C.6/68/SR.29: 68th session* (2013), para. 41. In 2018, the second half of the sessions were held in New York.

has reformed its method of consideration of these reports to provide effective guidance. The 6th Committee reports back to the General Assembly, suggesting draft resolutions for adoption.[1181] The policy supervision the 6th Committee over the ILC, a subsidiary organ of the General Assembly, is exercised with great restraint. This attitude allows for significant autonomy of the Commission, based however on the expectation that the ILC takes the recommendations of the General Assembly and the observations voiced in the 6th Committee fully into account.[1182]

Despite this well-intended mechanism, allowing on paper for a harmonious and efficient cooperation, the relationship between the two institutions is in practice not always an easy one, and reciprocal criticism was voiced. Delegates urged the ILC to exercise greater care in selecting topics to effectively address the needs of the international community and to put more effort into respecting deadlines for the sake of timely completion of works.[1183] Generally, a "*stronger and more intensive engagement*"[1184], and the "*need for a more fluid exchange between the Commission and the Sixth Committee*"[1185] were invoked by delegates in the 6th Committee.

One of the crucial problems was seen in the lack of a "*truly interactive dialogue*"[1186] between the Commission and legal experts in the 6th Committee. ILC members saw much of the responsibility for these shortcomings to lie with the 6th Committee.

Despite appreciating the relative independence they enjoyed, in background interviews ILC members frequently voiced disappointment about the lack of concrete initiatives by the 6th Committee with regard to the ILC's future agenda. One of the longest-serving members confronted the 6th Committee with the observation that "*the genuine dialogue repeatedly emphasized as imperative by Committee members would never take place if the status quo persisted. The presence of Commission members at meetings of the Committee's legal advisers was barely tolerated, and all interactive dialogue was reduced to its simplest expression* […] *The Committee had frequently criticized the Commission's suggestions for topics, sometimes with justification, but it was for States to formulate positive suggestions in return. While the Commission was fully open to receiving such suggestions — if not specific guidelines — from the Committee, neither had been forthcoming for many years.*"[1187]

Despite these controversies, the reactions of State delegates in the 6th Committee are a quintessential indicator for the ILC's ability to respond to concrete needs and to draft tools with an actual chance of having a significant practical impact.

The delegates do not serve in their individual capacity but represent their States. Several ILC members served their countries as delegates before their service on the ILC[1188], or acted as their State's

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[1181] *The work of the International Law Commission*, pp. 74-76.

[1182] Ibid., p. 77.

[1183] See for instance the statements of Hungary, *6th Committee, Summary record of the 16th meeting, A/C.6/64/SR.16: 64th session* (2009), para. 35; United Kingdom, *Sixth Committee, Summary record of the 18th meeting, A/C.6/70/SR.18: 70th session* (2015), para. 20.

[1184] Delegate of Indonesia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23: 70th session* (2015), para. 32.

[1185] Delegate of Cuba, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17: 68th session* (2013), para. 26.

[1186] Cuba, *Sixth Committee, Summary record of the 29th meeting, A/C.6/68/SR.29*, para. 41.

[1187] Mr. Pellet, speaking to the 6th Committee, *6th Committee, Summary record of the 21st meeting, A/C.6/66/SR.21: 66th session* (2011), para. 4.

[1188] For instance, the following ILC members spoke as delegates in the 6th Committee before joining the ILC: Ms. Escobar Hernández, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23: 63rd session* (2008); Mr.

delegates afterwards[1189]. Despite the administrative separateness and the different mandates, there is hence a conspicuous degree of reciprocal knowledge of the other body's institutional dynamics and ambitions.

After a chronological overview of the interaction between the ILC and the 6th Committee on the topic of State official immunity (I.), the positions voiced by State delegates are highlighted in detail (II.), before the relationship between the two organs is in conclusion evaluated (III.).

I. Overview – Reactions in the 6th Committee

In the quinquennium 2007-2011, it became apparent that the community of States was divided on the issue of State official immunity, as some delegations appeared to embrace the prudent approach supported by Mr. Kolodkin, whilst others opposed his approach (1.). The following quinquennium 2012-2016 was characterised by the changing direction works took in the Commission as Ms. Escobar Hernández was nominated Special Rapporteur for the topic. Her approach equally caused division among delegates (2.). The most critical issue, regarding exceptions and decided by vote in the ILC, was discussed in the quinquennium 2017-2021 (3.).

1. The Quinquennium 2007-2011

(1) In 2007, delegates welcomed the inclusion of the topic of immunities of State officials from foreign criminal jurisdiction on the ILC's agenda.[1190] Indicating the sensitive nature of the topic, a cautious approach was invoked from the start.[1191]

(2) The heated debates in the ILC following Mr. Kolodkin's Preliminary Report found their reflection in contrasting statements in the 6th Committee in 2008, regarding principally the adequate scope of the topic. Compared to the debates in the ILC, the discussion was less controversial. Mr.

Šturma, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24: 63rd session* (2008); Mr. Gouider, *6th Committee, Summary record of the 17th meeting, A/C.6/64/SR.17: 64th session* (2009); and Mr. Kittichaisaree, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26: 66th session* (2011).

[1189] Mr. Perera commented on the topic of State official immunity after having served on the ILC, see *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23: 72nd session* (2017).

[1190] The inclusion of the topic in the Commission's agenda was explicitly welcomed by the delegates of Guatemala, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19: 62nd session* (2007), para. 12; United Kingdom, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19*, para. 42; Sri Lanka, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19*, para, 55; Malaysia, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19*, para. 76; Portugal, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19*, para. 77; India, *6th Committee, Summary record of the 19th meeting, A/C.6/62/SR.19*, para. 107; Poland, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20: 62nd session* (2007), para. 1; United States of America, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 23; Greece, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 53; Romania, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 78; Israel, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 99; Kenya, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 112; and New Zealand, *6th Committee, Summary record of the 25th meeting, A/C.6/62/SR.25: 62nd session* (2007), para. 19. The delegate of Hungary noted how the inclusion of new topics required careful examination in view of the many incomplete issues on the agenda, *6th Committee, Summary record of the 20th meeting, A/C.6/62/SR.20*, para. 7.

[1191] See for instance the comments of the delegates of Egypt, *6th Committee, Summary record of the 18th meeting, A/C.6/62/SR.18: 62nd session* (2007), para. 71, and China, *6th Committee, Summary record of the 18th meeting, A/C.6/62/SR.18*, para. 79.

Kolodkin's approach was endorsed by numerous States, and the views voiced by most State representatives were more intermediate. The most frequently used invitations directed at the ILC were the use of "care" and "caution".[1192] The statements of delegates revealed widespread insecurity about the rights and duties of States under customary international law.

(3) Worries about the lack of progress were voiced in 2009[1193] and 2010[1194]. The standstill was considered particularly regrettable in the light of the topic's "*paramount importance*".[1195] The urgency of resuming works was highlighted, confirming the interest the topic aroused among States. In 2010, the ILC was therefore invited to give priority to its consideration of the topic.[1196]

(4) Before the meetings of the 6th Committee in 2011, the ILC had asked for the States' input on three specific issues, namely their preference for either an approach based on codification or progressive development, their views on the officials which are or should be covered by immunity *ratione personae*, and the crimes which are or should be excluded from immunity.[1197]

[1192] Instead of many, see the comment of the delegate of the United States, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 87.

[1193] See the statements of the delegates of Austria, *6th Committee, Summary record of the 15th meeting, A/C.6/64/SR.15: 64th session* (2009), para. 30; Hungary, *6th Committee, Summary record of the 16th meeting, A/C.6/64/SR.16*, para. 35; Portugal, *6th Committee, Summary record of the 16th meeting, A/C.6/64/SR.16*, para. 41; Ghana, *6th Committee, Summary record of the 17th meeting, A/C.6/64/SR.17*, para. 6; Libyan Arab Jamahiriya, *6th Committee, Summary record of the 17th meeting, A/C.6/64/SR.17*, para. 18; Chile, *6th Committee, Summary record of the 20th meeting, A/C.6/64/SR.20: 64th session* (2009), para. 33; New Zealand, *6th Committee, Summary record of the 22nd meeting, A/C.6/64/SR.22: 64th session* (2009), para. 74; Israel, *6th Committee, Summary record of the 23rd meeting, A/C.6/64/SR.23: 64th session* (2009), para 44.

[1194] See the statements made by the delegates of Denmark, *6th Committee, Summary record of the 19th meeting, A/C.6/65/SR.19: 65th session* (2010), para. 64; Austria, *6th Committee, Summary record of the 19th meeting, A/C.6/65/SR.19*, para. 78; Italy, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20: 65th session* (2010), para. 6; Portugal, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 12; Belgium, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 31; Slovenia, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 40; United Kingdom, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 49; France, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 65; Netherlands, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 71; Colombia, *6th Committee, Summary record of the 20th meeting, A/C.6/65/SR.20*, para. 77; Spain, *6th Committee, Summary record of the 21st meeting, A/C.6/65/SR.21: 65th session* (2010), para. 11; Libyan Arab Jamahiriya, *6th Committee, Summary record of the 21st meeting, A/C.6/65/SR.21*, para. 25; Hungary *6th Committee, Summary record of the 21st meeting, A/C.6/65/SR.21*, para. 27; Nigeria, *6th Committee, Summary record of the 21st meeting, A/C.6/65/SR.21*, para. 42; Argentina, *6th Committee, Summary record of the 21st meeting, A/C.6/65/SR.21*, para. 48; Switzerland, *6th Committee, Summary record of the 22nd meeting, A/C.6/65/SR.22: 65th session* (2010), para. 33; Ireland, *6th Committee, Summary record of the 24th meeting, A/C.6/65/SR.24: 65th session* (2010), para. 52; Sri Lanka, *6th Committee, Summary record of the 26th meeting, A/C.6/65/SR.26: 65th session* (2010), para. 47; Republic of Korea, *6th Committee, Summary record of the 26th meeting, A/C.6/65/SR.26*, para. 67.

[1195] Statement of the delegate of Libyan Arab Jamahiriya, *6th Committee, Summary record of the 17th meeting, A/C.6/64/SR.17*, para. 18.

[1196] *6th Committee, Summary record of the 19th meeting, A/C.6/65/SR.19*; *6th Committee, Summary record of the 28th meeting, A/C.6/65/SR.28: 65th session* (2010).

[1197] The *Report on the work of the sixty-third session (2011), Supplement No. 10 (doc. A/66/10+Add.1*), "*Chapter III - Specific issues on which comments would be of particular interest to the Commission*" contains this passage:
„*36. What approach would States wish the Commission to take on this topic? Should the Commission seek to set out existing rules of international law (lex lata), or should the Commission embark on an exercise of progressive development (lex ferenda)?*
37. Which holders of high office in the States (Heads of State, Heads of Government, Ministers for Foreign Affairs, others) enjoy de lege lata, or should enjoy de lege ferenda, immunity ratione personae?
38. What crimes are, or should be, excluded from immunity ratione personae or immunity ratione materiae?
39. It would greatly assist the Commission if States could provide information on their law and practice in the field covered by the Special Rapporteur's three reports (A/CN.4/601, A/CN.4/631 and A/CN.4/646). Such information could include recent developments in the case law and legislation. Information on the procedural issues covered by the Special Rapporteur's third report (A/CN.4/646) would be particularly helpful."

The issues touched upon in this solicitation dominated debates. Although not all delegates responded to the requests, the straightforward questions inviting delegations to profess flag, and the strong preferences emerging from the Special Rapporteur's reports, triggered several comments. Statements on State official immunity were more elaborate than during previous sessions. In general, the special rapporteur's approach was welcomed by numerous delegates, voicing pleas in favour of immunities in the name of sovereignty.[1198] Other delegates limited themselves to affirmations of the necessity to strike "*the correct balance between the prevention of impunity and the protection of immunity*".[1199] Delegates again expressed their preferences for[1200] or against[1201] the consideration of aspects related to international criminal jurisdiction and underscored the salience of the topic in the light of the application of the principle of universal jurisdiction[1202]. Further, comments were made on the procedural aspects highlighted by the special rapporteur[1203], often considered a pragmatic way to balance the various goals pursued.

(5) Summing up the debates in the quinquennium 2007-2011, the vehement rejection of the Special Rapporteur's approach by some ILC members did not happen in an equal measure in the 6th Committee.[1204] The question arises whether these different reactions in the two fora reflected to some

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[1198] Statements of the delegates of Niger, *6th Committee, Summary record of the 19th meeting, A/C.6/66/SR.19: 66th session* (2011), para. 43; Islamic Republic of Iran, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27: 66th session* (2011), para 45; Cuba, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 54; India, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 79; Republic of Korea, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28: 66th session* (2011), para. 26; Algeria, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 45.

[1199] Delegate of the United States, see *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 91. As further examples of statements pointing in this direction, see the comments of Poland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 73; Australia, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 1; Canada, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 20.

[1200] This opinion emerges from the statements made by Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 6; Greece, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 32-36; Thailand, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, paras. 46-47; Belgium, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 68.

[1201] In this direction went the comments made by delegates of Switzerland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 14; Peru, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 59.

[1202] See the comments made by the delegates of Switzerland *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 14; Thailand, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 46; Poland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 73; Belarus, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 38-39; United Kingdom, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 11; Algeria, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 44.

[1203] See the statements of the delegates of France, *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20: 66th session* (2011), para. 45; Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 8; Switzerland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 17; Italy, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 41; Peru, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 60; Portugal, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 71; India, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 79; Israel, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 23; Singapore, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 30; Kenya, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 53; Romania, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 66.

[1204] By way of example, unlike several ILC members, not a single delegate put the immunity ratione personae of ministers for foreign affairs into question in 2008. In 2009, there was one contrasting view voiced by the delegate of South Africa, expressing his agreement with the dissenting opinions formulated in the Arrest Warrant case, see *6th Committee, Summary record of the 16th meeting, A/C.6/64/SR.16*, para. 69.

extent a phenomenon described in the 6th Committee as "*an evident divergence of views between States and scholars*" regarding the topic of State official immunity.[1205]

Analysing which States supported which views, a tri-partition emerged. A group of States, especially from the Western Europe and Latin America, showed openness towards emerging trends restricting State official immunity. Another group of states, including the Permanent Members of the Security Council and Germany, gave explicit proof of preferring, for different reasons, a more conservative approach to the topic. In between, numerous countries professed either neutral positions showing no fundamental adversity towards new developments, or defensive positions expressing suspicion towards limitations of immunity. Except for South Africa, the latter position counted among its proponents many African States.

2. The Quinquennium 2012-2016

The start of the Commission's new quinquennium, following the replacement of Mr. Roman Kolodkin (who had not been re-nominated for election by the Russian Federation) by a Spanish special rapporteur, Ms. Concepcion Escobar Hernández, gave the impression of a new beginning – an ascertainment inducing mixed feelings. Mr. Kolodkin had however given the impression he considered his contribution as a Special Rapporteur completed, as he had been unwilling to consider the eventuality of progressive development, refusing to formulate any draft articles.[1206]

Despite some courteous remarks assuring the consideration of Mr. Kolodkin's efforts[1207], and the occasional recall of his conclusions by some delegates[1208], the new beginning resembled a start from scratches[1209]. A double investigation of a topic from two different perspectives is a rare and potentially productive privilege. Nevertheless, the momentum underlying the topic was not the same as in the previous years, in the aftermath of the *Pinochet* and *Arrest Warrant* cases, when the impetus

[1205] See the comment of the delegate of Denmark (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 19th meeting, A/C.6/65/SR.19*, para. 64.

[1206] See the conclusive statement of Mr. Kolodkin in the Commission after the debate in 2011, ILC, *Provisional summary record of the 3115th meeting, A/CN.4/SR.3115: 63rd session* (2011), p. 10.

[1207] See inter alia the remark made by the Chairman of the ILC, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 74.

[1208] Mr. Kolodkin's work was positively referred to by the delegates of Iran ibid., para. 120; Russian Federation, *Sixth Committee, Summary record of the 19th meeting, A/C.6/67/SR.19: 67th session* (2012), para. 93; *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19: 68th session* (2013), para. 43; Israel, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 17; Iran, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 21; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28: 71st session* (2016), para. 30; Criticism of his approach were voiced inter alia by the delegations of Peru, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 10; Singapore, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24: 71st session* (2016); *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27: 71st session* (2016), para. 130; El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 154.

[1209] See for instance the delegate of Ireland, welcoming "the considerable progress that had been made in starting to address the topic over the last year", *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18: 68th session* (2013). Para. 120.

of global debates had been at its peak.[1210] A less controversial approach than the one of Mr. Kolodkin would however have offered the opportunity of speeding up works.

(1) Reflecting the introductory nature of the Ms. Escobar Hernández' first report, the comments made by delegates in 2012 were of general nature. The importance of the topic and the need for clarification for the sake of legal certainty in an issue causing tension was frequently invoked.[1211] Many comments revolved around the approach suggested by Ms. Escobar Hernández, characterized by herself as systematic-deductive.[1212] Fears of controversy inside and outside the ILC emerged in the frequent references to division and the need for consensus.[1213] Acknowledging these fears and the need of a cautious, consensus-oriented approach, Ms. Escobar Hernández nevertheless felt reassured in her approach after the debate.[1214]

(2) The debates in 2013 revolved mainly around the latest suggestions of Ms. Escobar Hernández and the responses in the plenary regarding the scope of the topic and the immunity *ratione personae* of the highest-ranking State officials. The comments on the scope of the topic, which had not changed under the new Special Rapporteur, were appreciative.[1215] Delegations reaffirmed their interest in practical solutions and clarification rather than in theoretical foundations.[1216] Ms. Escobar Hernández declared to have captured this signal.[1217]

Regarding immunity *ratione personae*, the debate reflected the widely perceived need to extensively protect the highest-ranking officials of the State through immunity *ratione personae*. One central complexity coming with the Special Rapporteur's step-by-step approach emerged. Re-beginning the elaboration of the topic with less controversial issues to move gradually on towards the pivotal issue of limitations and exceptions appeared as being justified by pragmatic reasons. However, this

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[1210] Speaking of this lack of momentum, see for instance the comments of the Russian Federation, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 12; again the Russian Federation referred to the "legislative limitations" introduced by two pioneer States as Belgium and Spain, *Sixth Committee, Summary record of the 19th meeting, A/C.6/67/SR.19*, para. 94.

[1211] See the statements of the delegates of Chile, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, paras. 118, 121-123; Ireland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 44; Netherlands, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 50; South Africa, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, paras. 121, 123; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para 50; New Zealand, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 59; Cuba, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 86.

[1212] *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 28; explicitly approved by Chile, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 119; Republic of Korea, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 15; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 49; Viet Nam *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 13.

[1213] Canada, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 105; Republic of the Congo, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 59; Thailand, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 63; Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 87; Iran, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 59, 63.

[1214] *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, paras. 28-29.

[1215] See for instance the comments of the delegates of the United States of America, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, paras. 46-47; Singapore, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 75; Hungary, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 62; Germany, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 71; Chile, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 81; Czech Republic, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 99.

[1216] See for instance the comment of the delegate of China, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 57.

[1217] Statement of Ms. Escobar Hernández, ibid., para. 86.

meant that many delegates underlined the provisional nature of their comments, as they felt that issues like the extent of immunity *ratione personae* could not be comprehensively evaluated without a concomitant investigation of the issues of immunity *ratione materiae* and exceptions to immunity.[1218] This eager expectancy of elucidations on the proposals regarding exceptions[1219] was characteristic of the debates not only in 2013, but in the following sessions likewise.

(3) The discussions in the 69th session in 2014 revolved mainly around the issue of the subjective scope of immunity *ratione materiae* - who is (not) entitled to this kind of immunity, and who should (not) be? The ILC had provisionally adopted two draft articles dealing with these issues. Consideration of the material and temporal scope of immunity *ratione materiae* was postponed to a later moment.[1220] The definition of "State official" was said to cover individuals representing the State or exercising State functions, including the troika.[1221] Delegates considered the issues at stake to be less controversial than those discussed in previous sessions[1222], resulting in generally less critical statements. Most delegations agreed with the proposal to define the concept of State official, although some delegates raised doubts about whether such an exercise was necessary or fruitful.[1223] The ILC requested States to "*provide information,* […] *on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction*".[1224] In response, 10 States, the majority of which belonged to the WEOG-group, submitted written comments.[1225]

(4) The 70th session was characterized by a relatively uncontroversial debate. The issues under investigation were the temporal and material scope of immunity *ratione materiae*, whose essence was contained in two draft articles, most prominently defining "acts performed in an official capacity". The climate was dominated by the expectation of the next report, announced to deal with the most

[1218] For comments highlighting this problem and invoking the urgent elaboration of these issues, see inter alia the statements of the delegates of Norway (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 35; Switzerland, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 60; Portugal, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 93; Netherlands, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 33; South Africa, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 49; Germany, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 73; Greece, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 98; Republic of Korea, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 109; Romania, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 115; Poland, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 14.

[1219] The Special Rapporteur was extremely prudent on this issue, claiming that "the draft articles adopted thus far did not put forward any position on the issue of limits and exceptions to immunity", see *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 91.

[1220] Statement of the Chairman of the ILC, *Sixth Committee, Summary record of the 21st meeting, A/C.6/69/SR.21: 69th session* (2014), para. 101.

[1221] Statement of the Chair of the ILC, ibid., paras 104-105.

[1222] This point was explicated inter alia by the delegate of the Czech Republic, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23: 69th session* (2014), para. 44.

[1223] See inter alia the critical comments of the delegates of the United Kingdom, ibid., para. 34; Singapore, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 66.

[1224] *Report of the International Law Commission, A/68/10: 65th session* (6 May-7 June and 2013), para. 25.

[1225] These States were Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland, and the United States of America, see C. Escobar Hernández, *Third report on the immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/673 (2014), FN 13.

sensitive issue of exceptions to immunity.[1226] The ILC requested States to report on their national legislation and caselaw regarding "*(a) the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction; and (b) any exceptions to immunity of State officials from foreign criminal jurisdiction.*"[1227] 10 States, most of them from the WEOG, responded to this request.[1228] Several delegates pre-emptively underlined the need to carefully distinguish between what should not be covered by the scope of State official immunity, and what should constitute an exception.[1229]

(5) During the 71st session in 2016, the discussion finally moved on to the issue the delegations were most intrigued by: the limitations and exceptions to State official immunity. The tone of the debate changed, becoming generally less consensual. However, the issues which had set back the ILC debates also inhibited the exchange of views in the 6th Committee: as the ILC had not fully reviewed the Special Rapporteur's fifth report, available in only two of the six working languages at the time of consideration[1230], the debate in the 6th Committee was of a provisional nature. This was explicitly underlined by delegations[1231], although delegates often did not refrain from vigorously formulating their views. 7 States had submitted written replies to the ILC's renewed request to provide "*information on their legislation and practice, in particular judicial practice, related to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction*".[1232]

Formulated in the proposed Draft Article 7, the ILC's conclusion on exceptions to immunity *ratione personae* was that the analysis of practice allowed neither for the identification of a rule of customary law constituting limitations or exceptions to such immunity, nor was a trend in this direction discernible. On the contrary, limitations and exceptions would exist in the context of immunity *ratione materiae*, namely in case of international crimes, crimes that caused harm to persons or property in

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[1226] Instead of many, see the statements of the delegates of the United States of America, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 72; Israel, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 80; Ireland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 86.

[1227] *Report of the International Law Commission, doc. A/69/10: 66th session* (5 May–6 June and 2014), para. 28.

[1228] Some of these States had already provided information on their practice before (the Czech Republic, Germany, Switzerland and the United Kingdom), whilst other reported their practice for the first time in the context of the topic (Austria, Cuba, Finland, France, Peru and Spain).

[1229] Comments on this issue were made by the delegates of France, *Sixth Committee, Summary record of the 20th meeting, A/C.6/70/SR.20: 70th session* (2015), para. 23; Norway, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 110; Greece, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 6; Romania, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 53; Austria, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 72; Portugal, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 82; Switzerland, para. 100.

[1230] See the statement of the Chairman of the ILC, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 64. Heavy criticism was expressed by the delegates of France *Sixth Committee, Summary record of the 20th meeting, A/C.6/71/SR.20: 71st session* (2016), para. 80; and of the Russian Federation, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 9

[1231] For comments explicating this provisional nature, see inter alia the statements of the delegates of the United Kingdom *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para 27; Portugal, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 34; Slovenia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29: 71st session* (2016), para. 56; Ireland, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 82; Sri Lanka, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30: 71st session* (2016), para. 30 ; India, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 16.

[1232] 5 of these States were from the WEOG (Australia, Austria, Netherlands, Spain and Switzerland), whilst 2 belonged to the GRULAC (Paraguay and Peru), see Escobar Hernández, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, para. 8 and *Report of the International Law Commission, A/70/10: 67thsession*, Seventieth Session, Supplement No. 10 (4 May-5 June and 2015), para. 29.

the territory of the forum State, and corruption-related crimes. Many comments made in the ILC in the 2016 sessions had underlined the disagreement on this approach to limitations and exceptions both within the ILC and among States.[1233] This profound division was noted with concern by several delegations.[1234] Reflecting the sensitiveness of the issue of exceptions, the proposals resulted in polarisation. Some States expressed their full support for the suggested draft article 7.[1235] Others voiced their concerns in unprecedented blunt sharpness.[1236]

(6) Summing up the events in the 6th Committee around the topic of State official immunity in the quinquennium 2012-2016, the tripartition with regard to the positions of Ms. Escobar Hernández re-emerged in the views of the delegates: a group of staunch supporters of her proposals, another one of determined opponents, and a middle group of delegations expressing prudent, intermediate views.

3. The Quinquennium 2017-2021

(1) The controversial debate in the Commission regarding Ms. Escobar Hernández' Fifth Report and the adoption of draft article 7 by majority vote triggered the vivid reaction of a great number of States in the 72nd session in 2017. The polarisation that had emerged in the previous year persisted. Whilst some delegations formulated their pronounced support for the take on the issue of exceptions and limitations contained in draft article 7[1237], several others expressed their unequivocal disapproval. On the one hand, many delegates disagreed with the legal assessment underlying draft article 7[1238], on the other hand, their discontent regarded the way the Commission had handled the prerogatives implied in its mandate[1239].

The emerging overall picture was one of deep division and growing concerns about the way the efforts on the topic of State official immunity were developing. Besides the frequent invocation of

[1233] Compare the statement of the Chairman of the ILC, GAOR 2016b, para. 65.

[1234] This aspect was highlighted inter alia by the delegates of the United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 27; Portugal, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 34; Netherlands, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 5; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 19.

[1235] Strong support for the Special Rapporteur's approach and positions transpired from the comments made by the delegates of Chile, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 102; Norway (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, paras. 95-97; El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, paras. 151-153; Portugal, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 34; Slovenia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 55; Mexico, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 77; Mongolia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 97.

[1236] See instead of many the comment of the delegate of the Russian Federation, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, in particular para. 10.

[1237] Cfr. Greece, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 76; Portugal, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22: 72nd session* (2017), para. 81.

[1238] See inter alia the positions of the United Kingdom, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24: 72nd session* (2017), paras. 57-59; Germany, GAOR, 'Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24' (n 232), para. 96.

[1239] See inter alia Russian Federation, *Sixth Committee, Summary record of the 19th meeting, A/C.6/72/SR.19: 72nd session* (2017), para. 38; United States, *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21: 72nd session* (2017).

the clearest possible distinction of codification and progressive development[1240], the Commission was urged by many delegations to strive for consensus[1241]. As a possible solution to overcome the polarisation through a satisfactory balancing of the various priorities at stake, the elaboration of adequate procedural safeguards against the risk of arbitrary, politically motivated foreign prosecution was indicated by numerous delegations.[1242]

(2) The debates held in 2018 during the General Assembly's 73rd session had not yet been published at the time this study was concluded. On the agenda was the Sixth Report of Ms. Escobar Hernández, covering general issues relating to the procedural aspects of State official immunity. The delicate issue of procedural safeguards, whose importance had unambiguously emerged during the debates on limitations and exceptions to State official immunity, were indicated by the Special Rapporteur to be dealt with in a Seventh Report, to be discussed in 2019. The adoption of the draft articles in first reading in the ILC is scheduled for 2019 as well, foreshadowing another lively debate in the 6th Committee in the 74th session.

II. Positions on State Official Immunity in the 6th Committee

The content of the statements in the 6th Committee mirrored the contrasting positions voiced by the Special Rapporteurs and in the plenary. Comments regarded the general approaches to the topic, the latter's boundaries and sources to be considered (1.); issues relating to the scope (2.) and to exceptions to the scope of State official immunities (3.), as well as procedural aspects (4.).

1. Approaches, Boundaries of the Topic and Legal Sources

The topic of State official immunity confronted the ILC and States with several fundamental issues connected to the principle of sovereignty.

a. Approaches and Boundaries

Against this backdrop, the principal expectation voiced by delegates was that the ILC should prioritize practical guidance and legal certainty over delicate and ultimately insoluble moral and theoretical conflicts.[1243] Most delegates expressed the view that the highly contentious and intricate problem of recognition should be excluded from the topic.[1244] Views were divided over whether

[1240] Inter alia, Spain, *Sixth Committee, Summary record of the 20th meeting, A/C.6/72/SR.20: 72nd session* (2017), para. 11; France, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 43.

[1241] Cfr. China, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 56; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 45.

[1242] See for instance the comments of the delegates of Japan, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 128; Mexico, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 96.

[1243] For a straightforward formulation of this need, see the Statement of the delegate of Switzerland, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 17.

[1244] See for instance the statements of the delegates of Austria, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 16; China, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 34; United Kingdom; *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 67; Czech Republic, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 10; A different opinion was voiced by the delegates of Malaysia, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 75; Iran, *6th Committee,*

issues relating to universal jurisdiction[1245] and international criminal jurisdiction should be investigated[1246] or not[1247]. The limited interest delegates had in underlying theoretical issues found expression in their approval of Ms. Escobar Hernández' circumvention of the complex theoretical distinction between limitations and exceptions.[1248]

Whilst most statements revolved around the perspective of the official's State and the respect for its peculiarities when determining official acts[1249], attention for the situation of the receiving State and the restrictions imposed on its sovereign right to exercise jurisdiction was as well claimed[1250]. Some delegates contextualized the issues within concepts like the "*growing prominence of legal humanism*"[1251], the "*need to recognize the dignity of the individual within the international system*"[1252] or the "*process of humanization of international law*"[1253]. Other statements reflecting the general perspectives of States focused on the feared contribution of the ILC's works to fragmentation[1254], the idea of States being

Summary record of the 24th meeting, A/C.6/63/SR.24, para 45; Argentina, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 68.

[1245] See the statements of France, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19: 63rd session* (2008), para. 14; the Netherlands, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19*, para. 63.

[1246] In favour of dealing with the issue spoke the delegates of the Netherlands, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19*, para. 64; Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, paras. 4-5; Spain, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 38; Poland, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 57. Some delegates invoked the aspiration of achieving consistency with the Rome Statute, see the comments of Norway, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 109; Slovenia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 43.

[1247] Against including issues of international criminal jurisdiction from the topic spoke the delegates of France, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19*, para. 13; India, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para, 18; Republic of Korea, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 25; China, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 35; Malaysia, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 71; Switzerland; *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 14; Islamic Republic of Iran *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 45; Israel, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 72; Portugal, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24: 63rd session* (2008), para. 7; Sudan, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 16.

[1248] She opted for the terminology "*crimes in respect of which immunity does not apply*". See the approval of the delegate of Norway, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 96, and the explicit choice of the Austrian delegate not to comment on issues of theory, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 110.

[1249] Inter alia, this concern was underlined by the delegates of China, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22: 70th session* (2015), para. 71, Italy, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22*, para. 122; Cuba, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 12; Netherlands, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 32; Israel, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 79.

[1250] See the comments made by the delegation of Japan, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 37-38.

[1251] This words were used by the delegate of Slovenia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 43.

[1252] See the comment of the delegate of Portugal, ibid., para. 81.

[1253] On this point, compare the statement of the delegate of Chile, ibid., para. 104.

[1254] This worry was expressed by the delegate of Denmark (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22: 69th session* (2014), para. 14.

under a duty to prosecute certain crimes or waive their official's immunity[1255] and the concept that State official immunity could be concomitantly broad but regulated through exceptions[1256].

In the view of some delegations, the concept of the "values of the international community" introduced by the Ms. Escobar Hernández could play a significant role in the elaboration of the topic.[1257] Whilst some delegations considered these values an adequate paradigm to achieve progress[1258], others were unconvinced[1259]. Agreement on universal values or on appropriate paths towards their enactment was far, as views on these values might differ in different regions of the world.[1260]

In the quinquennium 2007-2011, a crucial question was the focus of delegates on either the codification of *lex lata* and or the progressive development of *lex ferenda*. Some delegations spoke up for an approach based primarily on progressive development. They underlined the overestimation and unreliability of the non-uniform State practice, and the dangers of being overtaken by the constantly evolving ways of handling immunities in practice.[1261] Others supported codification and *lex lata* along two lines. Some focused straightforwardly on immunity's beneficial effects, on the principles of sovereignty and non-interference and on the stability of international relations, declaring unrestricted immunities to constitute the codifiable *lex lata*.[1262] Others adopted a different argumentation: without denying possible undesirable outcomes, they affirmed that immunity could not be equated to impunity, that caution was required with limiting a crucial tool, and that national law-appliers needed legal certainty and clear guidelines.[1263]

[1255] This obligation was posited by the delegate of Portugal, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24: 69th session* (2014), para. 77; in the context of treaty-based obligations, similar ideas were expressed by South Africa, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 17.

[1256] See the statement of the delegate of the United States, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 67-68.

[1257] Describing the topic in this terms: Republic of Korea, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25: 69th session* (2014), para. 30.

[1258] Chile, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 119; Republic of the Congo, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 63; El Salvador, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 67; Portugal, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 81; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 49; and Sudan, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 6.

[1259] Belarus, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 28; Germany, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 2; Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 96.

[1260] This concern was for instance highlighted by the delegation of Thailand, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 63.

[1261] See for example the statement of the delegate of Portugal: "*The compilation of State practice, while a relevant legal tool and a way for the Commission to protect its work from the sometimes conservative views of States, should not be overrated as a working method or prevent the Commission from making new and daring proposals; States should, moreover, release it from that concern.*", *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20*, para. 27; see further the statements made by the delegates of Mexico, *6th Committee, Summary record of the 18th meeting, A/C.6/66/SR.18: 66th session* (2011), para. 52; Austria, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 77; Portugal, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 74; Netherlands, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 57.

[1262] In this direction went the statements of the delegates of China, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 12; Islamic Republic of Iran, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 45; Russian Federation, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 67; Israel, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 22.

[1263] A similar approach emerged from the statements of the delegates of France, *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20*, para. 43; Thailand, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*,

Most delegates expressed their preference for an approach combining *lex lata* and *lex ferenda*[1264], at times endorsing a two-step model, with codification preceding progressive development, where possible neatly distinguishing the two exercises [1265]. As the quinquennium 2012-2016 began, some delegates explicitly welcomed Ms. Escobar Hernández' step-by-step approach.[1266] Several delegations expressed their support for her declaredly functional take[1267] on State official immunity to adequately limit the latter's scope.[1268] Other delegations did not hide their scepticism and recalled the necessity of a solid basis of State practice as a starting point.[1269] Contributing to this picture of division, the efforts of Mr. Kolodkin were recalled with appreciation by some[1270], with disapproval

paras. 44-45; Germany, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 85; United Kingdom, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 11; Republic of Korea, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 26.

[1264] See the statement of the delegates of Peru, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 58; Poland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 73; Portugal, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 70; New Zealand, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 86.

[1265] This approach was suggested by the delegates of Hungary, *6th Committee, Summary record of the 19th meeting, A/C.6/66/SR.19*, para. 55; Switzerland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 16; Belgium, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 66; Austria, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 77; Sri Lanka, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 23; Belarus, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 38; Malaysia, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 6, Singapore, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 28. Some delegations raised the question whether the exercises actually could or should be distinguished, see the statements of the delegates of Peru, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 58; Japan, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 34.

[1266] See the comments of the delegates of Peru, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 10; Switzerland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 37; *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 44.

[1267] Compare Ms. Escobar Hernández, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 29.

[1268] Norway (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 97; Peru, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, paras. 11, 13; El Salvador, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 67; Portugal, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 80; Belgium, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 45.

[1269] This conviction was underlined by the delegates of Austria, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 110; Germany, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 1; Belarus, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, paras. 25-26; China, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 75; Jamaica, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 2; India, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 12; Thailand, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 63; Algeria, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 69; Cuba, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 86; Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 97; Israel, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 17; Islamic Republic of Iran, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 21.

[1270] Invoking in particular Mr. Kolodkin's views on procedural issues, see the delegate of the United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 30.

by others[1271]. Although numerous delegations greeted Ms. Escobar Hernández' intention to formulate draft articles[1272], it was considered premature to deliberate what the outcome should be[1273].

b. Principal Legal Sources of State Official Immunity

Delegates advocating strong immunities often approved of the majority position in the *Arrest Warrant* case.[1274] Delegates favouring exceptions recurred in their argumentations rather to the dissenting opinions expressed in the *Arrest Warrant* case, the *Pinochet* case, the decisions of the Nürnberg and Tokyo tribunals, or the resolutions of the Institute of International Law on immunities in 2001 and 2009.[1275] The case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* was frequently cited with approval. Delegates expressing intermediate views referred to the latter judgment as a clarification and a possible mitigation of the controversial views formulated in the *Arrest Warrant* decision.[1276]

[1271] Critical comments on the efforts of Mr. Kolodkin were made by the delegates of Singapore, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 130, and El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 153.

[1272] See the statements of the delegates of Chile, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 124; Republic of the Congo, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 63; Portugal, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 85; Romania, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 113; South Africa, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 123; New Zealand, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*; *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 60; Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 93; Viet Nam, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 13. Unconvinced was the delegation of Spain, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 75.

[1273] The issue was touched upon by the delegates of Chile, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 124; Republic of the Congo, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 63; Spain, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 75; Russian Federation, Russian Federation, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 93; Israel, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 17.

[1274] See for instance the statements of the delegates of France, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19*, para. 14; India, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 18; Republic of Korea, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 25; United Kingdom, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 65; Malaysia, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 71; Australia, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 18; Islamic Republic of Iran, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 45; Israel, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 72; Jamaica, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 78; Russian Federation, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 2. The judgment was further cited as expressing *lex lata* by the delegates of Hungary, *6th Committee, Summary record of the 19th meeting, A/C.6/66/SR.19*, para. 56; Thailand, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 47; Russian Federation, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 66; Israel, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 22; Republic of Korea, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 26.

[1275] See for instance the statements of the delegates of Norway (speaking on behalf of the Nordic countries), paras. 5; 7; Greece, para. 31; Italy, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 40; Belgium, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 68-69.

[1276] This was the position emerging from the statements of the delegates of Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 8; Greece, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 35.

A recurring issue was the need to give more consideration to legal systems and cultures outside the dominant North American and European legal traditions.[1277] To contrast the feared prevalence of views voiced in States dominating the international legal order, numerous States responded extensively in their statements to the ILC's invitation to report national practice.[1278]

Delegates highlighted their doubts regarding the legal rules to be applied and their effects. Recurrently, uncertainty reigned with regard to the effects of State official immunity unilaterally conferred by national law[1279], the hierarchy between different regimes of State official immunity[1280], and the relationship between international criminal jurisdiction and State official immunity, for instance if States acted to fulfil their obligations under the Rome Statute[1281]. This uncertainty might be the result of a lack of domestic jurisprudence.[1282] The readings of the perceived lack of domestic case law were contradictory. The question was raised whether the absence of national practice constituted a well-established practice itself, rather than a challenge in the identification of customary international law.[1283] Some delegates understood this lack to signal a widespread State practice in favour of immunities, as these were often accorded *in limine litis* before an actual case can arise.[1284] Others interpreted this lack as an expression of impunity: exactly because of this lack, international criminal courts and tribunals were created to fill the gap.[1285]

[1277] This problem was raised by the delegates of Jamaica, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22*, para. 30; Viet Nam, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 44; Mexico, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 104.

[1278] Hungary, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, paras. 53-54; Canada, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 106; Switzerland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 36; Ireland, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 43; Netherlands, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, paras. 51-53; South Africa, *Sixth Committee, Summary record of the 21st meeting, A/C.6/67/SR.21*, para. 122; Jamaica, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 4; United Kingdom, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, paras. 28-33; Cuba, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/67/SR.22*, para. 86; Japan, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/67/SR.23*, para. 1.

[1279] Delegates of Switzerland, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 57; Spain, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 142; Thailand, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 26; Cuba, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 29; Malaysia, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 36.

[1280] On this problem: Switzerland, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 57; Austria, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 69; Singapore, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 76; Czech Republic, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 99.

[1281] Invoking clarification: Austria, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 68; Netherlands, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 32; Hungary, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 62; Chile, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 86; Romania, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 115.

[1282] This problem was raised inter alia by the delegates of the United States, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 44; United Kingdom, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 19; Poland, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 15; Thailand, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 25.

[1283] See for instance the comment of the delegate of Norway (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 34.

[1284] This was the argumentation made by the delegates of Germany, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 14, and Israel, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 103.

[1285] This different perspective was advanced by the delegate of El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 153.

2. Issues Relating to the Scope of State Official Immunity

The issues touched upon by the majority of statements in the 6th Committee were the same that had caused controversy in the ILC: the personal scope of immunity *ratione personae*, considered by some to be limited to the troika, by others to include other high-ranking officials (a.); the personal scope of immunity *ratione materiae* (b.); and the adequate understanding of the concept of "act performed in an official capacity" (c.). In general, most delegates intervening expressed their preference for more flexible definitions or broader categories (especially regarding the beneficiaries of immunity *ratione personae*) than those suggested.

a. The Personal Scope of Immunity *Ratione Personae*

The positions regarding the officeholders enjoying immunity *ratione personae* were polarized. Significantly, no delegation supported the claim made by a dissenting judge in the ICJ[1286] that ministers for foreign affairs did not enjoy immunity *ratione personae*. On the contrary, one of the delegations in the 6th Committee most sceptical of broad State official immunity, South Africa, explicitly affirmed it did not want its position to be understood as fundamental opposition to the immunity *ratione personae* of foreign ministers, but rather as a call for greater clarification.[1287] In general, the debate reflected the widely perceived need to extensively protect the highest-ranking officials of the State. Many delegations voiced their support[1288] for the eventuality that the category of officials enjoying immunity *ratione personae* could be extended beyond the troika, as seemed to have been

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[1286] Dissenting opinion of Judge van den Wyngaert *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paras. 11-23.

[1287] Africa, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 50.

[1288] For positions of this kind, see the statements of the delegates of Algeria, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 44; Argentina, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 66; Belarus, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 9; China, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 33, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para, 9, and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 59; Chile, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 84; El Salvador, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 54; France, *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20*, para. 44 and France, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, paras. 115-116; Germany, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 71; Ireland, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 122; Israel, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 72, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 22 and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 42; Jamaica, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 78; Kenya, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 52; Poland, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 15; India, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 79 and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 20; Islamic Republic of Iran, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, paras. 75-76; Romania, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, 65; Russian Federation, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 2, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 66 and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, paras. 48-50; Singapore, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 77; Sri Lanka, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 24; Sudan, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 15; United Kingdom, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 66, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 10 and *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 20.

suggested by the ICJ in the *Arrest Warrant* case[1289]. Some delegations did not express a clear preference or showed neutral curiosity about the current *status quo* and potential developments.[1290] A minority of delegates explicitly opposed an extension of the category.[1291]

b. The Personal Scope of Immunity *Ratione Materiae*

Not all delegates were convinced of the fruitfulness of defining the concept of "State official" in the context of immunity *ratione materiae*. Among those supportive of a definition, greater clarity and precision, less vagueness and ambiguity were frequently demanded.[1292] The suggested definition was considered by many to be very general[1293] - for some inevitably open[1294], for others excessively broad[1295]. Many comments focused on the relationship between officials and their State[1296], and the

[1289] Arrest Warrant of 1 I April2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, I.C.J. Reports 2002, para. 51.

[1290] Cfr. Australia, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 18; Japan, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 44 and *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 35; New Zealand, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 87; Portugal, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 7; Singapore, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 29.

[1291] See the statements of Austria, *Sixth Committee, Summary record of the 20th meeting, A/C.6/67/SR.20*, para. 110 Belgium, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 66; Czech Republic, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 7 and *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 100; Greece, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18* para. 97; Indonesia, *6th Committee, Summary record of the 24th meeting, A/C.6/66/SR.24: 66th session* (2011), para. 72; and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 67; Italy, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 9; Republic of Korea, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 108; Malaysia, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 74; and *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 38; Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 3; Spain, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 33; Switzerland, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 15 and *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 59; Netherlands, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 58.

[1292] Going in this direction, see the comments of the delegates of Austria, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22*, para. 23; United Kingdom, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 34; Viet Nam, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25*, para. 19; Spain, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 26; Netherlands, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 48; Malaysia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 32; United States, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 68.

[1293] Underscoring this characteristic of the provisionally adopted definition, see inter alia the comments of the delegates of the United Kingdom, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 34; Switzerland, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 45; China, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 52; Slovakia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para, 87; Spain, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 26; United States, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 68; Islamic Republic of Iran, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 84.

[1294] Given the differences in constitutional systems of States, this idea was expressed by the Republic of Korea, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25*, para. 31.

[1295] This was the position expressed by the delegates of Germany, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 40; Netherlands, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 48; Palau, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 44, Viet Nam, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25*, para. 19.

[1296] Comments on this issue were made by the delegates of Denmark (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22*, para. 15; Italy, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22*, para. 48; Czech Republic, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 44; South Africa, paras. 15-18; Spain, *Sixth Committee, Summary record of the 24th meeting,*

necessary differentiation between the official and the act[1297]. By some delegates, the latter issue was considered somehow secondary, as the focal point of immunity *ratione materiae* should be the official act, rather than the performing official.[1298] In general, the suggested case-by-case approach was preferred over a list of categories of officials enjoying immunity *ratione materiae*.[1299]

c. The Material Scope of Immunity *Ratione Materiae*

The definition of acts performed in an official capacity suggested by Ms. Escobar Hernández was characterized by three elements: the (potentially) criminal nature of the act, its attribution to the State and its link to sovereignty and the exercise of elements of governmental authority.[1300] As in the ILC plenary, the first element was criticized by most delegates[1301] as confusing – giving the impression that all official acts are criminal by nature[1302] – and inconsistent with the principle that immunity operates in *limine litis*, before the lawfulness of the act is evaluated[1303]. The issue of attributability to the State triggered several comments on the relationship between State responsibility

A/C.6/69/SR.24, para. 26; Chile, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 49; Portugal, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 77; Algeria, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25*, India, *Sixth Committee, Summary record of the 26th meeting, A/C.6/69/SR.26: 69th session* (2014), para. 114; Indonesia, *Sixth Committee, Summary record of the 27th meeting, A/C.6/69/SR.27: 69th session* (2014), para. 63.

[1297] This aspect was commented on by France, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22*, para. 28; Spain, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 26; Greece, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, paras 91-93; Algeria, *Sixth Committee, Summary record of the 25th meeting, A/C.6/69/SR.25*, paras. 4-5.

[1298] This opinion was voiced by the delegates of Singapore, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 66; Israel, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 83; Thailand, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 57.

[1299] For exemplar expressions of this preference, see the statements of Belarus, *Sixth Committee, Summary record of the 21st meeting, A/C.6/69/SR.21*, para. 125; Romania, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/69/SR.22*, para. 46; China, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/69/SR.23*, para. 52; South Africa, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 13; Spain, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 27; Thailand, *Sixth Committee, Summary record of the 24th meeting, A/C.6/69/SR.24*, para. 57; India, *Sixth Committee, Summary record of the 26th meeting, A/C.6/69/SR.26*, para. 114; Indonesia, *Sixth Committee, Summary record of the 27th meeting, A/C.6/69/SR.27*, para. 63.

[1300] See the statement of the Chairman of the ILC, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 89.

[1301] See the statements of Belarus, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 18; Slovenia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 42; Romania, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 54; Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 64; Croatia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 90; EL Salvador, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 99; Viet Nam, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 43; Ireland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 86; Spain, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 110.

[1302] See instead of many the statement of the delegate of Singapore, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 126.

[1303] This view was expressed very clearly in particular by the delegates of Chile, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 103; Mexico, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 105; Russian Federation, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, paras. 119-120.

and individual accountability.[1304] Most delegates expressed approval of a "one act-dual responsibility"-model, underlining however that not all acts performed in an official capacity are *acta jure imperii* for the sake of State responsibility[1305], and that the model does not solve the issue of jurisdiction[1306].

The difficulties of determining unambiguously what constituted an act performed in an official capacity were acknowledged[1307], resulting in a clear majority of delegates expressing their preference for a broad, open-ended and flexible definition based on a case-by-case approach[1308], eventually to be completed by a non-exhaustive, exemplar list[1309]. However, the risks of an overly broad definition were highlighted as well[1310], invoking limitations and exceptions as a counterweight. In this respect, clarifications regarding the meaning of "acting within the limits of State authority" were repeatedly demanded, above all in relation to the inclusion in the scope of immunity *ratione materiae* of acts such as international crimes, ultra vires acts, *acta jure gestionis* or the acts of contractors and *de facto* officials.[1311]

[1304] See inter alia the statements of the delegates of Romania, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 54; Croatia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 92; El Salvador, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 100; Mexico, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 106.

[1305] On this aspect, see the statements of the delegations of Italy, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22*, para. 121; Singapore, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 127; Greece, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 5; Austria, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 72; Ireland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 86; Russian Federation, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 119.

[1306] This point was highlighted by the delegate of the Netherlands, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 34.

[1307] This view was voiced by the delegates of Israel, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 79; Kazakhstan, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 116.

[1308] See in particular the statements of the delegations of China, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22*, para. 71; Indonesia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 31; Greece, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 5; Romania, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 54; United States, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 69; Ireland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 85.

[1309] This idea was advanced by the delegate of Mexico, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 105.

[1310] On this issue, see in particular the statements of the delegate of Switzerland, ibid., paras. 99-100; for similar thoughts, see furthermore the statements of the delegates of Slovenia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 42; Austria, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 72; Japan, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, paras. 33-34; Republic of Korea, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 83; Ireland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 85.

[1311] See the comments made by the delegates of China, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/70/SR.22*, para. 72; Singapore *Sixth Committee, Summary record of the 23rd meeting, A/C.6/70/SR.23*, para. 127; Netherlands, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 33; Czech Republic, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 47; Portugal, *Sixth Committee, Summary record of the 24th meeting, A/C.6/70/SR.24*, para. 82; Croatia, para. 92; Islamic Republic of Iran, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 12; Japan, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 35-36; Switzerland, *Sixth Committee, Summary record of the 25th meeting, A/C.6/70/SR.25*, para. 100.

3. Limitations and Exceptions to State Official Immunity

The limitations and exceptions to State official immunity from foreign criminal jurisdiction were the thorniest issue to be touched upon in the context of the topic. The urgency of providing answers on eventual exceptions to immunities, particularly in the context of international crimes, was frequently invoked from the beginning of the works on the topic[1312], without however initially allowing to discern a clear trend in the preferences of States. In 2008, no delegation focused exclusively on the need to fight impunity and to ensure individual accountability. Conversely, some delegates limited their analysis to the defence of the principles of sovereign equality and non-interference, and on the need to preserve the stability of international relations, highlighting alternative ways to assure criminal accountability.[1313] Most delegates declared to favour an adequate balance of the two principles.[1314]

The question whether immunity *ratione personae* was subject to limitations and exceptions was one of the issues reviewed. As Mr. Kolodkin's views were discussed, several delegates affirmed the principle that, in the context of the most serious crimes, officials should be held responsible regardless of their rank was a well-affirmed principle.[1315] Commenting on Ms. Escobar Hernández' elaborations of the scope of immunity *ratione personae*, some delegations highlighted the desirability of subjecting even this kind of immunity to exceptions[1316], intimating that exceptions would not

[1312] See the statements of the Netherlands, *6th Committee, Summary record of the 19th meeting, A/C.6/63/SR.19*, para. 63; Austria, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 17; China, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 35 (warning against the risks of exceptions); Japan, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 44; El Salvador, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 54; Malaysia, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 76 (making a statement in favour of exceptions); Czech Republic (prudently in favour of exceptions), *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, 8-9; New Zealand (apparently in favour of exceptions), *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 12; Poland, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 57; Russian Federation, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 2.

[1313] In this sense, see the statements of the delegates of China, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 32; Islamic Republic of Iran, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 44; Israel, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 72; Russian Federation, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 2; Sudan, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 14.

[1314] See for instance the statements made by the delegates of Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 6; Japan, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 44; United States of America, *6th Committee, Summary record of the 23rd meeting, A/C.6/63/SR.23*, para. 87; New Zealand, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 12; Australia, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 18; Jamaica, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 78; Portugal, *6th Committee, Summary record of the 24th meeting, A/C.6/63/SR.24*, para. 7.

[1315] This idea was argued by the delegates of Greece, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 31-35; Italy, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 39; Belgium (affirming that in case of international crimes, lex lata immunity was excluded), *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 67; Singapore, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 30.

[1316] Voicing the view that immunity *ratione personae* could be subjected to limitations: Portugal, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 93; Greece, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 98; Republic of Korea, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 109; Romania, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 115; Italy, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 9; Malaysia, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 39.

have to be confined to immunity *ratione materiae*[1317]. Nevertheless, most States considered immunity *ratione personae* not to know exceptions *lex lata*.[1318] Even delegations with a positive attitude towards exceptions mainly affirmed that immunity *ratione personae* should *de lege ferenda* not be affected.[1319]

Conversely, in the context of immunity *ratione materiae*, several delegations were positively predisposed towards reviewing the latter's extent, in particular in cases of international crimes. The intention to increase the likeliness of prosecuting such crimes found wide support.[1320] Some delegates highlighted the importance of the rights of victims.[1321] Over the years, many delegates continued to urge the Commission and other States not to disregard tendencies to reduce State official immunity in the name of the fight against impunity.[1322]

The proposed draft article 7 triggered comments by many delegations affirming a clear trend towards restricting immunity *ratione materiae*, an evolution they deemed desirable. A handful of delegates considered immunity *ratione materiae* to already be subject to exceptions under positive law.[1323] The general openness towards the idea of countering impunity did however with regard to most delegations not translate into a general conviction that limitations and exceptions were an expres-

[1317] See statements of the delegates of Mexico, *6th Committee, Summary record of the 18th meeting, A/C.6/66/SR.18*, para. 53; Norway (speaking on behalf of the Nordic countries), *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 4; Belgium, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 70.

[1318] Austria, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 80 and *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 115; China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 92; Hungary, *6th Committee, Summary record of the 19th meeting, A/C.6/66/SR.19*, para. 56; Indonesia, *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20*, para. 72; Mexico, *6th Committee, Summary record of the 18th meeting, A/C.6/66/SR.18*, para. 54; Netherlands, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 59 and *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 7; Romania, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 22; Slovenia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 55; Spain, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 46; United Kingdom, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 10 and *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 28.

[1319] See the affirmations by the delegates of Austria, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 80; Netherlands, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 59.

[1320] See the statements of Hungary, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 83; Chile, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 102; Austria, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 114; Czech Republic, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 121; Germany, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 12; Viet Nam, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 47; Argentina, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 88; Islamic Republic of Iran, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 94; Mongolia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 97.

[1321] Compare the statements of the delegates of Thailand, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 11, and Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 21.

[1322] Invoking this trend not to be ignored, see inter alia the delegates of Japan, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 85; Portugal, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 92; Netherlands, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 34; South Africa, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 48; Austria, GAOR, 'Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22' (n 234), para. 73; Estonia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 22; Viet Nam, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 122.

[1323] Delegation of Italy, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18: 72nd session* (2017), para. 147; Norway (speaking on behalf of the Nordic Countries), *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 64; Slovakia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, paras. 35-36; Netherlands, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 29; New Zealand, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 68.

sion of *lex lata*. More prudently, the emergence of exceptions *ratione materiae* hence found the approval of numerous delegates, referring above all to the peremptory norms of international law prohibiting the most heinous crimes, as an expression of progressive development.[1324]

From a perspective of scepticism on the concept of exceptions and limitations to immunity ratione materiae, many intervening delegates affirmed that positive customary international law contains no exceptions to State official immunity from foreign criminal jurisdiction as they commented on Mr. Kolodkin's approach to exceptions.[1325] This position did not change over time. In reaction to Ms. Escobar Hernández' Fifth Report, numerous States showed disagreement with the suggestion that immunity *ratione materiae* knew limits *de lege lata*[1326].

Some delegations, including in particular all Permanent Members of the Security Council as well as several States with considerably tense relations with neighbouring States, expressed particularly vivid disagreement with the approach to the issue of exceptions and limitation emerging in draft article 7. Not only did these delegations oppose the recognition of exceptions *de lege lata,* they were equally unconvinced that a trend towards emerging exceptions to State official immunity could be

[1324] This idea underlie the statements of the delegates of; Greece, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 30, 32-36 and *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 76; Portugal, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 73 and *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 81. For further comments highlighting the emerging trends towards exceptions, see Peru, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 61 and *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 115; Austria, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 79; Spain, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 33; Romania, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 65 and *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 84; Hungary, *Sixth Committee, Summary record of the 19th meeting, A/C.6/72/SR.19*, para. 73; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 130; Czech Republic, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 68; Chile, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 90; South Africa, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 13; Cuba, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 76

[1325] This view was affirmed by the delegates of France, *6th Committee, Summary record of the 20th meeting, A/C.6/66/SR.20*, para. 43; Switzerland, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, para. 14; Germany, *6th Committee, Summary record of the 26th meeting, A/C.6/66/SR.26*, paras. 86-87; China, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, paras. 10-11; Russian Federation, *6th Committee, Summary record of the 27th meeting, A/C.6/66/SR.27*, para. 66; United Kingdom, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*; Algeria, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 44; Kenya, *6th Committee, Summary record of the 28th meeting, A/C.6/66/SR.28*, para. 51.

[1326] Delegation of the Republic of Korea, *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, para. 40 and *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 102; Sudan, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 77; Switzerland, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 86; Singapore, para. 112; India, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 121; Japan, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, paras. 126-127; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 47; Thailand, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 54; Malaysia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 119; Indonesia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 130.

identified[1327], considering it moreover not a prerogative of the ILC to establish "new law" determining how impunity should be countered[1328]. Frequently, they denied the need for an exception in the context of international crimes altogether, highlighting other available remedies.[1329] The "*admirable goal*" of fighting impunity could not be a valid criterium in deciding on the availability of a national fora, and should not be abused as a justification for the "*manipulation*" of well-established rules underpinning international relations[1330].

The categories of crimes to which immunity *ratione materie* shall not apply according to draft article 7 was not above criticism either. Several delegations voiced the view that the list of crimes excluded from the scope of immunity were to some extent established in an arbitrary way, without clear underlying criteria.[1331] The arguments in favour of a territorial tort exception, deleted in the Drafting Committee from the provisionally adopted draft article 7, triggered few approving[1332] and several critical[1333] comments. The delegations supporting the idea of denying the perpetrators of international crimes the benefice of immunity frequently underlined that the crime of aggression should be included in the list of crimes to which immunity *ratione materiae* shall not apply.[1334] Also the idea

[1327] Statement of the delegations of Australia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 98; France, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 43; Ireland, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 27; Belarus, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 36; United Kingdom, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, paras. 57-59; Iran, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 66; Israel, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 111.

[1328] Russia, *Sixth Committee, Summary record of the 19th meeting, A/C.6/72/SR.19*, para. 38; United States, *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, paras. 24-25, China, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 58; Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, paras. 91-93.

[1329] Very sceptical at regard were inter alia the comments of the delegates of China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, paras. 92-95; Belarus, *Sixth Committee, Summary record of the 26th meeting, A/C.6/71/SR.26: 71st session* (2016), para. 93; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 29; United States, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, paras. 71-72; Israel, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 102.

[1330] This harsh formulation was used by the delegate of the Russian Federation, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 12.

[1331] See in particular the comments made by the delegates of China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, paras. 93-95; Poland, *Sixth Committee, Summary record of the 26th meeting, A/C.6/71/SR.26*, para. 59; Austria, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 114; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 29; Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 96.

[1332] Affirmative comment was made by the delegates of Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 23, United States, *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, para. 23. Mexico, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 94. Comparably, the Austrian delegation stated a preference for an exception for crimes related to espionage, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 114.

[1333] Explicit doubts about a similar exception were voiced by the delegations of China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 94; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 29; Italy, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18*, para. 146; *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 79; *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 118; Viet Nam, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 123.

[1334] Delegation of Ukraine, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 20; Portugal, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 82; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 134.

of non-applicability of immunity to corruption-related crimes attracted numerous comments. Although a few delegates welcomed the proposal[1335], most were not convinced that "*common crimes*" of corruption, ultimately excluded in the Drafting Committee from the list of crimes not subject to immunity *ratione materiae* according to draft article 7, were of enough gravity to justify an exception to immunity.[1336]

Others did not see the need for an exception, as corruption-related crimes did anyway not qualify as "acts performed in an official capacity".[1337] Generally, it was a recurring argumentative pattern to claim that a specific exception was not needed, as the crime in question could anyway not constitute an act performed in an official capacity subject to immunity.[1338] Delegates preferred to exclude specific issues from the discussions *tout court,* rather than to expressly recognize them as exceptions.

Numerous delegations invoked the need to assure consistency between the Rome Statute and the Commission's output.[1339] Conversely, in the view of other delegations, the differences between consent-based international jurisdiction and customary rules on national jurisdiction would speak against the non-reflected transfer of rules developed in the first field to the latter.[1340]

In connection to the issues of exceptions and limitations, two further points of contention relating to the ILC's methods of work emerged virulently. Firstly, the Commission was invited by several

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[1335] Positive reactions to the proposed exceptions were voiced by the delegations of Malaysia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 34; Mongolia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 97.

[1336] With varying degrees of vigour, criticism of an exception on crimes of corruption in DA 7 was formulated by China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 95; Belarus, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 93; Austria, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 114; Romania, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 21; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 29; Germany, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 13; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 24; United States, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 71; Japan, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 90; Israel, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 102; India, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 18.

[1337] Delegate of Italy, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18*, para. 145; Austria, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 75; Mexico, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 93; Czech Republic, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 69; Greece, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 79; Viet Nam, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 123.

[1338] Regarding different categories of acts, comments of this kind were made by China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 95; Belarus, *Sixth Committee, Summary record of the 26th meeting, A/C.6/71/SR.26*, para. 93; Netherlands, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 7; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 14; Viet Nam, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 47; United States, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 71; Argentina, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 88; Islamic Republic of Iran, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 94; India, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 30.

[1339] Comments on the relationship between State official immunities in the context of national and international jurisdictions, compare the comments of the delegates of Norway, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 98; El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 155; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 22; Slovenia, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 56.

[1340] Romania, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 21 and the Netherlands, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 6; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 48.

delegations, in particular those unconvinced by the eventuality of exceptions to State official immunity *ratione materiae*, to distinguish clearly between provisions considered to contain positive law and proposals of progressive development.[1341] Secondly, although some delegations seemed not to be bothered by the provisional adoption of draft article 7 by vote[1342], many other considered this event a hazardous and eventually premature recurrence to a last resort, urging the Commission to reconsider this approach and strive for consensus[1343].

4. Procedural Issues

The emerging impression was one of deep division over the issue of exceptions and limitations to State official immunity. A focus on procedural issues was frequently invoked to overcome this scission at least partly. A neatly defined procedure was considered to be needed to satisfyingly deal with the "*odd situation*" that in *limine litis,* it needs to be decided whether a certain crime had been committed.[1344]

The debates held in the 6th Committee in 2018 on Ms. Escobar Hernández' approach to general procedural issues, contained in her Sixth Report, were not yet published at the time this study was concluded. Of even greater importance will her proposals be on procedural safeguards against arbitrary foreign prosecution, to be elaborated in her Seventh Report, to be discussed in 2019. Considering the course of debates so far, the issue of procedural safeguards appears to be of the uttermost importance to bring the works on the topic to an eventually successful conclusion. For some delegations, procedure seemed to be the potential key to prevent the abusive invocation of immunity without having to recognize exceptions to State official immunity.[1345] In general, procedural

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[1341] Statement of the delegations of Spain, *Sixth Committee, Summary record of the 20th meeting, A/C.6/72/SR.20*, para. 11 and *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 41; Austria, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 72; Switzerland, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 86; Australia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 99; Singapore, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 110; France, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 43; Ireland, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 28; United Kingdom, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 61; Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 90; Israel, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 113.

[1342] See for instance the comments of Portugal, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18*, para. 91 ("*A vote was not a setback, but simply a way of moving ahead, in conformity with the Commission's mandate and its rule of procedure.*") and Greece, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 75 ("[…] *an apparently irreconcilable divergence of views on the issue had not permitted the Commission to come up with a consensus proposal on draft article 7, making the rather unusual recourse to a recorded vote inevitable.*"

[1343] See the comments of the delegations of France, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18*, para. 126 ("*The difficulties encountered in 2017 regarding the topic of immunity of State officials from foreign criminal jurisdiction showed the risks of the Commission working too rapidly.*") and *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para 42; Spain, *Sixth Committee, Summary record of the 20th meeting, A/C.6/72/SR.20*, para. 11 and *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 42; Singapore, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 109; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 129; Slovakia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 34; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 45; China, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 56.

[1344] This problematic aspect of the procedure concerning State official immunity was highlighted in particular by the delegates of Belarus, *Sixth Committee, Summary record of the 26th meeting, A/C.6/71/SR.26*, para. 93, and Singapore, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 132.

[1345] A similar take on issues of immunity could be seen in the statements of the delegates of China, *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 93; United Kingdom; *Sixth Committee, Summary record of the*

safeguards, or even an "*international mechanism*"[1346] to prevent the politically motivated abuse of foreign prosecution, were however perceived by many delegations to be sorely needed to prevent the risks of destabilization coming with the recognition of exceptions to immunity[1347].

III. Evaluation

The events in the 6th Committee can be looked at from a variety of angles. Two features appear as particularly significant: the emerging behavioural patterns (1.) and the divergences between the ILC and 6th Committee on key issues (2.).

1. The Strategies of 6th Committee Delegations – Regularity of Interventions and Consistency of Positions

Although some delegates invited the ILC not to feel excessively bound by State practice, and to progressively develop the law, most delegations expressed attachment to State practice and *lex lata*. Current political tensions between States appeared as having an impact on the positions voiced by delegations, indicating how State official immunity is indeed a highly sensitive issue affecting international relations. For instance, a group of sceptical States defending State official immunity against approaches as the one of Ms. Escobar Hernández, was composed of countries dealing with complex geopolitical situations, such as Belarus, Iran or Israel, as well as the Permanent Members of the Security Council, particularly active in international relations. In a similar vein, the statements of India and Italy reflected the respective views on State official immunity purported by the two States in the context of the *MV Enrica Lexie* incident.[1348] Finally, States unconvinced by the proposal of exceptions and limitations in the context of international crimes showed at times more

28th meeting, A/C.6/71/SR.28, para. 30; United States, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 72; *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, para. 26; Russian Federation, *Sixth Committee, Summary record of the 19th meeting, A/C.6/72/SR.19*, para. 37; Australia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 101; United Kingdom, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 62; Iran, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 67; Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, paras. 97-98.

[1346] The delegate of Austria introduced this idea to the debate, see *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, paras 112-113; *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 74.

[1347] Invoking procedural safeguards in a function of this kind: Norway (speaking on behalf of the Nordic countries), *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 100; *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 66; Singapore, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, paras 131-132; El Salvador, *Sixth Committee, Summary record of the 27th meeting, A/C.6/71/SR.27*, para. 154; Mexico, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 96; Singapore, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 113; Peru, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 116; Japan, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 128; Slovenia, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 133; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 50; Greece, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 78; Romania, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 85; Poland, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 85; Estonia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 23; New Zealand, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 70; Republic of Korea, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 103; Malaysia, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 120.

[1348] The case, to be decided by the Permanent Court of Arbitration, opposes the two States in a dispute over the jurisdiction exercised by India over the shooting of Indian fishermen allegedly mistaken for pirates off the Indian

openness to the concept of territorial tort exceptions, allowing to prosecute crimes more likely to affect these countries, such as espionage or sabotage.[1349]

In the cases of States both having one of their nationals serving on the ILC and intervening in the 6th Committee, there was often a striking correlation between the general tenor of statements. This phenomenon was observable in relation to the interventions of the delegates of Russia, China, United Kingdom, Germany and South Africa, and the statements of their respective nationals in the ILC plenary.

Notable exceptions to this observation were Spain, whose delegation voiced disagreement with Ms. Escobar Hernández' approach; France, with the exception-friendly position of Mr. Pellet being contrasted by the exception-adverse comments of the French delegation; and Japan, with Mr. Murase showing a positive attitude towards draft article 7, unlike the Japanese delegation. Although ILC members are said to serve independently in their personal capacity, States tend to nominate candidates with views characterised by proximity to the goals pursued by governments.

Regarding patterns of behaviour, two aspects stand out: the regularity of interventions and the consistency of positions over time. The 6th Committee is one of the six Main Committees of the General Assembly, and any United Nations member State has the right to be represented and to intervene.[1350] Not all States made equal use of the latter possibility in the context of the topic of State official immunity. 66[1351] of the 193 member States commented on the topic; of these, one third, 22 States, belonged to the WEOG[1352], 14 to the Asia-Pacific Group[1353], 11 to the Eastern European Group[1354], 10 to the African Group[1355] and 9 to the GRULAC[1356].

In terms of geographic regions, whilst delegations from East and South-East Asia intervened frequently on the topic (above all China, Japan, the Republic of Korea, India, Malaysia, Singapore, Viet Nam, and Indonesia), there were only sporadic comments coming from the Gulf region and central Asia. Some regional powers did not comment on the topic at all, like Turkey, Pakistan and

coast by Italian soldiers escorting a civil vessel under Italian flag, see PCA, case number 2015-28. This contextualisation nuances the perspective on the opposition of Italy to a territorial tort exception, Italy, *Sixth Committee, Summary record of the 18th meeting, A/C.6/72/SR.18*, para. 146, and the Indian focus on the importance of the status and duty performed by State officials in determining jurisdiction, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 122.

1349 Delegation of the United States, *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, para. 23.

1350 See the Rules of Procedure of the General Assembly, rule 100.

1351 The Nordic countries (Sweden, Norway, Denmark, Finland and Iceland) were represented by a single delegation, speaking however in the name of five members.

1352 Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Greece, Iceland, Ireland, Israel, Italy, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and United States; the only WEOG-States not commenting a single time on the topic were Andorra, Liechtenstein, Luxembourg, Malta, Monaco, San Marino and Turkey.

1353 China, India, Indonesia, Iran, Japan, Republic of Korea, Malaysia, Mongolia, Palau, Qatar, Singapore, Sri Lanka, Thailand and Viet Nam.

1354 Belarus, Croatia, Czech Republic, Estonia, Hungary, Poland, Romania, Russian Federation, Slovakia, Slovenia and Ukraine.

1355 Algeria, Republic of the Congo, Egypt, Ghana, Kenya, Libya, Malawi, Nigeria, South Africa and Sudan.

1356 Argentina, Chile, Colombia, Cuba, El Salvador, Guatemala, Jamaica, Mexico and Peru.

Saudi Arabia, or also Brazil, in other instances noteworthily active as a norm entrepreneur at UN level with the concept of "responsibility while protecting".[1357]

The frequency and steadiness of intervention was an important step to develop ascendency over the discourse unfolding in the 6th Committee. Roughly half of the 66 delegations intervening, commented on the topic at every session. The messages contained in their statements had more resonance than those of other delegations. Nevertheless, quantity does not equate quality: not all comments were equally articulate. Most promising for effectively shaping the debate appeared the strategy of developing a clear line of argumentation and some key paradigms, and to consistently repropose them over time. Some delegations succeeded in this undertaking:

China, underlining that procedural immunity does not equate impunity, and invoking the extension of the category of those enjoying immunity *ratione personae*;

the *Russian Federation*, focusing on continuity with the former Special Rapporteur's works, on codification, on *lex lata* and on the risks for international relations;

the *United Kingdom*, basing its positions on substantiated reviews of treaty and case law, campaigning for consensual proposals acceptable to most States;

the *United States*, prudently expressing scepticism due to the difficulties coming with the lack of case law, and insisting on the importance of procedure;

Japan, tracing a historical narrative, from the principle of sovereignty to new efforts in combating impunity;

Germany, praising the suitability of the rules *lex lata*, urging the Commission to focus on codification based on national practice to be reported by States;

Israel, denying that any exceptions to immunity had developed, or were developing;

Belarus and the Islamic *Republic of Iran,* underlining the centrality of State official immunity as a tool supporting the sovereign equality of States;

the *Netherlands*, suggesting the further development of international criminal law institutions as a desirable solution;

the *Nordic countries*, fearing fragmentation and urging for consistency with the Rome Statute, denying immunity for the most serious crimes;

Portugal with its fierce invocation of immunity as an exception rather than as a rule, positing the priority to safeguard individual dignity*;*

and finally, *Chile* and *Slovenia* invoking the humanization of international law, a trend towards legal humanism and the values of the international community.

2. Divergences between the ILC and the 6th Committee – The Menace of Perpetuated Scission

[1357] On this initiative, see the letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations, addressed to the Secretary-General, A/66/551-S/2011/701.

Echoing the disagreement in the Commission, the community of States had contrasting views on how to proceed with the topic of State official immunity, in particular with regard to the sensitive issue of limitations and exceptions to immunity *ratione materiae*.[1358] Not always were the respective majorities in the Commission and in the 6th Committee on the same line. It cannot go unnoticed that numerous States expressed worries and disagreement with Ms. Escobar Hernández' Fifth Report and the approach crystallising in draft article 7. Among these States were all the Permanent Members of the Security Council, with China and the Russian Federation formulating the most fundamental criticism. Other influential States such as Germany, India and Japan were, too, unconvinced. Several States however welcomed the direction works had taken. Among the main supporters of the Commission's proposals figured South Africa, numerous WEOG-States (inter alia Italy, the Nordic countries, the Netherlands, Portugal, Greece, Slovenia and New Zealand) and almost all the Latin American and Caribbean States intervening.

Faced with contrary invitations to move forward with the development of State official immunity on the one hand, or to focus on formalisation of the *status quo* on the other, the ILC's reaction depended on the concrete issues at stake.

Regarding the modification of the personal scope of immunity *ratione personae*, Ms. Escobar Hernández declared her opposition against the extension of the category of officials enjoying this type of immunity, opting instead for the approach that only the troika enjoyed full immunity *ratione personae.*[1359] The question arises whether the ILC was deliberately ignoring the needs of States and the transformation of international relations, nowadays increasingly carried on by ministers of trade, defence or finance as much or more than by ministers for foreign affairs.

At the end of the day, even some of the delegations favourable to extend the category of officials enjoying immunity *ratione personae* seemed reluctant to open this Pandora's box, as no common understanding on how to agree on a similar extension was in sight.[1360] The fear was wide-spread that lengthy discussions over a set of criteria identifying eligible State officials or the drafting of a list of officials enjoying immunity *ratione personae ex nomine* would have further complicated the already fragile struggle over the topic.[1361] The widely approved solution was that immunity *ratione personae* was *de lege lata* confined to the troika, without however precluding the immunity of other high-level State officials, either *ratione materiae* or in accordance with the rules applicable to special

[1358] According to a detailed numerical analysis of the positions voiced by State delegates in the controversial debates on draft article 7, of the 49 States intervening, 23 had a generally positive attitude towards draft article 7, 21 a predominantly negative one, and 5 States an ambiguous one. 5 States considered draft article 7 to express lex lata, 16 States declared that draft article 7 did not express lex lata, and 24 States were insecure about this issue. 11 States did not take issue with the way in which draft article 7 had been provisionally adopted in the ILC, whilst 26 States voiced serious concerns at this regard. 16 States urged the Commission to distinguish between lex lata and lex ferenda aspects of the proposal, 21 States urged the ILC to clarify or revisit draft article 7, and 21 States considered draft article 7 to be based on insufficient State practice. Finally, 31 States underlined the centrality of procedural safeguards, Cfr. J. Barkholdt and J. Kulaga, 'Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017: KFG Working Paper Series, No. 14', Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (2018), pp. 9-11.

[1359] *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 90.

[1360] Referring to these difficulties, see inter alia the comments of the delegate of Switzerland, *Sixth Committee, Summary record of the 17th meeting, A/C.6/68/SR.17*, para. 58.

[1361] Highlighting this issue: Republic of Korea, *Sixth Committee, Summary record of the 18th meeting, A/C.6/68/SR.18*, para. 108; Indonesia, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 67.

missions when travelling in an official capacity.[1362] This example highlights the Commission's readiness to adopt, if necessary, pragmatic positions, avoiding end- and fruitless debates of principle.

More controversy caused the clash of views regarding exceptions. Both Special Rapporteurs had to face severe criticism of their working methods in the 6th Committee. Mr. Kolodkin's approach, considered well-grounded in positive law and balanced by some delegations, appeared to others as a one-sided disregard of significant recent developments. Many statements criticising Ms. Escobar Hernández' approach were not exclusively based on colliding views on legal questions but touched upon the deeper layer of method. She was repeatedly confronted with the accuse of not having satisfied the criteria for the identification of customary international law. Her proposals were perceived to be based on subjective convictions about a regime of State official immunity coherently embedded in the system of international law, rather than on thorough investigations of State practice and *opinio juris*. In other words, the Special Rapporteur was accused of lacking impartiality and of not having done her legal homework – a harsh criticism[1363], hardly justified and often revealing a one-sided perspective on the issues at stake.

This line of criticism was somehow summed up by the statement of the Russian delegate, claiming that the Special Rapporteur had proposed an "*unusual approach to the question of exceptions to immunity, by attempting to present exceptions as established norms that were appropriate for codification, but also suggesting that there was an all but objective need for exceptions to immunity. That idea was based not on State practice or* opinio juris *but rather on subjective considerations regarding the need for a balance between various components of the system of international law, whereby all those components could exist and function without coming into conflict with each other.*"[1364] Although her systematic approach was praised by some delegates[1365], a great number of delegates criticized her for not giving sufficient evidence for the claimed exceptions to immunity *ratione materiae*[1366], and for relying only on a very limited array of practice[1367]. The Chinese delegate, for instance, used strong words to express his delegation's disapproval: "*The bulk of the evidence cited in the report for and against those exceptions consisted of just a small number of objections to decisions of the International Court of Justice and civil cases before some national or international judicial bodies. Such evidence*

[1362] See the statement of the Special Rapporteur, *Sixth Committee, Summary record of the 19th meeting, A/C.6/68/SR.19*, para. 30.

[1363] Highlighting in particular detail "*grave methodological flaws*", see for instance Germany, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 88.

[1364] *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 10.

[1365] See in particular the comments of the delegates of Romania, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 21; Thailand, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 11; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 21, Mexico, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 77; Republic of Korea, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 14, India *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 16.

[1366] This consideration was expressed inter alia by the delegates of Romania, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 21; United Kingdom, *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 29; Greece, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 20; United States, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 71; Japan, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 90; Israel, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 102; Sri Lanka, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 11; India, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 18.

[1367] See the critical comment of the delegate of Belarus, *Sixth Committee, Summary record of the 26th meeting, A/C.6/71/SR.26*, para. 93: "*Subjectively understood values, doctrinal considerations and the practice of individual States were not a sufficient foundation for codification, and certainly not for the progressive development of international law on such an important matter.*"

was hardly convincing and was clearly biased."[1368] Even delegations that had appeared as cautiously supportive of Ms. Escobar Hernández efforts in the past distanced themselves to some degree from the proposals on limitations and exceptions.[1369]

The scission caused by the topic of State official immunity confronted the ILC and its members with a complex choice. Did the Commission want to continue its way towards suggesting exceptions to State official immunity, despite the missing readiness of many States to adopt a regime of reduced immunity of both foreign and their own State officials[1370], or would it be advisable to follow the invitation to focus on a more limited core of rules acceptable to sceptical States? In other words, the emerging question was whether the ILC should moderate its ambitions and refrain from any policy considerations, or whether the Commission was ready to position itself as a counterweight to the States' reluctance to enhance foreign prosecution.

At this regard, the legitimacy of some degree of disregard for the desires of States and the smoothness of international affairs had been openly invoked within the ILC.[1371] Furthermore, not all States opposed the Commission's decision on limitations and exceptions to State official immunity: support for the ambitious approach of the majority of ILC members crystallising in draft article 7 was voiced by more than one delegation. As underlined by some delegates, draft article 7 was a *"good starting point*"[1372] and "*a step in the right direction*"[1373].

Speaking up for a new understanding of State official immunity at the cost of being considered an antagonistic player by many States was however an option causing serious concern. Insisting on the path laid down in draft article 7 implied the risk that the ILC could be perceived as bluntly exceeding its mandate by venturing into the field of political prerogatives reserved to States under international law.

The delegation of Germany articulately formulated this line of criticism, echoed by several States: *"*[…] *whereas a non-governmental organization could put forward an argument in order to pursue a political goal, the Commission was an organ of the United Nations: it received its mandate from States, and its members were elected by States.* […] *When the Commission blurred the line between the two aspects of its mandate, namely*

[1368] *Sixth Committee, Summary record of the 24th meeting, A/C.6/71/SR.24*, para. 92.

[1369] See in particular the statements of the delegates of Germany, stating that "*It would not be advisable to expand the exceptions beyond what was clearly supported by State practice and opinio juris. Any such attempt could destabilize international relations and weaken the existing exceptions by making the category as a whole politically questionable.* […] *Her delegation was not convinced that the Special Rapporteur's report […] addressed those concerns in a satisfactory manner*", *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 14, and Greece, noting that *"[…] there was some justification to the concerns raised by Committee members, particularly with regard to the process followed to identify customary international law and the assessment of existing national legislative and judicial practice*", *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, para. 20; in a similar critical vein, see the comments of the Netherlands, *Sixth Committee, Summary record of the 29th meeting, A/C.6/71/SR.29*, paras. 5-8 and Japan, *Sixth Committee, Summary record of the 30th meeting, A/C.6/71/SR.30*, para. 90.

[1370] This state of affairs was underlined by the delegation of the Russian Federation, see *Sixth Committee, Summary record of the 28th meeting, A/C.6/71/SR.28*, para. 12.

[1371] See inter alia the comments of Mr. Pellet, ILC, *Provisional summary record of the 2986th meeting, A/CN.4/SR.2986*, p. 27, and Mr. Vasciannie, ILC, *Provisional summary record of the 3087th meeting, A/CN.4/SR.3087*, pp. 18-19.

[1372] Delegation of South Africa, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 14.

[1373] Delegation of Greece, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para 76. Pointing in the same direction, see also the statements of the delegation of Portugal, *Sixth Committee, Summary record of the 22nd meeting, A/C.6/72/SR.22*, para. 82 ("[…] *Portugal commends the Commission for having adopted draft Article 7 concerning international crimes in respect of which immunity ratione materiae does not apply*."

codification and progressive development, it called into question the very foundation of its legitimacy. It was the States, and not the Commission, that created international law."[1374]

Whether these critiques should be justified or not, the Commission cannot ignore them. The ILC does not have the power to impose its proposals upon the international legal order. The adversarial dynamics within the Commission risk having serious consequences for the efforts on the topic, as it appears unpredictable if and in which form the proposed draft articles would ever be adopted by the General Assembly. As one delegation warned, "*No one can realistically expect that division in the ILC with regard to this particular draft article will go unnoticed in the General Assembly. The situation will make a potential consensual action of the GA with regard to draft articles almost impossible.*"[1375] Adopting in the ILC a set of draft articles rejected by a significant part of the General Assembly, will hence most likely mean that "*the proposal will be stillborn*".[1376]

In analogy to the issues arising with the controversial decision-making in the ILC, the viability and efficacy of solutions welcomed by a majority of States but not meeting universal consensus is at stake. Whilst the prevalence of majority views might at times be justified or even inevitable, the bottom line is that a proposal rejected by a consistent number of States – notwithstanding the fact that the opponents of the proposal include many of the most influential States[1377] – will have difficulties in emerging as a widely shared norm. The solution to this polarisation is in either way not a simple one, as a pronounced restriction of State official immunity will dissatisfy some States, whilst a turn against limitations and exceptions will not be approved by many others. A convincing combination of immunity, leeway for foreign prosecution and procedural guarantees against the abuse of either concept is needed to banish the seemingly inescapable risk of scission within the community of States, and to overcome the frictions between the ILC and the 6th Committee.

[1374] *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, paras. 92-93. In the same vein, the United States underlined that, "[…] *the development of law in that area properly belonged in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7 exhibits none of these features, and risks creating the impression that the Commission is creating new law.*" *Sixth Committee, Summary record of the 21st meeting, A/C.6/72/SR.21*, para. 25. See also the comments of the Russian Federation: "[…] *the main drivers of the development of international law were States themselves, and the Commission should be guided by their opinions and practice. Its approach should be one of healthy conservatism*. […] *The issue before the Commission was not how to prosecute officials but whether there were exceptions to the general rule of immunity* […] *The artificial establishment of an international legal norm that did not reflect reality and that States emphatically opposed could not constitute either codification or progressive development of the law and thus did not fulfil the purposes of the Commission's work*". *Sixth Committee, Summary record of the 19th meeting, A/C.6/72/SR.19*, paras. 35 and 38.

[1375] Delegation of Slovakia, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 34; see also similar comments voiced by the delegations of France, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 42; Sri Lanka, *Sixth Committee, Summary record of the 23rd meeting, A/C.6/72/SR.23*, para. 49.

[1376] Spain, *Sixth Committee, Summary record of the 24th meeting, A/C.6/72/SR.24*, para. 42.

[1377] The finding that the States contrary to exceptions and limitations to State official immunity constituted a vast majority in terms of global population, economic power and surface was underlined in the ILC by Mr. Huang, framing the issue in the context of the "*representation of the main forms of civilization and of the principal legal systems of the world*" required by the Statute. His comment triggered the vivid disagreement of Mr. Jalloh and Mr. Gómez-Robledo, Cfr. ILC, *Provisional summary record of the 3378th meeting, A/CN.4/SR.3378: 69th session* (2017), pp. 10-14.

Conclusions
The Codification and Progressive Development of State Official Immunity – A Tortuous Path Towards an Uncertain Destination

While the path to codification of the immunity of State officials in the ILC has been tortuous, the intention of the following section is as straightforward as can be: recapitulating the study's analytical endeavour (A), presenting its findings (B) and, crucially, indicating potential future research areas (C), which shall contribute to accruing and developing our understanding of the processes and dynamics governing the evolution of international law.

A. Summary of the Analytical Endeavour – The ILC's Discursive Practices on State Official Immunity

In the present study, I intended to analyse the discursive practices of the ILC on the topic of State official immunity from foreign criminal jurisdiction as well as the corresponding reactions of the 6th Committee of the General Assembly. The objective was to assess the patterns, difficulties, but also the achievements of contemporary codification and progressive development efforts on a controversial topic in a crucial institutional setting. The central sources of analysis were the official records of debates in the ILC and in the 6th Committee between 2007 and 2018, the statements of qualifications of candidates in the ILC elections in 2006, 2011 and 2016, as well as international and national jurisprudence, treaty practice, national legislation and academic writings concerning State official immunity.

The opening chapter of the study (Part 1) elaborated the theoretical and methodological framework underlying the analysis. Given the complexity of identifying customary rules of international law and of determining their content, the law of State official immunity was approached through a specific prism, beginning with the observation that the rules of international law are shaped by the practices of international lawyers. From this viewpoint, the activities of such lawyers, particularly within the ILC – in terms of the interactions between members on the subject of the immunity of State officials – crucially contribute to reshaping the topic's controversial standing and significance. These very acts of communication, in whichever form, are conceptualised as semantic operations of meaning-creation. Ultimately, the rules governing the field of State official immunity are elaborated, critiqued and reformulated through the communicative action of ILC members, that is, the Commission's discursive practices, which endow the pertinent concepts with a specific meaning.

In the course of the twentieth century, scholars from various theoretical backgrounds, whether from constructivist, post-structuralist or critical studies perspectives, have developed different approaches to the concept of discursive practices. While the vastness of methods and approaches is, in its sheer amplitude, disconcerting, this study draws on a combination of functional insights offered by these diverse understandings. In the present research, the latter are employed as a magnifying glass for a close-up investigation into the dynamics and processes governing the ILC's efforts towards drafting proposal codifying and progressively developing the immunity of State officials.

In this light, the driving forces channelling the Commission's efforts were conceptualised as an amalgam of propelling aspects, as, for instance, the interests of the actors involved – both States and individual ILC members themselves – and the force of normative expectations. Within this picture, the ILC members deployed different strategies and argumentative techniques to outline their views, with the aim of persuading various audiences. In this study, these virtuous dialectical exchanges of views and arguments among ILC members and between the Commission and the 6th Committee are considered to be the foundation of the ILC's legitimacy and authority.

The discursive practices described were embedded in the context constituted by the community of international lawyers. This community, and its various sub-communities, coalescing inter alia around professional backgrounds and expertise, gave rise to the self-understanding of the ILC members as international lawyers, and shaped their convictions and approaches. The normative expectations towards the ILC, both with regard to State official immunity and in terms of compliance with the standards of codification and progressive development, also originated from this very community. Convincing the latter was crucial for the effectiveness of the Commission's efforts.

Following the establishment of the study's theoretical framework, Part 2 gradually zooms into the workings of the Commission, by addressing the relationship between the community of international lawyers and the ILC members who have dealt with the topic of State official immunity over the years. Starting from the assumption that there is a correlation between members' individual profiles and their attitude towards the evolution of international law, the chapter analyses what kind of international lawyers from amidst the international legal community were elected to serve on the Commission. In particular, the chapter focuses on the profiles of the elected (and unelected) candidates in terms of their professional and educational background, their age, gender and linguistic affiliation.

Analytically, the comparison of the elected and unelected candidates evaluates the respective impact of these factors on success in elections. To a significant extent, the latter is impacted by the political weight and strategies of the nominating States. My focus on electoral patterns on the basis of the candidates' nationality showed how several global and regional powers usually managed to ensure the election of their candidates throughout the assessed period, whilst less influential or politically relatively isolated States struggled to get their candidates elected.

Based on the reasonable assumption that members' backgrounds in terms of their professions and expertise influence their preferences and convictions, the analytical saliency lies in assessing to what extent their profiles find expression in their individual approaches to the topic of State official immunity. In terms of profession, the overwhelming majority of members came from either ministries of foreign affairs or academia, whilst a few members had their roots in other domestic legal institutions or international organisations. The numbers did not reveal a decreasing influence of academics. Many profiles gave proof of hybridity, combining significant experiences in different fields of practice and academia. With regard to expertise, growing numbers of members specialised in fields with a strong affinity to questions of international justice, the accountability of perpetrators of international crimes and the rights of victims, such as international criminal law, human rights and international humanitarian law. In sum, the analysis revealed how the quota system resulted in a representativity of the different regions of the world providing a strong source of legitimacy,

although, on the downside of this mechanism, highly qualified candidates at times failed to achieve election.

Following the characterisation of the actors involved in the ILC's discussions and negotiations, Part 3 delves deeper into their discursive practices. During the quinquennium 2007-2011, the first special rapporteur, Mr. Kolodkin, authored three reports, causing virulent criticism among parts of the plenary, as many members considered his approach to be excessively focused on codification, at the cost of ignoring recent developments. Since 2012, the second special rapporteur, Ms. Escobar Hernández, has published six reports, conversely criticised as engaging insufficiently with relevant practice, whilst relying too much on systematic deductions. While Mr. Kolodkin did not consider the topic to be apt for further action by the Commission, Ms. Escobar proposed a set of draft articles, virulently discussed in the plenary and reworked by the Drafting Committee.

Following the analysis of the relevant reports and the respective debates in the ILC plenary sessions, as well as the broad range of national and international practice and academic writings they cover, the present study engages with the main points of contention in relation to State official immunity.

The deepest cleavage running through the ILC relates to the members' divergent understandings of the role of codification and progressive development. Whilst some members voiced a clear preference for concentrating efforts on codification, others urged the Commission not to refrain from progressive development. The majority considered the two tasks to be inextricably linked, as the elaboration of the topic of State official immunity by the ILC necessarily contained elements of both.

With regard to the nature of State official immunity, the Commission differentiated between two categories: the highest-ranking officeholders of a State were considered to enjoy status-based personal immunity (*ratione personae*), covering their acts of both official and private nature, temporally limited to their terms of office.

Conversely, functional immunity (*ratione materiae*) was considered by the ILC to be enjoyed by State officials in general, including those former officeholders having previously enjoyed immunity *ratione personae*. This type of immunity is not time limited and bars the exercise of foreign criminal jurisdiction only with regard to acts performed in an official capacity. The definition of the term "State official" finally agreed on was wide-ranging, covering in essence all kinds of officials, despite the proposal to exclude officials not exercising governmental authority.

Although most members invoked the need to balance the objectives of fighting impunity and preserving the stability of international relations among equally sovereign States, a compromise formulation meeting the approval of the proponents of both views could not be achieved. Departing from its consensus-based decision-making, the Commission voted to adopt draft article 7, which affirmed the inapplicability of immunity *ratione materiae* in cases of genocide, crimes against humanity, war crimes, torture, enforced disappearances and apartheid.

Major disagreement arose over the question whether the two aspects of the Commission's mandate – codification of *lex lata* and the progressive development of *lex ferenda* – should be clearly distinguished. Some considered this distinction essential in the pursuit of providing guidance to States

and national law appliers. Others opposed this proposal, fearing it would be considered an invitation to disregard those aspects labelled as progressive development. With regard to the thorny issue of limitations and exceptions to immunity *ratione materiae*, this issue was heatedly discussed, as some members considered draft article 7 to constitute neither an expression of codification nor of progressive development, but "new law". In general, the debates illustrated how the members strategically used the categories of *lex lata* and *lex ferenda* in their argumentations to strengthen or dismiss proposals.

With the provisional adoption of draft article 7, the interest shifted from merely investigating procedural aspects to establishing "procedural safeguards". The eventuality of prosecution by foreign authorities was by most members considered to require the establishment of legal mechanisms countering the risk of abusive exercises of national criminal jurisdiction. The debate at this regard was in so far inconclusive, as these issues will be elaborated in Ms. Escobar Hernández' seventh report, to be discussed in the ILC plenary sessions and in the 6th Committee in 2019.

The final chapter of my study, Part 4, examines the Commission's interaction with key addressees of its proposals. The reactions in the 6th Committee to the efforts undertaken in the ILC on State official immunity, mirrored the scission in the Commission. For the sake of stable international relations, non-interference and the preservation of sovereign equality, numerous States expressed positions favouring the codification of unrestricted State official immunity. Conversely, the need to fight impunity, thereby improving the conditions for the effective enjoyment of human rights, was highlighted by many other States.

Whilst some delegations managed to formulate highly articulate statements during all or most General Assembly sessions assessed, others intervened rarely or not at all, eventually revealing disparities with regard to the resources and priorities of delegations. Although ILC members are generally considered to serve on the Commission in their individual capacity as recognised experts and not as representatives of their States, usually the views voiced by ILC members and by the 6th Committee delegations of their States of origin were to a large extent congruent.

Besides States, a crucial partner of the Commission in the evolution of international is the ICJ. Frequently, ILC members get elected to the Court's bench after service on the Commission: currently, 7 of the 15 ICJ judges have previously been ILC members. Such close ties are considered a precious and beneficial feature. Nevertheless, the ICJ's position on State official immunity, emerging first and foremost in the *Arrest Warrant* case, was at times heavily criticised in the ILC plenary. Nevertheless, efforts were undertaken in the Commission to minimise as far as possible the divergences of views to avoid open rupture with the Court.

B. Key Findings - Facing Crossroads

The present study has, to a great extent, focused on the tensions and dialectic dynamics shaping the evolution of international law in the ILC. The balance between different propelling forces has been analysed from different viewpoints: in terms of the actors themselves, of their discursive practice and of their communication with the 6th Committee. Just as the scrutiny of the driving forces behind the ILC's activities has demonstrated a very varied and complex interplay of different

factors, the identification of clear "trends" adequately describing the evolution of State official immunity is an arduous task (I.). It is no less challenging to depict the dynamics of the codification and progressive development of international law in the ILC and 6th Committee, than evaluating the desirability of current developments or the viability of future advancements (II). However, the analysis of the discursive practices as carried out in the present study encourages certain reflections on the underlying legal and institutional issues.

I. State Official Immunity - Preservation or Restriction?

The topic of State official immunity brings to the light several aspects that have the potential of significantly affecting the relations between States, which the international community is obviously aware of. While State official immunity is widely recognised to be a fundamental rule, having merits in promoting the stable relations among equally sovereign States, in the context of fighting impunity, limitations to foreign criminal jurisdiction can be obstacles justice. Although agreement is broad on the need to balance these various priorities, the international community continues to be divided on how to give adequate form to this balance in practice.

On the conceptual level, the debate involves two of the most basic notions of international legal discourse: sovereignty and justice. Discussing the rights and duties of States in protecting their own officeholders and prosecuting foreign officials raises crucial questions about how the concept of sovereignty is to be contemporarily understood. These questions have no straightforward answer, as numerous ambivalences emerge. If, for instance, prosecuting the officials of a foreign State is considered a violation of the latter's sovereignty, the prohibition to perform domestic prosecutions of foreign officials can as well be understood as a limitation of the sovereign rights of the forum State.

In a similar vein, the positive connotation of State official immunity as the basis of stable relations among equally sovereign States, defending less influential States against the hegemonic ambitions of more powerful ones, raises doubts. Unquestioned State official immunity can destabilise international relations, bearing the risk of *de facto* weakening sovereignty. For the highest-ranking office holders, recurring to heinous crimes in order, for instance, to stay in power, comes at a lower cost without the threat of foreign prosecution. The potential political and societal instability of this scenario carries the hazard of effectively undermining the internal sovereignty of States, coming with significant collateral damages to the conditions of human rights enjoyment and the stability of inter-State relations.

Conceptualisations of justice do not allow for easy insights either. According to a common argumentation, if both the authorities of the official's State and international judicial bodies are unwilling or incapable to prosecute, foreign criminal jurisdiction is needed to fill the gap and restore justice by ensuring the accountability of the perpetrators of international crimes. However, doubts subsist on the question whether justice is effectively promoted if accountability is pursued selectively. The significant risk that the highest-ranking officeholders, in particular those of influential States, are likely to escape prosecution anyway, was frequently voiced. Another critical question regards the degree of substantive justice that can be achieved if standards of fair trial and procedural

justice cannot fully be met, as foreign criminal proceedings might be subject to numerous obstacles hindering the appropriate investigation and prosecution of suspects.

These conceptual disagreements translate deeper issues affecting the availability of foreign criminal prosecution into the legitimating language of law. One of these issues is the level of reciprocal trust between States. The lack of trust in the impartiality of foreign criminal jurisdiction is widespread, highlighting the risk of politically motivated prosecutions without due process guarantees. Conversely, the collusion of powerful perpetrators of international crimes and domestic law enforcement authorities is a factual risk: the discussions expressed a lack of trust that other States will seriously pursue the accountability of their own officials.

The problem of lacking political will to prosecute State officials is not confined to this last scenario. States might be tempted to renounce the prosecution of their own officials, but they might as well be reluctant to engage in time- and cost-intensive prosecutions of foreign officials. The latter holds true in particular if the alleged perpetrators have to be judged *in absentia* and without the cooperation of the official's States, complicating *inter alia* the proper investigation of facts through the collection of evidence and the hearing of witnesses. Another aspect affecting these considerations is the influence of the official's State: the more powerful, the less advisable might prosecution be from the perspective of political convenience.

A convincing legal answer to these points of contention, cannot eschew addressing the reasonable doubts raised in the Commission and in the 6th Committee. As I see it, reducing the possibility of foreign criminal jurisdiction to a minimum would be a step in a questionable direction. In order to emphasize the profound condemnation of acts considered intolerable by the international community, it is necessary to affirm the principle that the perpetrators of those crimes shall be prosecuted, recurring, if necessary, to all available means – including foreign criminal jurisdiction. Undeniably, the conditions of ensuring accountability for international crimes are in many regards still in an embryonic state. However, beyond classifying all efforts departing from the *status quo* as wishful thinking, international lawyers are called to take action in order to improve it. The awareness that the community of States seriously engages in fostering the accountability of perpetrators of international crimes will function as a deterrent on officeholders over time.

Under this premise, a long-term perspective is needed, which, beyond current obstacles, promotes the conviction that - slowly but steadily - international legal commitments encourage change. The normative force of international law has often found expression in the prohibition of behaviours that were previously considered acceptable, or in the prescription of new legal obligations. As shown by numerous examples in the fields of human rights law, international humanitarian law or international criminal law, over time, an increasing number of actors gradually came to accept emerging paradigms of international practice.

Moreover, the alternative of *a priori* closing both eyes on the condemnable behaviour of foreign State officials does not appear to produce more virtuous effects. In the long run, if the stability of international relations, the peacefulness of the world and the enjoyment of human rights are to be improved, international crimes should be combated, rather than ignored. Through this lens, international relations would benefit from transferring the tensions into courtrooms, instead of facing

far greater internal and inter-State tensions, resulting from unpunished international crimes. Suggesting that State official immunity *ratione materiae* shall not apply in case of the alleged perpetration of the most heinous international crimes, points in a well-grounded and future-oriented direction.

Nevertheless, the threat of counterproductivity remains real: the danger of causing new tensions through politically motivated prosecutions and undue external interference in sensitive internal conflicts, possibly based in power disparities between the States involved, should not be ignored. The availability of foreign criminal prosecution coming with eventual exceptions would have to be balanced by adequate procedural safeguards. The latter would need to ensure the necessary trust between States by limiting politically motivated arbitrariness, by enhancing the duty to cooperate and by establishing a clear hierarchy of competences in the multi-layered network of the various jurisdictions. Similar safeguards would require in-depth reflections over how domestic, foreign and international jurisdiction are to be integrated to achieve a maximum of efficacy and a minimum of friction. Exceptions to State official immunity, balanced by appropriate safeguards against arbitrary (absence of) prosecution, would give the international community a tool for fostering accountability without giving up control over politically explosive and potentially destabilising issues.

II. The ILC – Between Doctrinal Techniques and Legal Policy

The evaluation of the appropriate legal answers to the questions raised by State official immunity needs to be distinguished from both the assessment of international law's standing with regard to these issues *de lege lata* and *de lege ferenda*, and from the understanding of the Commission's role in addressing these issues through its mandate of progressive development and codification.

The prevailing view within the ILC was that absolute immunity *ratione personae* constitutes *lex lata*, whilst the same does not apply to the proposed limitations and exceptions to immunity *ratione materiae*. The State practices in the field and the opinions voiced by States in the 6th Committee were too varied to consider the latter issues positive customary law, ripe for codification. However, the suggested exceptions and limitations are not mere normative proposals without legal foundation: in various instances international judicial bodies, treaty parties, national legislators and law enforcement authorities have decided that State official immunity does not apply to acts constituting determinate crimes. Beyond the identification or rebuttal of clear trends pointing in one direction or in another, the law appears to be in flux.

A focus on codification was at times invoked in the Commission and in the 6th Committee. Some members argued that adherence to an uncontroversial array of legal techniques – in order to identify and interpret widely accepted rules – would be preferable to venturing on the thin ice of progressive development. The latter, according to them, would involve complex legal policy evaluations to determine which developments are actually deemed desirable.

Tackling the topic by limiting efforts to the codification of *lex lata* does not do justice to the complexity of the issues touched upon. Given the often uncertain *status quo* of State official immunity, it seems unavoidable to adopt an approach involving a certain degree of legal policy considerations. Largely ignoring the – possibly countervailing – developments characterising the topic of State

official immunity by exclusively adhering to the affirmation of unchallenged rules, does implicitly express a policy preference.

Moreover, the factual perspectives allegedly corroborating positions do imply elements of prognosis. For instance, it is often impossible to empirically evaluate claims regarding the conditions of stable international relations, or the potential effects of State official immunity on accountability. Argumentations of this kind express policy evaluations and policy preferences: they give proof of how the efforts on the topic cannot be based exclusively on legal-doctrinal considerations. The competence to scrutinise policy considerations is implied in the mandate of progressive development and codification. The majority of ILC members have embraced this opportunity, voting in favour of draft article 7, formulating limitations and exceptions to immunity constituting at least in parts progressive development.

The view prevailed that explicitly distinguishing *lex lata* and *lex ferenda* was both impossible and potentially harmful in practice. The shortcomings of a similar approach can not entirely be rebutted: in particular, national law appliers might be best served by clarity on how to comply with the commitments their States are subject to under positive international law. Nevertheless, the predominant understanding in the ILC described codification and progressive development as a comprehensive dynamic process, gradually contributing to the transformation of legal rules. Under this premise, the counterproductivity of explicitly distinguishing well-established rules (to be respected) from desirable developments (which could be ignored, as not expressing positive law) seems coherent. By dissolving the grey area between *lex lata* and *lex ferenda*, the ILC would give up its best trump card to encourage the conversion of emerging norms into widely accepted rules.

C. Outlook – Between Ongoing Tensions and the Struggle for Consensus

The works of the ILC on the topic of State official immunity are not completed. Ms. Escobar Hernández's seventh and last report will be discussed in 2019, which focuses on the much-awaited procedural safeguards against the risks of abusive invocations of immunity and arbitrary exercises of criminal jurisdiction. Moreover, the draft articles are expected to be adopted in the first reading. Further controversy can be anticipated, as the fracture in the ILC was far from overcome. Will the general desire to reach consensus result in a compromise proposal of the rules of State official immunity, or will the factions within the ILC that crystallised in the vote in 2017 be determined to firmly stick to their positions?

So far, by deciding to advance developments considered ripe, the majority within the ILC has taken the risk of discontenting many of the most influential States, *inter alia* all the Permanent Members of the Security Council, which clearly voiced their opposition to limitations and exceptions to State official immunity. This raises far-reaching questions about the dynamics currently underlying the codification and progressive development of international law, which were touched upon in the

interactive dialogue held between ILC members and the legal advisors of States during the 6th Committee sessions in 2018.[1378]

One of the issues causing concern to State representatives was the reluctance of the ILC over the last decades to elaborate draft conventions, thereby renouncing to activate the prerogatives of States in negotiating their legal commitments. Although the views voiced by States were accounted for by both Special Rapporteurs, opting for the instrument of draft articles as a means to tackle State official immunity allowed the ILC to develop its positions in relative autonomy. However, given the sensitive and uncertain nature of the issues, the proposed solution would have benefitted from the political authority coming with an international convention. Critical observers might wonder whether the ILC is arrogating itself a political function which is primarily reserved to States.

In the light of the debates held in the 6th Committee, it appears however highly unlikely that an eventual draft convention on State official immunity would ever have entered into force. In so far, the approach to the topic can be read as an indicator of frustration within the ILC for the slow pace currently characterising the development of international law in many instances. One intention pursued through the approach prevailing in the ILC was to directly address national law-appliers. Initiatives of this kind appear as a counterstrategy to the reluctance of States to accept evolving legal commitments, in the case at hand, limitations and exceptions to immunity *ratione materiae*. However, regardless of how well-grounded proposals are, broad political support is an unconditional necessity for advancement.

The hazard of an unsuccessful conclusion of the Commission's works on State official immunity is not to be underestimated. A similar outcome would not benefit anyone: neither the ILC, nor the community of States, can be interested in a proposal rejected by large parts of the General Assembly. The Commission's effort on the topic would appear as having been wasted, and the uncertainties for law-appliers would grow rather than decrease. The potentially serious damage in terms of authority would hit both institutions. The ILC's reputation would suffer from the assessment that States where not persuaded by its yearlong efforts. Conversely, the General Assembly would appear as being unable to adequately steer the action of one of its sub-organs. The failure of successfully concluding the sorely needed project of codifying and progressively developing the highly practice-relevant rules on State official immunity from foreign criminal prosecution, would, in the first place, be perceived as a failure of the General Assembly and an opportunity lost by the community of States.

These risks seem partly reconnected to the highly contentious nature of the topic of State official immunity itself. Although the positions at times seem already too polarised to achieve a widely shared result, the most promising approach to this challenging situation are the much-invoked procedural safeguards. Reaching consensus in the ILC on a comprehensive package of balanced provisions fostering prosecution whilst providing guarantees against abusive claims or denials of State official immunity is, in the current circumstances, an indispensable prerequisite for convincing the General Assembly to back the ILC's proposals.

[1378] The minutes of the interactive dialogue held between ILC members and the legal advisors of States on the 24th of October in New York had not been published at the time of completion of this study; the author was however personally present as an observer to this meeting.

Nevertheless, the relationship between the Commission and the 6th Committee was far from frictionless. Generally, ILC members had at times an impression of insufficient participation of States in the ILC's efforts, as formulated by Mr. Pellet when addressing the 6th Committee: "*The brutal truth was that the Committee had little interest in the Commission, which was a carefully preserved legacy that had undergone no truly radical changes since its establishment in 1948*."[1379] Whilst, hence, the ILC was disappointed by the lack of involvement and guidance provided by States, the latter were concerned about the (perceived) tendency of the ILC to develop international law in increasing autonomy, disregarding the States' political prerogatives. Improvements in the relationship between the ILC and the 6th Committee are urgently needed to ensure a bright future to the codification and progressive development of international law in the General Assembly, which continues to be an important asset for the international community.

The complexity of codification and progressive development were exacerbated by institutional shortcomings on several levels and both the mechanism of codification and progressive development within the ILC and the 6th Committee show manifold symptoms of overload. While the number of topics on the ILC's agenda is high, the infrastructures supporting the Commission's work struggle to issue and translate reports in a timely manner. Thereby, the time ILC members have at their disposal to prepare debates is reduced, negatively affecting the conduct of the sessions. In the same vein, State delegates struggle to keep up with the amplitude of reports and requests presented by the ILC. The schedule of the 6th Committee sessions does not allow to adequately review the numerous topics deserving attention. On all sides, the resources in terms of time and funding appear to be insufficient. Given that it seems difficult to reform the existing structures, it is worth asking whether less (in quantity) would not be more (in quality): reducing the topics on the agenda would allow for a more profound engagement with issues, eventually resulting in more thoroughly reviewed and hence more widely supported legal instruments.

Beyond the topic assessed in this study, a pertinent question relates to the adversarial attitude characterising the Commission's works on State official immunity: will it remain an isolated case, or will other topics in future lead to comparable divisions, eventually resulting in decision-taking by majority vote rather than by consensus? Several topics on the ILC's current agenda are closely related to the intricate disputes over jurisdiction, accountability and the interrelationships of sovereign equality and justice that caused much friction in the works on State official immunity. In particular, the topics "Peremptory norms of general international law (*Jus cogens*)" and "Crimes against humanity" as well as the issue of "Universal criminal jurisdiction", included on the Commission's long-term programme of work[1380], have the potential of triggering noteworthy tensions. Will the ILC continue to formulate legal rules intended to promote accountability, operating in a

[1379] Mr. Pellet, speaking to the 6th Committee, *6th Committee, Summary record of the 21st meeting, A/C.6/66/SR.21: 66th session* (2011), para. 4.

[1380] *Report of the International Law Commission, A/73/10: 70th session* (30 April–1 June and 2018) The Commission considered that the topic met the "[…] *criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification*." See also Annex A, pp, 307-325, containing a syllabus of the topic drafted by Mr. Jalloh introducing the topic and outlining in detail the reasons for the inclusion in the long-term programme of work. The General Assembly took note of the Commission's decision, *Resolution 73/265 of 22 December 2018: A/RES/73/265*.

deliberately indefinite grey area between codification and progressive development, basing its insights on the "values of the international community" and international law's systemic coherence? Or will the desire to align with the priorities signalled by many States, favour solutions geared at upholding sovereignty and non-interference?

As State official immunity continues to give rise to ongoing controversy, divisions persist in the international community. Following a decision of the African Union[1381], the General Assembly has received a request from Kenya to include on the agenda the request for an advisory opinion by the ICJ "*on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials*" [1382], to be discussed in the General Assembly sessions in 2019[1383]. An eventual advisory opinion by the ICJ would probably further fuel the debate. In the same line, it remains to be seen, how State official immunity issues will be approached in the proceedings regarding the appeal against the decision of the ICC condemning Jordan's non-compliance with the request for the arrest and surrender of Omar Al-Bashir.[1384] A further case soon due for decision regards the "*Enrica Lexie" Incident*, involving India's exercise of criminal jurisdiction over the killing of Indian fishermen by Italian soldiers escorting a commercial vessel under Italian flag, to be discussed before the Permanent Court of Arbitration[1385].

Among the many interesting facets featured by these cases, they also give proof of how many of the international lawyers serving the ILC on a part-time basis are, in parallel, involved in a multitude of other practices shaping State official immunity.[1386] The present study did not investigate the question whether these multiple allegiances impact the convictions of former and current ILC members: to what extent do they formulate consistent positions in the different fora, and to what extent do they adapt the views they express to the different instances?

These questions touch upon the issue of the independence of the international lawyers serving on the Commission. As shown by the comparison of the interventions in the 6th Committee and in the Commission, usually the positions expressed by ILC members and by the delegations of their States of origin are on the same line. The independence of ILC membership is circumscribed, a factor intrinsically connected to their part-time membership and to the electoral system, making candidates dependent on the support of their States of origin for nomination and (re)election.

1381 *Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX): 30th Ordinary Session of the Assembly*, Doc. EX.CL/1068(XXXII) (2018).

1382 Permanent Representative of Kenya to the United Nations, *Request for the inclusion of an item in the provisional agenda of the seventy-third session - Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials, A/73/144: 73rd session* (2018).

1383 Secretary-General, *Preliminary list of items to be included in the provisional agenda of the seventy-fourth regular session of the General Assembly (2019), A/74/50: 74th session* (2019)., No. 89.

1384 For the minutes of the oral hearings in open session, see *Omar Hassan Ahmad Al-Bashir* (International Criminal Court, Appeal Chamber, 10 September 2018).

1385 For the preliminary proceedings, see *The "Enrica Lexie" Incident (Italy v. India)* (Permanent Court of Arbitration, 29 April 2016).

1386 In the appeal of Jordan before the ICC, numerous current ILC members are involved: Mr. Hmoud, Mr. Murphy and Mr. Wood are part of the team of legal experts arguing the position of Jordan, whilst Mr. Jalloh and Mr. Tladi made an amicus curiae submission in support of Jordan's case on behalf of the African Union, see *Omar Hassan Ahmad Al-Bashir*, pp. 2-3. In the case regarding *The "Enrica Lexie" Incident (Italy v. India)*, Mr. Wood is part of the legal team advising Italy, whilst a former member, Mr. Pellet, acts as a counsel to India, pp. 5-6.

However, whilst ILC members shall be persons of recognised competence in international law, their independence is not explicitly enshrined in the Commission's statute. The relative independence of ILC members appears to be a – ambiguous – cornerstone of the mechanism of codification and progressive development, ensuring however that ILC members remain embedded in the contemporary practice and academia of international law, keeping them aware about and responsive to the priorities of States.

As illustrated by these dynamics, the investigation of the interconnections of international lawyers and States allows to pursue a more nuanced picture of how international legal rules evolve. In line with this insight, a crucial intention underlying this study was to highlight how the discursive practices of international lawyers shape international law, how individual actors and the international legal order mutually affect each other, and how all these interactions are influenced by both normative ideals and mechanisms involving different expressions of power. These interests are not confined to the assessment of the approaches to the topic of State official immunity in the ILC and in the 6th Committee. The theoretical and conceptual framework at the basis of the present analysis can be deployed to investigate a multitude of other instances, characterised by the decisive role of international lawyers and the institutions identifying, developing and litigating rules in the evolution of the international legal order. As I have shown, this evolution is not linear or clear-cut, but instead follows the tortuous turns and oscillations of an increasingly multipolar and complex world.

No study on discursive practices can elude the irony of its own ambivalent role. It is subject to narratives which it, simultaneously, influences and rewrites. On different scales, this process is replicated in all environments: from the ILC to the drafting of doctoral dissertations. Analysing discursive practices ultimately lays bare the dynamics of power and highlights individual agency: actively engaging with language and thought always implies a production of meaning. Thinking and writing is an emancipatory act – and as such this study should be understood.

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B. Materials of the International Law Commission

I. Reports of Special Rapporteurs

1. First Special Rapporteur, Mr. Roman A. Kolodkin

Kolodkin, R. A., *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, doc. A/CN.4/601 (2008).

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2. Second Special Rapporteur, Ms. Concepción Escobar Hernández

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II. Texts of Provisionally Adopted Draft Articles

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