CHAPTER 2

Lessons from the ILC's Work on 'Immunity of State Officials': Melland Schill Lecture, 21 November 2017

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Abstract

The topic *Immunity of State officials from foreign criminal jurisdiction* has been on the programme of work of the International Law Commission since 2007. After ten reports from two Special Rapporteurs, by June 2019 it has yet to complete a first reading, not least because the topic has proved highly contentious both within the Commission and among States. The Commission could only adopt a central provision (on exceptions to immunity *ratione materiae*), exceptionally, having recourse to voting. There are several lessons to be learnt from the handling of the topic over the last twelve years, including for such crucial aspects of the Commission's working methods as the choice of topics; the need for a clear view of the Commission's aim in taking up a topic; the need for rigour in assessing the current state of international law; the importance of dialogue, within the Commission and between the Commission and States; and the utility or otherwise of voting.

Keywords

International Law Commission – Immunity *ratione personae* – Immunity *ratione materiae* – State Officials – Official Acts

1 Introduction

It is a pleasure to return to the Manchester International Law Centre (MILC), and an honour to give the Melland Schill lecture this year. My particular thanks go to Iain Scobie and Jean d'Aspremont for their invitation. I congratulate them on reviving this important lecture series.[1]

1 See http://www.law.manchester.ac.uk/milc/about/melland-schill/ (accessed 27 March 2019). On 14 October 2015, Professor John Dugard delivered the first Melland Schill lecture since

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My aim today is to shed some light on the way the UN International Law Commission (hereafter 'the Commission' or 'ILC') operates; and to do so by examining what has been described as 'one of the most controversial issues the Commission has ever dealt with',[2] *Immunity of State officials from foreign criminal jurisdiction*.[3]

1974, entitled 'Are Existing States Sacrosanct?'. On 5 May 2016, Judge Xue Hanqin of the International Court of Justice delivered the second lecture, entitled 'The Cultural Element in International Law', and on 14 September 2018 Professor Jan Klabbers lectured on 'Epistemic Universalism'. In conjunction with Manchester University Press, the University of Manchester Library has digitized the original series of Melland Schill Lectures (delivered between 1961 and 1974): https://www.escholar.manchester.ac.uk/search/?search=%22melland+schill%22&button_escholarsearch=Search (accessed 27 March 2019).

2 Germany, UN General Assembly's Sixth (Legal) Committee, 73rd session, 30th meeting (31 October 2018), available on the UN PaperSmart Portal at http://statements.unmeetings.org/media2/20305268/germany-82-cluster-3.pdf (accessed 27 March 2019).

3 H. Huang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction' (2014) 13 Chinese Journal of International Law 1; 'Symposium on the Immunity of State Officials' (2015) 109 AJIL Unbound 153 (W.S. Dodge, 'Foreign Official Immunity in the International Law Commission: The Meanings of 'Official Capacity' 156; C.I. Keitner, 'Horizontal Enforcement and the ILC's Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction' 161; R. O'Keefe, 'An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely' 167); S.D. Murphy, 'Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission' (2016) 110 American Journal of International Law 718, at 732–742; S.D. Murphy, 'Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission' (2017) 111 American Journal of International Law 970, at 981–988; G. Bernabei, 'Nobody's Land: Where All Step but No One Settles', available at http://ilawyerblog.com (accessed 27 March 2019); 'Symposium on the Present and Future of Foreign Official Immunity' (2018) 112 AJIL Unbound 1 (S.D. Murphy, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of the Exceptions?' 4; Q. Shen, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction' 9; P. Webb, 'How Far Does the Systemic Approach to Immunities take us?' 16; M. Forteau, 'Immunities and International Crimes before the ILC: Looking for Innovative Solutions' 22; R. van Alebeek, 'The "International Crime" Exception to the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?' 27); C. Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in M. Evans (ed.), *International Law* (5th edn OUP 2018) 346; D. Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?' (2019) 32 Leiden Journal of International Law 1; R. van Alebeek, 'Material Immunity of Foreign Officials from Criminal Jurisdiction for "Acts Committed in the Official Capacity" and Possible Exceptions Thereto' in T. Ruys, N. Angelet and L. Ferro (eds.), *Cambridge Handbook of Immunities and International Law* (CUP 2019) 496; H. Ascensio and B.I. Bonafe, 'L'Absence d'immunité des agents de l'état en cas de crime international: pourquoi en débattre encore?' (2018) 4 RGDIP.

I shall begin with a few words about the Commission, which has for its object 'the promotion of the progressive development of international law and its codification'.[4] It was established 70 years ago as a subsidiary organ of the UN General Assembly. It is composed of 34 individuals, 'persons of recognized competence in international law',[5] who act in their personal capacity, not on instructions from governments. The General Assembly elects the whole Commission every five years, with the seats distributed among the five UN regional groups in accordance with a formula laid down by the Assembly. As with all UN elections, political factors play a role.

Nowadays the Commission usually follows a standard procedure for dealing with topics. First, and crucially, a topic is normally chosen from amongst those proposed or taken up by members of the Commission,[6] and is placed first on the long-term programme of work. If it is decided to move forward with a topic it is put on the current programme of work, and a Special Rapporteur is usually appointed (often the member who proposed the topic). The choice of topics is not easy; and once on the current programme of work, they are not easily removed, even if it becomes clear that they are unlikely to lead to useful results.

The Special Rapporteur can be seen as the motor for the Commission in respect of his or her topic; without his or her efforts it would be difficult for the Commission to make progress. But it is the Commission as a whole which ultimately steers the topic and affixes its seal to the output. The Commission's work is a collective effort. Through careful negotiation and drafting, the Commission usually makes substantial improvements on proposals from the Special Rapporteur. At least, that was my experience with the topic for which I acted as Special Rapporteur, *Identification of customary international law*.

The Special Rapporteur (or, over time, Special Rapporteurs) produces a series of reports which are first debated in plenary. The Special Rapporteur's proposals may then be referred to the Drafting Committee, which is where the real negotiation usually takes place, against the background of the debate in plenary. The texts that emerge from the Drafting Committee, sometimes very significantly revised from those proposed by the Special Rapporteur, are adopted by the plenary, usually without significant amendment or debate. Commentaries are then prepared by the Special Rapporteur, and these are considered and adopted by the Commission in plenary, towards the end of the session, as part of

4 Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947 (as amended), Art. 1.

5 Ibid., Art. 2 (1).

6 Topics have occasionally been proposed by the General Assembly, the Secretariat of the Commission, or other UN organs; and by States.

the process of adopting the Commission's Annual Report. This may be quite an unsatisfactory procedure, since it does not always allow adequate time for the careful consideration which the commentaries, an important element of the Commission's output, merit. Occasionally, where there is time and if the Special Rapporteur so wishes, a working group has reviewed a preliminary draft of the commentaries before the Special Rapporteur submits them for translation and discussion in plenary.[7]

After a first reading stage, there is normally a year off to enable sufficient time for States to submit written comments on the draft texts adopted by the Commission. Then a second (final) reading takes place, usually focused on considering the observations and comments of States. The final product is then submitted to the UN General Assembly, together with a recommendation as to future action (for example, to conclude a convention based on the Commission's text, or to bring the text to the attention of States and others).

States have many opportunities to comment in the course of the Commission's work on a topic, in particular in the debate in the Sixth Committee of the UN General Assembly on the Commission's Annual Report, which details the progress made with regard to each topic. Such input is important for the Commission's work, which is indeed intended to be useful to States, to whom the Commission reports and who are the ultimate law-makers in the international legal system.

The Commission is only part way through its work on the topic *Immunity of State officials from foreign criminal jurisdiction*. It has not yet completed a first reading, so any overall assessment would be premature. I nevertheless propose to draw on the work done so far in order to offer some thoughts on the Commission's role in today's world, a role that has sometimes been questioned. A key issue is the extent to which, for any particular topic on its programme of work, the Commission does or should engage in progressive development of international law as opposed to its codification, or indeed in proposing wholly new rules of law, especially as such distinctions have not always proven workable in practice.[8] More precisely, how far can the Commission's output on any

7 This was done with the second reading commentaries on *Responsibility of States for internationally wrongful acts* (2001); the first and second reading commentaries on *Identification of customary international law* (2016, 2018); some of the first reading commentaries on *Provisional application of treaties* (2017); and some of the commentaries on *Protection of the environment in relation to armed conflict* (2018).

8 See also M. Wood, 'The UN International Law Commission and Customary International Law', Morelli Lecture (27 May 2017) in E. Cannizzaro (ed.), *Methodologies of International Law* (forthcoming 2019).

particular topic be seen as setting out *lex lata* as opposed to *lex ferenda*? As I have said elsewhere,

> an important distinction needs to be made between the terms 'codification' and 'progressive development' on the one hand, and '*lex lata*' and '*lex ferenda*' on the other. At least as used in the Statute of the Commission, the former refers to the outcome of a process of reducing unwritten law to writing; it is inevitably a matter of degree. The latter is a clear-cut distinction: a rule is either existing law or it is not.[9]

The distinction between what the law is and what it might be is of great practical importance, if not for the Commission in its day-to-day work, then certainly for States and practitioners, and for judges, including those in national courts, who often need to know what the law is, or was, at any particular time.[10] The immunity of State officials is an area of international law that frequently comes before national courts and is often at issue in high-profile cases, so clarity on the part of the Commission is particularly important.[11]

A closely related question is whether the final output on a topic should be draft articles intended—in principle, at least—to form the basis of a multilateral convention, or whether it should be put forward as a restatement (in the case of codification), or as 'soft law' or something in the nature of a study.

It is worth recalling that, over the years, the Commission has made important contributions to the progressive development and codification of international law in the field of international immunities, including in the preparatory work of the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963, and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004.

There have also been less successful projects in the field, at least in the sense that they have not resulted in widely ratified conventions: the 1969 New York Convention on Special Missions, which as of June 2019 has only 39 States

9 Ibid., at para. 6.

10 See also M. Wood, 'What Is Public International Law? The Need for Clarity about Sources' (2011) 1 Asian Journal of International Law 205.

11 See also R. van Alebeek, 'The "International Crime" Exception to the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?', supra note 3, at 32 ('Even if the ILC's general practice of declining to distinguish between progressive development and codification is sensible, such a distinction should have been drawn in the particular case of Draft Article 7. Whether, and how, the "international crimes" exception can be framed in terms of existing customary international law is the central question in the debate triggered almost two decades ago by the *Pinochet* case, and nearly all members who participated in the ILC debates articulated a position on this point').

Parties; the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, not (yet) in force after more than 40 years, having achieved 34 of the 35 ratifications required; and the 1989 Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier, which were given a 'decent burial' by the Sixth Committee in 1995.[12] A sub-topic on the immunities of international organizations was discontinued in 1992, and efforts to revive it in recent years have not been greeted with enthusiasm.[13] The reasons for the relative failure of these topics vary, but they were either seen as unnecessary or as conferring an undue scale of privileges and immunities. Most of these projects have, nevertheless, had some influence on the law. For example, the customary international law on the inviolability and immunity of persons on special missions was undoubtedly influenced by the adoption of the New York Convention in 1969.[14]

II Work on the Topic *Immunity of State Officials From Foreign Criminal Jurisdiction* (up to 2018)

The topic *Immunity of State officials from foreign criminal jurisdiction* has been on the Commission's current programme of work since 2007.[15] There have been two Special Rapporteurs, Roman Anatolyevitch Kolodkin (Russian Federation) between 2007 and 2011, and Professor Concepción Escobar Hernández (Spain) from 2012 to the present.

Between 2008 and 2011, Kolodkin produced three reports,[16] but they contained no proposed draft articles. In addition, in 2008 the Commission's Secretariat

12 UNGA Decision 50/416 of 11 December 1995, by which the General Assembly brought consideration of the topic to a conclusion by bringing the Commission's final draft articles to the attention of Member States while reminding them of the possibility that this field of international law might be subject to codification at an appropriate future time.

13 See G. Gaja, 'Jurisdictional Immunity of International Organizations' Yearbook of the International Law Commission 2006, vol. II, Part 2, 201.

14 See A. Sanger and M. Wood, 'The Immunities of Members of Special Missions' in T. Ruys, N. Angelet and L. Ferro (eds.), *Cambridge Handbook of Immunities and International Law* (CUP 2019) 452; M. Wood, A. Sanger and Council of Europe (eds.), *The Immunities of Special Missions* (Brill 2019).

15 The topic was placed on the Commission's long-term programme of work in 2006, on the basis of a syllabus prepared by Mr Kolodkin: Yearbook of the International Law Commission 2006, vol. II, Part 2, at 191–196.

16 Preliminary Report (A/CN.4/601: Yearbook of the International Law Commission 2008, vol. II, Part 1, at 157–192); Second Report (A/CN.4/631: Yearbook of the International Law Commission 2010, vol. II, Part 1, at 395–426); Third Report (A/CN.4/646: Yearbook of the International Law Commission 2011, vol. II, Part 1, at 223–243).

published a detailed study on the topic.[17] Kolodkin's first report was debated in the Commission in 2008[18] and his second and third reports in 2011.[19]

Kolodkin's first report, while preliminary in nature, covered a range of important issues (not all of which have yet been dealt with by the Commission). The report clarified that the topic 'covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official)'.[20] It also observed that '[t]he basic source of the immunity of State officials from foreign criminal jurisdiction is international law, and particularly customary international law';[21] and that '[i]mmunity of State officials from foreign criminal jurisdiction is procedural and not substantive in nature'.[22] The first report explained that

> [a]ctions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these actions also to the person who performed them.[23]

With regard to immunity *ratione personae*, the first report suggested that

> [t]he high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and ministers for foreign affairs;

and that

> [a]n attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all

17 Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat (A/CN.4/596 and Corr.1).

18 2982nd–2987th meetings: Yearbook of the International Law Commission 2008, vol. I, at 175–234.

19 3086th–3088th, 3111th, and 3113th–3115th meetings: Yearbook of the International Law Commission 2011, vol. I, at 37–72, 249–251, 266–281, 282–290.

20 Yearbook of the International Law Commission 2008, vol. II, Part 1, at 191, para. 130 (a).

21 Ibid., at 184, para. 102 (a).

22 Ibid., at 184, para. 102 (g) (adding that '[i]t is an obstacle to criminal liability but does not in principle preclude it').

23 Ibid., at 184, para. 102 (h).

> high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined.[24]

In the debate on Kolodkin's first report, members of the Commission were divided on the question of which holders of high-ranking office in a State should be recognized as entitled to immunity *ratione personae*, a question that appears to have been connected to the wider debate as to whether the Commission should approach the topic as a whole as an exercise in codification or as one of progressive development (or both).[25] The debate in the Sixth Committee in 2008 revealed differences among States as well, including on the question of exceptions to immunity and, more broadly, the approach that the Commission should adopt: while some delegations emphasized the usefulness of codification of existing law, others 'cautioned that the study of this topic by the Commission should take into account the balance of competing interests involved, namely, the prevention of impunity on the one hand and the stability of inter-State relations and the protection of the State's ability to perform its functions on the other'.[26]

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24 Ibid., at 192, paras 130 (d) and (e).

25 In summarizing the debate, the Special Rapporteur noted that: 'With regard to immunity *ratione personae*, some members took the view that only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity. Others, while admitting that other officials might also enjoy immunity *ratione personae*, cautioned the Commission against venturing beyond the limits of the "troika". At least two members held that, even if officials other than the troika enjoyed such immunity, the Commission should not mention them explicitly lest it prejudge the situation regarding other categories of persons who might enjoy personal immunity. At the same time, several members of the Commission—indeed perhaps the majority—considered that, in the light of current trends in the conduct of affairs of State, the Commission would have difficulty in confining its study to the troika. However, even those who were in favour of extending its scope felt that the Commission should exercise very great caution. State officials who might enjoy immunity *ratione personae* had been cited, for example, ministers of defence, ministers of foreign trade, Presidents of Parliaments, Vice-Presidents and judges. The question of immunity for officials representing the constituent units of federal States had also been raised. Many members had proposed, as an alternative to listing State officials who enjoyed immunity *ratione personae*, the definition of criteria that could be invoked to determine the categories of eligible persons. He [the Special Rapporteur] suggested that, in deciding on the approach to be adopted, a more thorough analysis of the judgment rendered by the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case should be undertaken': Yearbook of the International Law Commission 2008, vol. I, at 232, para. 29. See also Yearbook of the International Law Commission 2008, vol. II, Part 2 (Report of the Commission to the General Assembly on the Work of its 60th Session), at 138–139, para. 290.

26 For a summary of the 2008 debate, see A/CN.4/606: Report of the International Law Commission on the Work of its 60th Session (2008): Topical Summary of the Discussion Held

Kolodkin's second report was dedicated to 'the scope of immunity of a State official from foreign criminal jurisdiction'. Presenting the various considerations at play and drawing upon a wealth of materials it concluded, inter alia, that

> State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;
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> Immunity *ratione materiae* extends to *ultra vires* acts of officials and to their illegal acts;
>
> Immunity *ratione materiae* does not extend to acts which were performed by an official prior to his taking up office; a former official is protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official;
>
> Immunity *ratione personae*, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity; and
>
> Immunity is valid both during the period of an officials stay abroad and during the period of an officials stay in the territory of the State which he serves or served. Criminal procedure measures imposing an obligation on a foreign official violate the immunity which he enjoys, irrespective of whether this person is abroad or in the territory of his own State.[27]

As regards exceptions to immunity, the report concluded, inter alia, that '[t]he various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing', and that it was 'difficult to talk of exceptions to immunity as a norm of international law that has developed, in the same way as it cannot definitively be asserted that a trend toward the establishment of such a norm exists'.[28] The report continued, however: 'That States are undoubtedly entitled to establish restrictions on the immunity of their officials from the criminal jurisdiction of one another by concluding an international treaty is another matter'; and it added that '[i]n this regard, the Commission could consider, alongside the codification of customary international law currently in force, the question of drawing up an

in the Sixth Committee of the General Assembly during its 63rd Session, Prepared by the Secretariat, at 18–21, paras 89–110, especially paras 89–90, 106–110.

27 A/CN.4/631: Yearbook of the International Law Commission 2010, vol. II, Part 1, at 425–426, para. 94 (b), (f), (g), (i) and (m).

28 Ibid., at 426, para. 94 (n) and (o).

optional protocol or model clauses on restricting or precluding the immunity of State officials from foreign criminal jurisdiction'.[29]

Kolodkin's third report was dedicated mostly to 'procedural aspects of immunity', including the timing of consideration of immunity; invocation of immunity; and waiver thereof. Such procedural aspects are of much importance in the present context.

In the plenary debate in 2011, controversy persisted as to the approach that the Commission should take with respect to the topic, that is, the extent to which it should codify customary international law or engage instead in progressive development of the law. In summarizing the debate, the Special Rapporteur noted, *inter alia*, that

> [o]pinions had varied on who should enjoy personal immunity. Claims that ministers of foreign affairs or even the troika did not or should not enjoy immunity could not, in his view, be supported by objective political and legal analysis. The debate had revealed little support for such a position within the Commission. Several members had said that the group of officials who enjoyed personal immunity should be restricted to the troika. However, he had already drawn attention to a ruling of the International Court of Justice suggesting that, in addition to the troika, other high-level officials enjoyed personal immunity. Several rulings of national courts which recognized that personal immunity was enjoyed not only by the troika, but also by other high-level officials, such as ministers of defence and ministers of trade, were based on that ruling. The favourable disposition of governments had been taken into account by national courts in reaching such decisions, which were now facts of law. The logic behind those decisions resulted in part from global changes: important State functions, including representation of the State in international relations, were no longer the exclusive preserve of the troika. He was not aware of any legal rulings to the effect that absolutely no officials other than the troika enjoyed personal immunity. To what extent, then, was a restrictive approach grounded in law?
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> Several members of the Commission had underscored the need for care and rigour in addressing the issue, and that was obviously the right approach. Indeed, he had applied it in formulating the proposals in his preliminary report on establishing the criteria that high-level officials other than the troika had to meet in order to enjoy personal immunity and in the suggestion in his third report that a distinction should be

29 Ibid., at 425, para. 93.

made between such individuals and the troika for procedural aspects of immunity, despite the fact that personal immunity was the same for both groups.[30]

Kolodkin did not stand for re-election in 2011, and so was no longer a member of the Commission in 2012.[31] That year the Commission appointed a new Special Rapporteur, Professor Concepción Escobar Hernández. She has so far produced seven reports (2012–2019).

The new Special Rapporteur's first (preliminary) report in 2012 recalled the work on the topic during the quinquennium 2007–2011 and presented a roadmap of the issues to be considered going forward (namely, immunity *ratione personae* and immunity *ratione materiae*; implications of the international responsibility of the State and the international responsibility of individuals; and procedural aspects of immunity).[32] The report recognized that 'the topic of the immunity of State officials from foreign criminal jurisdiction is not without controversy',[33] and that 'the points of contention [...] should [be addressed] in a systematic, ordered and structured manner'.[34] As to whether to approach the topic from the perspective of *lex lata* or *lex ferenda*, the Special Rapporteur stated her opinion that 'the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches' and that 'both aspects must be taken into account in the future work of the Commission'.[35] At the same time, the Special Rapporteur indicated that 'she fully realizes the usefulness of beginning with *lex lata* considerations and including an analysis *de lege ferenda* of some topics, as needed, at a later date', in order to 'make it possible to address the topic in a balanced manner'.[36] She added that this was 'fully consistent with the Commission's mandate to pursue simultaneously the codification and progressive development of international

30 Yearbook of the International Law Commission 2011, vol. I, at 286–287, paras 22–23 (also noting at para. 24 that 'The most serious differences of opinion related to exceptions to immunity').

31 Kolodkin was re-elected by the Commission in a by-election in 2015, and again by the General Assembly in 2016. Upon returning to the Commission, although no longer Special Rapporteur, he took a full part in the consideration of the topic. In October 2017 he became a judge on the International Tribunal for the Law of the Sea, resigning from the Commission before its 2018 session.

32 A/CN.4/654: Yearbook of the International Law Commission 2012, vol. II, Part 1, at 41–51.

33 Ibid., at 47, para. 50.

34 Ibid., at 50, para. 72.

35 Ibid., at 51, para. 77.

36 Ibid.

law'.[37] Several members of the Commission expressed concern, however, at the Special Rapporteur's reference to '[all the] principles, values and interests of the international community as a whole' as a general normative framework.[38] For them, such a vague framework risked introducing a highly subjective element to the work.[39]

The second report (2013) delineated the suggested scope of the topic, distinguished between the concepts of immunity and jurisdiction, and then focused on immunity *ratione personae* (and proposed six draft articles).[40] In the debate on the second report that year, concern was again expressed about a 'values-based' approach.

The Special Rapporteur's third report (2014) sought to mark the starting point for the consideration of the 'normative elements' of immunity *ratione materiae*.[41] It discussed the concept of an 'official', and described terms employed to designate the persons to whom immunity *ratione materiae* would apply. In referring to the subjective scope of such immunity, the report proposed a draft article to the effect that 'State officials who exercise governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction'.[42]

37 Ibid.

38 For example, ibid., at 48, para. 57.

39 See, for example, Yearbook of the International Law Commission 2012, vol. I, at 98, para. 15 (Mr. Nolte saying that 'the 'value' argument could not be so easily transposed to the rules and principles of international law. Rules of international law, such as the rules on immunity, also represented values. It was not sufficient simply to balance values against each other; such a balancing process must take place within the framework of general rules relating to the formation and evidence of customary international law. Needless to say, the Commission would also have to discuss in greater depth the more or less legal nature of the values to which the Special Rapporteur was referring'), at 11, para. 57 (Mr. Wisnumurti saying that 'it was necessary to be cautious about what was meant by that phrase [i.e. 'the principles and values of the international community']; a broad interpretation would be counterproductive'). But see at 116, para. 17 (Mr. McRae opining that 'in fact the Commission constantly referred to [values and principles of international law], because legal discourse was implicitly or explicitly all about values. The question at the heart of the topic under consideration, namely whether the value of relations between States took precedence over the value of combating impunity, was fundamentally a debate about the international community's values and principles. Legal language and methodology masked, but did not obliterate, the essential policy choices which were made individually and collectively in the course of a debate. The only current difference was that the Special Rapporteur admitted that state of affairs quite openly').

40 A/CN.4/661.

41 A/CN.4/673.

42 Ibid., at para. 151.

The fourth report (2015) sought to cover additional aspects of the material scope of immunity *ratione materiae*, namely, what constituted an 'act performed in an official capacity', and its temporal scope.[43] The Special Rapporteur emphasized that characterization of the subjective, material and temporal scope of immunity *ratione materiae* as 'the normative elements' of this type of immunity 'should not be read as a pronouncement on exceptions to immunity or as recognition that it is absolute or limitless in nature'.[44]

In her fifth report (2016), the Special Rapporteur sought to cover 'the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction'.[45] As we shall see, the fifth report (and draft Art. 7 proposed therein) gave rise to heated debate within the Commission and among States.

The Special Rapporteur's sixth report became available towards the end of the 2018 session.[46] While it began to discuss certain procedural issues, it did so in general terms; there were no proposals for draft articles. The debate within the Commission on the sixth report began at the end of the 2018 session and is to continue in 2019, together with the debate on her seventh report, which makes specific proposals on procedural matters (A/CN.4/729).

III Draft Articles 1–6

As of June 2019, the Commission has provisionally adopted, on first reading, seven draft articles with commentaries, one of which (on definitions) is still to be completed.[47]

43 A/CN.4/686.

44 Ibid., at para. 20.

45 A/CN.4/701.

46 A/CN.4/722.

47 See Commission's Annual Reports for 2013 (A/68/10), 2014 (A/69/10), 2016 (A/71/10), and 2017 (A/72/10):
Draft Art. 1: Scope of the present draft articles (Yearbook of the International Law Commission 2013, vol. II, Part 2, at 39–43);
Draft Art. 2 (e): State official (ILC Report 2014, at 231–236);
Draft Art. 2 (f): Act performed in an official capacity (ILC Report 2016, at 353–359);
Draft Art. 3: Persons enjoying immunity *ratione personae* (Yearbook of the International Law Commission 2013, vol. II, Part 2, at 43–47);
Draft Art. 4: Scope of immunity *ratione personae* (Yearbook of the International Law Commission 2013, vol. II, Part 2, at 47–50);
Draft Art. 5: Persons enjoying immunity *ratione materiae* (ILC Report 2014, at 236–237);
Draft Art. 6: Scope of immunity *ratione materiae* (ILC Report 2016, at 359–363);
Draft Art. 7: Crimes under international law in respect of which immunity *ratione materiae* shall not apply (ILC Report 2017, at 177–191).

The present section briefly describes draft Articles 1–6. The next two sections turn to draft Art. 7: Section IV describes the provisional adoption of the draft article; and Section V addresses some important issues to which its adoption gives rise. Section VI seeks to draw some lessons from the work on this topic to date.

Draft Art. 1 addresses the scope of the draft articles. Para. 1 makes it clear that the draft articles cover immunity 'from the criminal jurisdiction of another State', that is, not from the jurisdiction of an international criminal court or tribunal; and para. 2 provides that the draft articles are without prejudice to the immunity enjoyed under special rules of international law. It gives a non-exhaustive list, referring to persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces.[48] Such special rules include both treaty rules and rules of customary international law (for example, the immunity of persons on special missions both under the 1969 Convention on Special Missions and under customary international law).

Draft Art. 2 so far only contains two definitions, of 'State official' and of 'act performed in an official capacity'. These are arguably unnecessary, but if retained they must of course be correct, and properly described in the commentary.

Para. (*e*) defines 'State official' to mean 'any individual who represents the State or who exercises State functions'. This is broad, covering both representation and the exercise of functions. The words 'any individual' imply that any person who exercises State functions is covered, even if he or she does not have the status of an official under national law.[49]

Para. (*f*) defines an 'act performed in an official capacity' to mean 'any act performed by a State official in the exercise of State authority'. Members of the

48 Draft Art. 1 reads:
'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'.

49 Clarity is not, however, enhanced by the following remark in paragraph (9) of the commentary to draft Art. 2 (f): 'although the definition contained in draft article 2 (f) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act, in other words, the State official. It thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State' (A/71/10, at 356).

Commission, and States in the Sixth Committee, questioned the need for any such definition. The lengthy commentary to draft Art. 2 (f) raises some potentially difficult questions, which were picked up in the Sixth Committee:

> While support was expressed by some delegations for draft article 2 (f) [...] doubt was also expressed about the necessity of such a definition. The suggestion was made to broaden the scope to comprise all functions by State officials acting in their official capacity. Some delegations encouraged further analysis of various aspects of this definition, including: the legal regime concerning *de facto* officials acting under governmental direction and control; of the relationship between immunity and acts *iure gestionis*; of acts performed in an official capacity but for personal gain; and whether acts *ultra vires* could be considered official acts for purposes of immunity. Further clarification on the relationship between immunity *ratione materiae* and the attribution of conduct to a State under the law of State responsibility was also sought.[50]

One point is worth noting in particular. Unlike the previous Special Rapporteur, Professor Escobar Hernández had indicated that in her view *ultra vires* acts could not be official acts, and this was reflected in her draft commentary. Following discussion in plenary,[51] a revised draft commentary was adopted that concluded that '[t]he question whether or not acts *ultra vires* can be considered as official acts for the purpose of immunity from criminal jurisdiction will be addressed at a later stage, together with the limitations and exceptions to immunity'.[52]

Other definitions may be needed, including of 'immunity from criminal jurisdiction'. It is not yet entirely clear whether the expression includes inviolability.[53]

Draft Art. 3, entitled 'Persons enjoying immunity *ratione personae*', provides that 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction'. There was significant disagreement within the Commission on this issue, both as to what the law is, and what it should be.

50 A/CN.4/703: Report of the International Law Commission on the Work of 68th Session (2016): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 71st Session, Prepared by the Secretariat, at para. 53.

51 A/CN.4/SR.3345, at 15–16.

52 A/CN.4/SR.3346, at 6–7.

53 ILC Report 2017 (A/72/10), at para. 130.

In her second report in 2013, the Special Rapporteur recalled her suggested general analytical framework of 'all the norms, principles and values of international law that are relevant to the topic'.[54] She described both what she referred to as 'a strict interpretation that links and restricts immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs' and 'a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions'.[55] Then, based on a reading of the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* judgments of the International Court of Justice[56] and of State practice,[57] and because of 'the impossibility of drawing up an exhaustive list',[58] the Special Rapporteur 'consider[ed] that the subjective scope of immunity from foreign criminal jurisdiction *ratione personae should* be limited to Heads of State, Heads of Government and ministers for foreign affairs'.[59]

Within the Commission, different views were expressed as to which State officials enjoy immunity *ratione personae*. Several members expressed disagreement with the Special Rapporteur's 'restrictive approach', suggesting that the relevant international practice was not fully or accurately discussed in her report. In particular, attention was drawn to the International Court's pronouncement in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases that 'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal',[60] and to the significant endorsement of this view by States (including national courts). Against this background, the Special Rapporteur summarized the debate by stating her understanding that the Commission

54 A/CN.4/661, at para. 7 (c).
55 Ibid., at paras 57–62.
56 Ibid., at para. 62.
57 Ibid., at para. 63.
58 Ibid., at para. 64.
59 Ibid., at para. 67 (emphasis added).
60 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) [2002] ICJ Rep 3, at 20–21, para. 51; *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) [2008] ICJ Rep 177, at 236–237, para. 170 (emphasis added).

should approach the matter 'from the dual perspective of *lex lata* and *lege ferenda*'.[61]

Eventually, the Commission provisionally adopted a draft article that specifies that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, but does not refer to other holders of high-ranking office.

While the debates in the Commission's Drafting Committee are not public, the Statement of the Chairman of the Drafting Committee to the plenary indicates that the text provisionally adopted by the Drafting Committee (and eventually by the Commission on first reading) was the result of a compromise and did not reflect a consensus as to the content of existing law:

> Several members indicated that, contrary to the draft article proposed by the Special Rapporteur, immunity *ratione personae* now extends beyond the *troika* as there was practice to that effect. On the other hand, some other members disputed whether Ministers for Foreign Affairs enjoy immunity *ratione personae* under customary international law. This matter was raised in the Drafting Committee. The commentary will provide examples of State practice and case law in respect of the *troika*. In provisionally adopting the text of draft article 3 limited to the *troika*, it was recognized that other high-ranking officials of the State may benefit from immunity under rules of international law relating to special missions. The commentary to draft article 3 would clarify this point.
>
> A reservation was nevertheless expressed regarding draft article 3 as a whole. It was contended that the Drafting Committee, as well as the Commission in Plenary, had not given adequate consideration to whether the list of persons in draft article 3 precisely reflected the state of international law on this subject. Such a point of view was opposed by some members.[62]

Draft Art. 4 concerns the scope of immunity *ratione personae*.[63] The Special Rapporteur's fifth report 'concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a

61 Yearbook of the International Law Commission 2013, vol. I, at 41, para. 4 (3170th meeting).

62 Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi (7 June 2013), at 11–13. See also the commentary to draft Art. 3: A/68/10, Yearbook of the International Law Commission 2013, vol. II, Part 2, at 45–46, para. (8).

63 Draft Art. 4 reads:

> '1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

trend in favour of such a rule'.[64] Under the draft article, as under customary international law, immunity *ratione personae* during the term of office covers all acts, whether performed in a private or official capacity and whether carried out before or during office.

Draft Art. 5, entitled 'Persons enjoying immunity *ratione materiae*', is the first of the draft articles on immunity *ratione materiae* and is intended to define the persons who enjoy this category of immunity from foreign criminal jurisdiction. It provides that 'State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction'.[65] This fairly straightforward formulation was adopted in 2014 without prejudice to possible exceptions to immunity *ratione materiae*, which were to be taken up later.[66]

In the following year (2015), discussion of the scope of immunity *ratione materiae* commenced, but could not be concluded. The Commission's report of that year does mention that, again,

> [t]he view was [...] expressed that it was necessary to strike a balance between fighting impunity and preserving stability in inter-State relations. In such circumstances, it was considered essential that there be transparency and an informed debate on whatever choices were to be made and on the direction to be taken.[67]

Draft Art. 6, adopted in 2016, was generally uncontroversial. Entitled 'Scope of immunity *ratione materiae*', it provides that:

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

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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*'.

64 A/72/10, at 166, para. 83.

65 A/69/10, at 236.

66 Ibid., at 237, para. (5).

67 A/70/10, at 121, para. 194.

immunity with respect to acts performed in an official capacity during such term of office.[68]

IV Draft Art. 7: Provisional Adoption

Draft Art. 7, entitled 'Crimes under international law in respect of which immunity *ratione materiae* shall not apply', was highly controversial within the Commission and among States. The divisions go back to the debates on Kolodkin's reports in 2008 and 2011, but they were particularly acute in the debates in 2016/2017 and 2018, concerning the second Special Rapporteur's fifth report (2016) and her proposal for a draft Art. 7 on 'limitations and exceptions'[69] to immunity *ratione materiae*.[70]

68 A/71/10, at 359.

69 For an explanation of the terms 'limitations' and 'exceptions', see paragraphs (11)–(13) of the commentary to draft Art. 7: A/72/10, at 183–184. The Special Rapporteur's use of these terms was not entirely straightforward. She appeared to distinguish between cases where there is no immunity because the alleged offence was not an official act (or should be deemed not to be an official act), so no question of immunity *ratione materiae* could arise ('limitations'); and cases where specific crimes were to be excluded from immunity *ratione materiae* because, although they were official acts, they fell within one or more exceptions to immunity. In her view, draft Art. 7 was worded ('shall not apply') so that the listed crimes might be viewed in either way. See, for example, her explanation of this '[idea] central to the report': ibid., at 166, para. 80 ('she noted that the phrase "limitations and exceptions" echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as "limitations" or "exceptions" led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case'). See also ibid., at 174, para. 135 ('The Special Rapporteur reiterated her position that the distinction between limitations and exceptions, as set out in the report, helped to illuminate the concept of immunity of State officials and its role within the international legal system. In her view, that approach was not incompatible with the pragmatic formulation of draft article 7, which focused on the situation in which immunity "does not apply"; rather, that formulation avoided a number of controversies relating to the distinction between limitations and exceptions and found its basis in practice'); and at 167, 171, paras 86, 117–118 ('A number of members considered that the distinction between limitations and exceptions was useful and should be maintained. It helped to distinguish situations in which immunity was not at issue, because the relevant conduct could not be considered as an official act or as performed in official capacity, from cases in which immunity was excluded on the basis of exceptional circumstances […]. Some members noted that a distinction might provide theoretical clarity, but that it had no basis in the practice of States').

70 Draft Art. 7 as proposed by the Special Rapporteur in her fifth report (A/CN.4/701, at 95) read:

In her fifth report, the Special Rapporteur acknowledged the limited and divergent State practice and referred to a 'trend', which suggested that her proposed draft Art. 7 was at most *lex ferenda*.[71] The Special Rapporteur indicated that, in her view,

> the Commission should approach the topic of immunity from foreign criminal jurisdiction, and in particular the question of limitations and exceptions, *from the perspectives of both codification and the progressive development of international law*. The challenge for the Commission was to decide whether to support a developing trend in the field of immunity, or whether to halt such development.[72]

Draft Art. 7 lies at the heart of the topic. In the debate in plenary, which for exceptional reasons stretched over two sessions (with a different membership), a good number of Commission members did not support reference of the Special Rapporteur's proposed draft Art. 7 to the Drafting Committee.[73] They and others did not accept the Special Rapporteur's assertion, from time to time, that her proposed draft article reflected existing customary international law; in their view, the various materials cited did not in fact support such a position.[74] The Special Rapporteur's alternative claim, that there was a 'trend' in the direction of her draft, was also strongly contested. These views

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'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. Crime of corruption;
   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 the forum State and the State of the official, under which immunity would not be applicable;
   ii. The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State'.

71 Ibid., at 73, para. 179.

72 A/72/10, at 167, para. 84 (emphasis added).

73 Discussion on whether or not to refer draft Art. 7 to the Drafting Committee was cut short by a motion by one member to end the discussion, which was carried by a vote (see A/CN.4/SR.3365, at 18).

74 See summary of the debate in the Commission in 2016 (A/71/10, at 346–347, paras 214–220) and 2017 (A/72/10, at 168–169, paras 92–101); Tladi, 'The International Law Commission's

were repeated in the Drafting Committee, with some members urging that the draft article not be reported back to the plenary pending consideration of procedural safeguards that may prevent abuse of any exceptions to immunity.

The debate in the Sixth Committee in 2016 was necessarily preliminary since the Commission itself had only begun (but not completed) its own debate on the Special Rapporteur's fifth report; many delegations preferred to await the completion of the work on the fifth report within the Commission. Nevertheless, those who spoke 'observed that the topic involved fundamental principles of real practical significance for States, and urged the Commission to proceed cautiously and accurately'.[75] The Commission's Secretariat summarized the debate in 2016 as follows:

> Some delegations stressed the need to develop the topic focusing on the *lex lata*, while other delegations emphasized the need to also progressively develop this area of the law. Some delegations suggested that the Commission should consider the *lex lata* first prior to attempting to develop the topic *lex ferenda*; and some delegations observed that a clearer distinction between what was *lex lata* and *lex ferenda* within the draft articles was warranted. Several delegations emphasized that developments in international law must be taken into account when addressing the issue of exceptions, in particular international criminal law. However, a number of delegations were of the view that the customary international law rules on immunity of State officials did not recognize any exceptions to immunity and that no clear trend towards such a development had emerged.[76]

The revised draft Art. 7 that emerged from the Drafting Committee in 2017,[77] though somewhat more limited in substance, remained unacceptable to a significant number of Commission members. Nevertheless, after much debate, draft Art. 7 was provisionally adopted by the Commission by a recorded vote

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Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?', supra note 3, at 8–11.

75 A/CN.4/703: Report of the International Law Commission on the Work of its 68th Session (2016): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 71st Session, Prepared by the Secretariat, at para. 51.

76 Ibid., at para. 52. See also paras 55–56.

77 From the earliest days, the Commission's Drafting Committee has engaged in much more than drafting: see H.W. Briggs, *The International Law Commission* (Cornell University Press 1965), at 233–236. On the Drafting Committee generally, see the UN Secretariat's publication *The Work of the International Law Commission* (9th edn 2017), at 33–34.

(21 in favour, eight against, one abstention). This was striking: voting on core issues is nowadays very exceptional in the Commission. In the early years of its activity there was fairly frequent recourse to voting,[78] but over time voting as a method for adopting proposed texts had virtually died out.[79] Instead, efforts are made to reach a consensus and these are pursued as far as possible. But on this occasion, some members were not willing to postpone a decision until 2018, when the matter could have been considered together with procedural safeguards that may assist in preventing abuse of any exceptions that might be proposed.

Draft Art. 7, as provisionally adopted in 2017, lists six exceptions to immunity *ratione materiae*:

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.[80]

The six exceptions are defined by reference to definitions in existing treaties. That is the purpose of para. 2 of the draft conclusion and the annex.[81] Whether definition by reference to existing instruments is a good technique may be debated: States that are not parties to the treaties to which reference is made may not wish to see them referred to in this way. But it is certainly convenient, and

78 I. Sinclair, *The International Law Commission* (Grotius Publications 1987), at 34.

79 See also L.T. Lee, 'The International Law Commission Re-Examined' (1965) 59 American Journal of International Law 545, at 550 ('The recent thawing of the Cold War has also produced an impact upon the Commission. Instead of settling an issue by majority vote, the Commission would devote lengthy sessions to resolve differences so that in the end a Quaker-like spirit for compromise and consensus could prevail. In this task, the Commission is well aided by its Drafting Committee—actually a misnomer, since its activities often concern substance instead of mere form').

80 See A/72/10, at 177–178. The annex lists certain multilateral treaties containing definitions of the listed crimes, which definitions are thus incorporated by reference into the draft articles.

81 See also ibid., at 189–191, paras (25) to (35).

avoids either the use of just the names of the crimes (as originally proposed by the Special Rapporteur) or a very lengthy set of definitions that might have dominated what is otherwise a relatively concise text.

Draft Art. 7 does not apply to persons while they enjoy immunity *ratione personae.* Nor does it apply to those subject to a special regime, such as persons connected with diplomatic missions, consular posts, special missions, and the military: this is clear from draft Art. 1.

Following the provisional adoption of draft Art. 7 by vote, the Commission proceeded to adopt a lengthy and contested commentary. The commentary, like the plenary debate and the votes, indicates clearly the differences within the Commission.[82] The divisions within the Commission are clear from the following:

– The Commission debate on Kolodkin's first report in 2008.[83]
– The Commission debate on Kolodkin's second report in 2011.[84]
– The partial debate within the Commission on Escobar Hernández's fifth report in 2016[85] and its completion in 2017.[86]
– The 20 July 2017 statement of the Chairperson of the Drafting Committee.[87]
– The adoption of draft Art. 7 by recorded vote on 20 July 2017, and the explanations of vote before and after the vote.[88]

82 The divisions within the Commission may perhaps best seen in paragraphs (5) to (8) of the commentary to draft Art. 7, with lengthy footnotes referring to and questioning the materials relied upon by the Special Rapporteur (A/72/10, at 178–183). Paragraphs (5) to (7) set out the views of those supporting the draft, though how far they really represent all their views is far from clear having regard to what was said in the plenary debate on the fifth report in 2016/2017; paragraph (8) sets out the views of those who opposed draft Art. 7.

83 See Yearbook of the International Law Commission 2008, vol. I, at 169–234; and the summary of the debate provided in Chapter X of the Commission's 2008 Annual Report (A/63/10).

84 See Yearbook of the International Law Commission 2011, vol. I, at 37–72, 249–251, 266–290; and the summary of the debate provided in Chapter VII of the Commission's 2011 Annual Report (A/66/10).

85 For the partial debate, see summary records of the Commission's meetings on 26 to 29 July 2016 (A/CN.4/SR.3328–3331); and the summary in Chapter XI of the Commission's 2016 Annual Report (A/71/10).

86 See summary records of the Commission's meetings on 18, 19, 23, 24, 26 and 30 May 2017 (A/CN.4/SR.3360–3365); and the summary in Chapter VII of the 2017 Annual Report (A/72/10).

87 See A/CN.4/SR.3378, at 3–9; for the verbatim text see http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_iso.pdf&lang=EXXX (accessed 27 March 2019).

88 A/CN.4/SR.3378, at 9–16.

– The consideration of the Special Rapporteur's draft commentary on draft Art. 7 at plenary meetings on 3 and 4 August 2017.[89]
– The Commission's partial debate on the Special Rapporteur's sixth report in 2018.[90]

The two main views within the Commission were strongly put, and diametrically opposed. It is not obvious how they can be reconciled. The Special Rapporteur's seventh report in 2019, which proposes procedural provisions, will be important. Commission members who do not accept that draft Art. 7 is a statement of existing law might be ready to work on it as a proposal for new law, to be put to States for adoption (with or without amendment) or rejection as they see fit. This could be done by preparing draft articles explicitly intended to become a treaty. Some members did not wish to take the Special Rapporteur's proposed draft article further unless she made it clear that such should be the Commission's aim: their concern was that, otherwise, the draft article might be viewed by national courts as reflecting customary international law. Even then there would remain a risk that national courts might regards a proposal for a treaty as an indication of existing law or of a 'trend' upon which they might feel empowered to build.[91]

The Sixth Committee debate in 2017 revealed very divided views among States with regard to draft Art. 7. The following points emerged:[92]

89 A/CN.4/SR.3387 (3 August 2017); A/CN.4/SR.3388 (3 August 2017); A/CN.4/SR.3389 (4 August 2017). A comparison of the Special Rapporteur's draft commentary (in A/CN4/L.903/Add.2) and the commentary as adopted, as well as what was said in the debate on adoption of the commentary, is highly revealing.

90 See summary records of the Commission's meetings on 30 and 31 July (A/CN.4/SR.3438-3440); and A/73/10, Chapter XI.

91 Whether national courts should be at the forefront of the development of international law is questionable. The English courts have rejected any such role: see, for example, *Jones v Saudi Arabia* [2006] UKHL 26, para. 63 (Lord Hoffmann (with whom other Law Lords agreed) noting that international law 'is based upon the common consent of nations' and adding that '[i]t is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states').

92 See also A/CN.4/713: Report of the International Law Commission on the Work of its 69th Session (2017): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 72nd Session, Prepared by the Secretariat, at 10–13, paras 29–44; J. Barkholdt and J. Kulaga, 'Analytical Presentation of the Comments and Observations by States on Draft Art. 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?' (April 2018).

- Very few States considered that draft Art. 7 reflected customary international law.
- Even if a slight majority seemed to support draft Art. 7 in some form or another, most of the supporters considered it was a proposal *de lege ferenda*.
- A considerable number of States asked the Commission to be clear about whether it considered draft Art. 7 to be *lex lata* or *lex ferenda*.
- A significant minority opposed draft Art. 7.
- The list of exceptions in draft Art. 7 was strongly criticized on various grounds.
- A very large majority considered that, if draft Art. 7 were to be adopted, there must be procedural safeguards to prevent the abuse of any exceptions that may be proposed.
- Some States urged the Commission to continue its efforts to seek to achieve a consensus.

Speakers in the Sixth Committee debate in 2018 continued to express deep concern about the topic in general and draft Art. 7 in particular.[93] For example, Algeria was of the view that '[o]wing to its complexity and political sensitivity, the topic "Immunity of State officials from foreign criminal jurisdiction" should be addressed with extreme caution'.[94] Australia 'remained unable to support that draft article [7], which had been provisionally adopted by a vote in the absence of a consensus, and continued to share concerns that, in its current form, the draft article did not reflect any real trend in State practice and, still less, existing customary international law'.[95] And the US representative said that

> [t]he Commission's categorical pronouncements in terms of immunity *ratione materiae* could not be said to rest upon customary international law. In particular, her delegation did not agree that draft article 7 of the draft articles provisionally adopted by the Commission at its sixty-ninth session was based on a clear trend in State practice.[96]

For Belarus, 'the only acceptable way of regulating immunity of State officials from foreign criminal jurisdiction was through the conclusion of an

93 A/CN.4/713: Report of the International Law Commission on the Work of its 70th Session (2018): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 73rd Session, Prepared by the Secretariat, at paras 17, 30 et seq.

94 A/C.6/73/30, at para. 87 (Algeria).

95 A/C.6/73/30, at para. 36 (Australia).

96 A/C.6/73/29, at para. 38 (US).

international treaty'.[97] Indeed, the opposition by States to draft Art. 7 remained as strong as ever in 2018. It was summed up by the representative of Egypt:

> [H]is delegation did not concur with the Special Rapporteur's endeavour to formulate principles that would entail exceptions to the immunity granted to certain State officials. It therefore completely rejected draft article 7, which was not based on any existing international law or custom, or any tangible trend in State practice, or any international legal opinions. It amounted to a proposal for a completely new law, rather than the codification of existing international law or its progressive development. If the Commission wished to propose a new law, there was nothing to prevent it from formulating a model draft article which interested States could consider including in any treaty that they might conclude. Moreover, there were no clear legal criteria for the determination of the crimes listed in paragraph 1 of the draft article. The list clearly reflected political priorities and was largely based on the Rome Statute of the International Criminal Court, which had not been universally ratified. The Commission should therefore review draft article 7 in whole, and perhaps consider removing it entirely; it could not be accepted in its current form.[98]

V Draft Art. 7: Some Questions

Draft Art. 7 raises at least three important questions:

- Is it a codification of existing law (*lex lata*) or progressive development of the law/new law (*lex ferenda/lex nova*)? And linked to that, should the Commission make that explicit? Similarly, if draft Art. 7 were eventually to be adopted by the Commission, should the Commission recommend the adoption of a treaty?
- Should draft Art. 7 list less, more, or different exceptions?
- If exceptions are recommended by the Commission, what procedural safeguards should also be suggested?

1 *Is Draft Art. 7* lex lata *or* lex ferenda*?*

The weight to be given to the Commission's drafts as an aid to determining customary international law is not the same in all cases. Bearing in mind its dual object of codification and progressive development, a first question is whether

97 A/C.6/73/29, at para. 89 (Belarus).
98 A/C.6/73/30, at para. 66 (Egypt).

the Commission is claiming to state a rule of existing law (*lex lata*) or to make a proposal *de lege ferenda* or for new law (although it may well be silent about that). Even where it does claim to be stating existing law,

> [t]he weight to be given to the Commission's determinations [affirming the existence and content of a rule of customary international law or concluding that no such rule exists] depends [...] on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.[99]

The first Special Rapporteur's second report stated that there were no exceptions to immunity (*ratione personae* and *ratione materiae*) of State officials under the *lex lata* (except, possibly, a 'territorial crime' exception).[100]

The second Special Rapporteur's fifth report was less clear. In places, she suggested that there were 'limitations or exceptions' under the *lex lata* for certain core crimes (genocide, crimes against humanity, war crimes) and possibly also for the 'crime of corruption' and what she referred to as 'territorial tort' crimes. In other places, she suggested that there was merely a 'trend' in this direction. In introducing the report in 2017, the Special Rapporteur said that

> the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae* ['*se concluía que existían límites y excepciones a la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado en relación con la inmunidad* ratione materiae'].

99 Para. (2) of the introductory commentary to Part Five of the Commission's 2018 conclusions on *Identification of customary international law.* The full passage reads: 'The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output': Report of the International Law Commission on the Work of its 70th Session (A/73/10), at 142–143, para. (2) (citations omitted)).

100 See supra note 28.

> Although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole.[101]

In summing up the plenary debate in 2017, while stressing the importance of national jurisprudence, the second Special Rapporteur admitted that 'it might have been limited and not sufficiently homogeneous'.[102]

As we have seen, the debates within the Commission in 2016/2017 and 2018 revealed very different views among members. Most speakers, even if supporting the inclusion of exceptions in the text to be developed by the Commission, did not consider that the second Special Rapporteur had made out a case for them to be considered as *lex lata*. The Special Rapporteur herself accepted that there was a general understanding that draft Art. 7 did not reflect customary international law.[103] She

> acknowledged the disagreement between members over a possible customary rule or emerging trend towards limitations and exceptions to immunity of State officials. She maintained that the Commission ought to focus on identifying the relevant rules *lex lata* and *lex ferenda* relating to immunity. […] [T]he Special Rapporteur noted that the draft articles, like other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.[104]

In any case, draft Art. 7 has so far been adopted on first reading only. As such, it does not represent the Commission's considered and final view, as to *lex lata* or otherwise. The commentary makes this abundantly clear.[105]

It is also noteworthy that the language of draft Art. 7 itself is essentially neutral on whether it is *lex lata* or new law. The wording 'shall not apply', however, sounds like treaty language, that is, like a proposed rule to be accepted or not by States. The first sentence of para. (1) of the commentary likewise suggests

101 A/72/10, at 166–167, para. 83.

102 Ibid., at 173, para. 132.

103 A/CN.4/SR.3388, at 4 (the Special Rapporteur suggesting that 'it had been generally agreed that a trend, rather than a norm of customary international law, could be identified').

104 A/72/10, at 174, para. 134.

105 See supra note 82.

that the exceptions are proposed for the purposes of the draft articles, not as a statement of general international law. It reads:

> Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply *under the present draft articles*[106] (emphasis added).

It was proposed that another sentence, based on the report of the Chairman of the Drafting Committee, be added at the end of para. (1) of the commentary, reading:

> The Commission proceeded in its work on the general understanding that the outcome of its work was without prejudice to, or taking a position on, the question whether the text of draft article 7, or any part thereof, codified existing law—reflecting *lex lata*—or whether the result constituted an exercise in progressive development, reflecting *lex ferenda*.[107]

Members of the Commission who opposed adding such a sentence did not do so because they disagreed with its substance.[108]

The lengthy commentary to draft Art. 7 reflects in unusual detail the different views within the Commission, including the view that the authorities cited (chiefly case-law and legislation) did not support the Special Rapporteur's views on the *lex lata* or the existence of a 'trend'.[109]

Writings on draft Art. 7 are similarly clear that it does not, and was not intended to, reflect existing customary international law.[110] Support within the

106 A/72/10, at 168. The Special Rapporteur had proposed a different text: 'Draft article 7 refers to crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* does not apply'; for the extended debate over this change, see A/CN.4/SR.3387, at 10–13.

107 A/CN.4/SR.3387, at 10 (Murphy).

108 Ibid., at 13 ('Mr. Murphy said that his understanding of the views expressed was that those members who were opposed to his proposal for a third sentence objected to its placement rather than its content. He was prepared to withdraw the proposal in the interest of moving forward, even though it appeared to reflect the majority view of the Commission').

109 See supra note 82.

110 Murphy convincingly demonstrates, in respect of each of the six crimes listed in draft Art. 7, 'the lack of State practice—let alone widespread, representative, and consistent practice' ('Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of the Exceptions?', supra note 3, at 4). His conclusion is as follows: 'All told, the State practice in support of the six exceptions listed in Draft Article 7 is not widespread, representative, or consistent. Rather than relying on existing practice, the Commission justifies Draft Article 7 on two grounds. First, it claims

Commission for the view that the exceptions reflect customary international law declined significantly between the 2011 debate and that in 2016/17:

> Whether, and how, the 'international crimes' exception can be framed in terms of existing customary international law is the central question in the debate triggered almost two decades ago by the *Pinochet* case, and nearly all members who participated in the ILC debates articulated a position on this point. The fact that almost 80 percent of members of the 2017 ILC were not prepared to adopt Draft Article 7 as existing law shows that the Rapporteur did not succeed in capitalizing on the majority consensus in the 2011 ILC in favor of a *lex lata* approach.[111]

2 *Should Draft Art. 7 List Less, More, or Different Exceptions?*

There was a widespread feeling in the Commission that the list of crimes in draft Art. 7 was drawn up without any well-developed criteria and simply reflected the personal preferences of some members.[112]

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that there is a 'discernible trend' towards limiting such immunity, a claim that also is not borne out by the extremely limited practice cited. Second, the Commission claims that its draft articles must be shaped to fit 'an international legal order whose unity and systemic nature cannot be ignored'. That vague and cursory claim does not explain how the text of Draft Article 7 takes account of rules that seek to avoid interstate conflict, nor why some crimes are 'in' (apartheid) while other crimes are 'out' (slavery, trafficking in persons, aggression). What both claims do suggest, however, is that Draft Article 7 is not grounded in law, but in policymaking by the Commission. The divided views within the Sixth Committee appear to suggest the same. In that light, Draft Article 7 might be regarded as a proposal by the Commission for a new rule that could be embodied in a treaty, which states might choose to accept or reject. It cannot be regarded, however, as reflecting existing law' (at 8). See also Forteau, supra note 3: 'Does Draft Article 7 reflect customary law, or does it constitute progressive development of international law? For the Commission to consider that there is 'a discernible trend'—a view that many scholars agree with—is quite ambiguous in that regard. The reactions in the Commission and in the Sixth Committee tend to demonstrate the absence of a general *opinio juris* supporting Draft Article 7, which would then constitute progressive development, rather than codification, of international law' (at 24).

111 R. van Alebeek, 'The "International Crime" Exception to the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?', supra note 3, at 32.

112 It does not help, indeed it confuses, to refer to this list as '*ius cogens* crimes': Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?', supra note 3, at 3.

Some members suggested that the list of exceptions should be open-ended.[113] This approach, which would have introduced great uncertainty, was not accepted.

A minority within the Commission argued that the crime of *aggression* should be listed. Those opposed, including the Special Rapporteur, considered that attempts to prosecute State officials before national courts for the crime of aggression would contravene the sovereign equality of States, an issue that did not arise in the case of prosecution before an international court.[114]

Some Commission members suggested adding other crimes, including slavery, terrorism, and crimes against global cultural heritage.[115] In reply, 'the Special Rapporteur expressed her readiness to include the crime of *apartheid*, but continued to have reservations regarding the inclusion of other transnational crimes, as the latter were treaty based and did not derive from custom'.[116] The crime of *apartheid*, which the fifth report did not include in the list, was added by the Drafting Committee, but slavery, trafficking in persons, and other crimes identified in multilateral treaties, were not included. This is perhaps an example of what one member of the Commission referred to as 'arbitrary progressive development'.[117]

Although the fifth report proposed that the '*crime of corruption*' be listed as an exception, ultimately it was dropped.[118] A few members regretted this omission. The commentary asserts that the Commission's view is that the crime of corruption (understood as referring to 'grand corruption', which some regard as entailing a 'transnational' connection) involves an act that is not 'official' in nature, and therefore cannot attract immunity. But this seems hard to square with the 'limitations and exceptions' approach, unless 'limitations' refers only to acts that are in fact official acts but must for some reason be deemed not to be, a proposition for which there is no authority.

No member of the Commission argued for retention of what the fifth report termed the '*territorial tort exception*'.[119] According to the fifth report, the

113 See also A/72/10, at 172, para. 120.

114 Ibid., at para. 122; and 174, para. 137 ('the Special Rapporteur maintained her hesitancy regarding the inclusion of the crime of aggression, as it risked increased politicization of the entire project').

115 Ibid., at 172, para. 121.

116 Ibid., at 174, para. 137.

117 A/CN.4/SR.3387, at 12 (Petrič).

118 See also A/72/10, at 172, paras 123–125.

119 See the proposal in the fifth report, which read: *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*

exception 'was not restricted to the sphere of civil jurisdiction' and aimed at addressing major offences, such as sabotage and espionage.[120] While some took the view that 'immunity could exist in these circumstances and the exception should not be included in draft Art. 7 because there was insufficient practice to justify doing so', the commentary to draft Art. 7 asserts, without any real basis for doing so, that the Commission considered

> that certain crimes, such as murder [sc. assassination], espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.[121]

3 *If There Were Exceptions, Should They be Accompanied by Procedural Safeguards, and if So What Should These be?*

There was general agreement that any exceptions would need to be accompanied by procedural safeguards, to guard against politically-motivated abuse. However, the Special Rapporteur did not submit a further report concerning this matter in 2017, nor did the sixth report in 2018 propose any draft provisions on the matter.[122] A seventh report with draft articles on certain procedural matters appeared in June 2019.

One proposed set of elements that might be considered for such safeguards includes the following. First, a forum State shall only deny immunity *ratione materiae* on the basis of an exception contained in draft Art. 7 when (a) the current or former State official is present in the forum State; (b) the alleged crime was committed in territory under the forum State's jurisdiction (or when its nationals were harmed by the crime); (c) the evidence that the official

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crimes are committed (A/CN.4/701, at 95, draft Art. 7.1 (iii)). For the debate in 2016, see A/71/10, at 351, para. 244; and for the debate in 2017, see A/72/10, at 172–173, para. 126.

120 A/72/10, at 174, para. 138.

121 Ibid., at 188, para. (24) (adding that '[t]his is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft Art. 1, paragraph 2'). This paragraph (which is very different to the one proposed by the Special Rapporteur) was negotiated by a very small group, in the margins of the last plenary meeting of the session on 4 August 2017. On the 'territorial exception' more generally, see A. Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 International and Comparative Law Quarterly 193; Webb, supra note 3, at 18–19.

122 A/72/10, at 170, para. 110.

committed the alleged offence is considered particularly strong; and (d) the decision to pursue a criminal proceeding against the official was taken at the highest level of government or prosecuting authorities that is appropriate under the forum State's national law. Second, if a decision is taken by the forum State to pursue a criminal proceeding, the forum State shall (a) notify the State of the official that it intends to pursue a criminal proceeding; and (b) if that other State is able and willing to submit the matter to prosecution in its own courts, then the proceeding shall be transferred to that other State.[123]

VI Lessons Learnt (or Not)

The handling of the topic *Immunity of State officials from foreign criminal jurisdiction* sheds light on several aspects of the Commission's work and working methods. It also invites reflection on how these may be improved going forward.

First, there is a need for the Commission to exercise great care in choosing topics. The Commission should not select topics on which diametrically opposed views are likely to be strongly held. This is likely to lead to failure—a 'train crash'. That cannot be helpful for the work and reputation of the Commission, certainly not if it happens often, and, more seriously, it is hardly likely to promote the Charter objective of the development or codification of international law.[124]

Second, it can be very helpful to have a good idea, as early as possible in the work on a topic (ideally at the outset, though this is often not done) what the Commission's aim is, and in particular what form the final output will have and what recommendation will be made to the UN General Assembly.[125] In the case of the present topic, the Commission's approach should have been determined by whether it was aiming to propose draft articles including as

123 See Murphy, 'Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission', supra note 3, at 988.

124 Having said that, even when a topic is unsuccessful, there may nevertheless be some useful side-effects. For example, the Commission made little progress on the topic *The obligation to extradite or prosecute* (aut dedere aut judicare), but one spin-off was an excellent Secretariat memorandum that was cited before the ICJ in the *Belgium v. Senegal* case: A/CN.4/630: Survey of Multilateral Instruments Which May Be of Relevance for the Work of the International Law Commission on the Topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (2010).

125 Of course, the Commission's approach has at times changed in the course of working on a topic, as happened, for example, in relation to the law of treaties and State responsibility.

appropriate progressive development of the law with a view to proposing a treaty, to which States may or may not decide to become party. Failure to clarify this early on has greatly complicated debates within the Commission and among States.

Third, the role of the Special Rapporteur is crucial in keeping the Commission on track and united. Where there are significant differences of opinion within the Commission, it is usually possible to reconcile them through constructive debates and with the development of careful compromises either promoted by the Special Rapporteur or within a specially convened working group. Informal consultations among the most interested members, including between sessions, can be helpful in this regard.

Fourth, the Commission needs to listen carefully to the views of States, expressed in the Sixth Committee and elsewhere, and to take account of those views as far as possible.[126]

Fifth, the age-old debate over the Commission's dual object—progressive development of international law and its codification—is still very much with us, and can be central to work on a particular topic. In particular, should the Commission indicate whether its proposals are *lex lata* or not? This may sometimes be difficult, depending upon the subject-matter, if only because there may be different views on the question within the Commission. Yet there are certainly times when it may be particularly helpful and important that it does so, including when national courts are likely to be referred to the Commission's work.

Sixth, where the Commission is engaging in codification (at least 'strict' codification), and thus in identifying existing rules of customary international law and their content, it may be expected to set an example. It should follow its

126 Concerns have long been expressed about the relationship between the Commission and the Sixth Committee. These were prominent once again in the Sixth Committee's 2018 debate on the Commission's Annual Report on its seventieth session, not expressly with reference to the present topic, but perhaps with it in mind. General Assembly resolution 73/265 of 22 December 2018 contains novel language concerning new topics: '8. *Encourages* the International Law Commission to take into account the capacity and views of Member States when including topics in its current programme of work', and, in relation to two new topics on the long-term programme of work, '9. [C]alls upon the Commission to take into consideration the comments, *concerns* and observations expressed by Governments during the debate in the Sixth Committee' (emphasis added). The resolution also included an important observation about the Commission's working methods: '15. *Recalls* the importance of an in-depth analysis of State practice and the consideration of the diversity of legal systems of Member States to the work of the International Law Commission'. The following seems to be addressed more to the Assembly itself: '22. *Underlines* in this regard the necessity to allow sufficient time for the consideration of the report of the International Law Commission in the Sixth Committee'.

own past practice[127] and the methodology which it itself has described in the topic *Identification of customary international law*.[128]

Seventh, should the Commission strive to reach consensus, or should it be ready to vote if necessary to move forward with a topic? A number of members have viewed consensus as a practice that does not allow the Commission to realize its full potential of developing the law. Some 20 years ago, a former member of the Commission opined that voting 'may not be as collegial as decision-making by consensus, [but] allows ILC to make progress when a small minority of recalcitrant members would thwart it, and tends to produce articles that are less mushy, thus giving clearer guidance to States'.[129] Yet it remains true that, in the words of a member of the Commission writing some 40 years earlier, 'the authority and effectiveness of drafts prepared by a codifying agency must be decisively impaired if formulated under the impact of the hazards and alignments of voting'.[130] Disagreement within the Commission inevitably reduces the chances that its product will be seen as promoting the development of international law (since it will be seen as controversial and give arguments to States who do not favour the topic), and will certainly reduce the likelihood of it being regarded as a reflection of customary international law. This is particularly the case when the disagreement is taken up by States in the Sixth Committee.

Finally, it has been suggested that the International Court of Justice is institutionally constrained from presenting 'morally desirable outcomes [...] as

127 See also the Secretariat Memorandum describing how the Commission itself had set about identifying rules of customary international law over the years: A/CN.4/659: Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission that Could Be Particularly Relevant to the Topic (2013).

128 In 2018, the Commission adopted, on second and final reading, 16 draft conclusions with commentaries: A/73/10: Report of the International Law Commission on the Work of its 70th Session (30 April–1 June and 2 July–10 August 2018), at 119–156. On 20 December 2018, the General Assembly took note of the conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought them to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest distribution: UNGA Res 73/203 (20 December 2018).

129 S. McCaffrey, 'Is Codification in Decline?' (1997) 20 Hastings International & Comparative Law Review 639, at 658.

130 H. Lauterpacht, 'Codification and Development of International Law' (1955) 49 American Journal of International Law 16, at 37. On early exchanges in the Commission as to whether voting or consensus should be preferred as a procedure for decision-making see Briggs, supra note 77, at 236–239.

results of an objective application of legal methodology'.[131] The same may be said of the Commission when it is undertaking to codify the *lex lata* (as opposed to *lex ferenda*). Arguments about 'the soul of international law' and calls for a 'brave new world in international law' add nothing to legal argument.

Acknowledgments

The text is based on the lecture as delivered, but some details have been added, and reference is made to later developments and writings. I am very grateful to Mr Omri Sender for his assistance.

131 N. Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 *European Journal of International Law* 357, at 363.