

SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

IMMUNITIES AND INTERNATIONAL CRIMES BEFORE THE ILC: LOOKING FOR
INNOVATIVE SOLUTIONS

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The International Law Commission's (ILC's) work on *Immunity of State officials from Criminal Jurisdiction*, which started ten years ago, has generated over time high expectations. In light of progress in international criminal law, the ILC is expected to strike a reasonable balance between the protection of sovereign equality and the fight against impunity in case of international crimes. It requires the Commission to determine whether or not immunity from criminal jurisdiction applies or should apply when international crimes are at stake. At its 2017 session, the ILC eventually adopted [Draft Article 7](#) on this issue, which proved quite controversial and did not meet states' approval. The purpose of this essay is to shed some light on the main shortcomings of this provision and to identify possible alternatives that could permit the ILC to overcome the deadlock concerning its adoption.

Ambiguities and Deficiencies of Draft Article 7

In August 2017, the ILC adopted Draft Article 7, according to which "Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crimes of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of *apartheid*; (e) torture; (f) enforced disappearance."¹ The Commission did not achieve a consensus on that provision. Instead, it took two quite unprecedented decisions: First, it resorted to a vote to decide whether or not the debate in the Plenary should be closed and Draft Article 7 as proposed by the Special Rapporteur should be referred to the Drafting Committee (the Commission deciding with a majority of twenty members to close the debate and refer Draft Article 7 to the Drafting Committee).² Second, the Commission decided some weeks later to provisionally adopt Draft Article 7 as proposed by the Drafting Committee by recorded vote, with twenty-one votes in favor, eight votes against, and one abstention, and with explanations of votes by no less than twenty members.³ For the Commission to resort to two ballots (plus declarations of vote) and not to the usual procedure of consensus is very unfortunate. Rushing to a vote and forcing through the adoption of a divisive provision inevitably made it more difficult to reach consensus at the diplomatic level. Unsurprisingly, when discussed in the Fall 2017 in

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¹ See Int'l Law Comm'n, [Report on the Work of Its Sixty-Ninth Session](#), UN Doc. A/72/10, at 176–77 (Sept. 11, 2017) [ILC Report 2017].

² See Int'l Law Comm'n, [Provisional Summary Record of the 3365th Meeting](#), UN Doc. A/CN.4/SR.3365, at 16–18.

³ See [ILC Report 2017](#), *supra* note 1, at paras. 74–75, as well as Int'l Law Comm'n, [Provisional Summary Record of the 3378th Meeting](#), UN Doc. A/CN.4/SR.3378.

the Sixth Committee of the UN General Assembly, Draft Article 7 gave rise to many criticisms, some relatively mild, others unusually harsh. In my view, most of the criticisms are justified.⁴

Draft Article 7 raises, in particular, three important concerns. First, procedural aspects of immunities should have been explored before taking any position on possible exceptions to immunities.⁵ Many members of the Commission suggested to the Special Rapporteur that there was a need to assess them together.⁶ In 2016, the Special Rapporteur announced that she intended to follow that approach in 2017,⁷ but eventually she did not do so. In 2017, she did not submit a report on the procedural aspects of the topic and asked for the adoption of Draft Article 7 on the basis of her last report exclusively.⁸

This action is regrettable because exceptions to immunity can hardly be defined without taking into account procedural issues. In practical terms, there is indeed no immunity *ratione materiae* if the relevant state does not claim immunity. From that perspective, a procedural requirement is inseparable from the benefit of immunity, and bears legal consequences. [According to the ICJ](#), “The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned” and “the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.”⁹ Besides, the rules of immunity are “procedural in character.”¹⁰ Since other procedural rules can possibly restrict the scope of immunities from criminal jurisdiction, the former need to be articulated with the latter to define the extent and limits of such immunities. This is in particular the case for the right to a remedy and the obligation to investigate or prosecute.¹¹ In addition, the regime of possible exceptions or limitations to immunities from criminal jurisdiction should be dependent on the elaboration of a procedural regime aimed at protecting state officials from frivolous prosecutions. When crafting Draft Article 7, the majority of the ILC failed to take that important element into account. Members of the Commission argued in support of Draft Article 7 that the draft articles on immunities “should follow the example of the Rome Statute of the ICC [International Criminal Court], which in article 27 declares the irrelevance of official capacity” when international crimes are at stake.¹² But for the analogy to be relevant, it has to be comprehensive, i.e., it should imply that exceptions to immunity are admissible before domestic courts only insofar as they are accompanied with corresponding procedural safeguards such as the principle of

⁴ Twelve states supported Draft Article 7 (Austria, Chile, Czech Republic, El Salvador, Greece, Italy, Mexico, Netherlands, Norway, Poland, Portugal, South Africa); ten states observed that the ILC should have tried to reach consensus before adopting any provision (Australia, China, France, Italy, Portugal, Romania, Slovakia, Slovenia, Spain, Sri Lanka); twenty-two states expressed concerns or disagreement with Draft Article 7 (Australia, China, France, Germany, India, Indonesia, Iran, Ireland, Israel, Japan, Korea, Malawi, Malaysia, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom, United States). All the relevant statements are available at [Sixth Committee, 72nd Session](#), UNMEETINGS (Item 81 of the Agenda, Oct. 23 to 27 and 31, 2017).

⁵ In 2017, it has been decided that “the procedural provisions and safeguards applicable to the present draft articles” will be considered at the next session of the Commission in 2018 (see the asterisk added to Parts II and III of the draft articles so far adopted, [ILC Report 2017](#), *supra* note 1, at para. 140, as well as Paragraph 9 of the Commentary of Draft Article 7).

⁶ See, e.g., Int'l Law Comm'n, [Report on the Work of Its Sixty-Eighth Session](#) para. 247, UN Doc. A/71/10 (Sept. 19, 2016); [ILC Report 2017](#), *supra* note 1, at paras. 110–15.

⁷ See Int'l Law Comm'n, [Provisional Summary Record of the 3331st Meeting](#), UN Doc. A/CN.4/SR.3331, at 12, last paragraph.

⁸ See [ILC Report 2017](#), *supra* note 1, at para. 136.

⁹ [Certain Questions of Mutual Assistance in Criminal Matters](#) (Djib. v. Fr.), 2008 ICJ REP 177, para. 196 (June 4).

¹⁰ [Jurisdictional Immunities of the State](#) (Ger. v. It.), 2012 ICJ REP 99, para. 93 (Feb. 2), para. 93.

¹¹ See in particular Vincent Coussirat-Coustère, *Immunité*, in [DICTIONNAIRE DES IDÉES REÇUES EN DROIT INTERNATIONAL](#) 304–05 (Hervé Ascensio et al. eds., 2017).

¹² [ILC Report 2017](#), *supra* note 1, at para. 95.

complementarity and guarantee against abusive prosecutions, which qualify the ICC's jurisdiction but are not included in Draft Article 7.

Second, Draft Article 7 is hard to reconcile with the previous work of the Commission on a related topic. A number of authors consider that under international law exceptions to immunity from criminal jurisdiction derive from treaty obligations compelling states to prosecute or extradite persons accused of international crimes committed by foreign officials. When such an obligation to extradite or prosecute applies, it should necessarily prevail over any immunity.¹³ This convincing approach should mean that customary exceptions to immunity depend on the existence of a customary obligation to prosecute or extradite. However, in its 2014 Final Report on the obligation to extradite or prosecute, the Commission was unable to conclude whether or not such an obligation is part of customary international law.¹⁴ This uncertainty is not fully consistent with the position in Draft Article 7 that under general international law state officials should not benefit from immunity in case of alleged international crimes.

Third, the absence of consensus within the Commission on the identification of the relevant materials to substantiate Draft Article 7 is problematic for the credibility of the conclusions reached by the Commission. The Commentary on Draft Article 7 relies on a number of cases, national laws, and treaties to support the assertion that “there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae*” in case of international crimes.¹⁵ But some members of the Commission challenged the relevance and even the accuracy of the materials invoked by the majority. In particular,

those members noted that only nine cases are cited ... that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of the cases actually provide no support for the proposition that such immunity is to be denied.¹⁶

It is very unfortunate that the Commission did not even succeed in proposing convergent views on existing precedents on the topic. The Commission also failed to take into account the whole relevant practice.¹⁷

Admittedly, there is nothing problematic in having disagreements on the identification of existing customary law on a given topic. The problem is that the Commission did not clarify the nature of the conclusions it drew from the relevant materials: 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 7,¹⁸ which would then constitute progressive development, rather than codification, of international law.¹⁹ However, domestic authorities in charge of

¹³ See in particular Pierre d'Argent, *Immunity of State officials and the Obligation to Prosecute*, in IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM 250–60 (A. Peters et al. eds., 2014); Dapo Akande & Sangeeta Shah, *Immunities of States Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 839 (2011).

¹⁴ Int'l Law Comm'n, *Report on the Work of Its Sixty-Sixth Session*, UN Doc. A/69/10, para. 65, sub-paras. 49–55 (2014).

¹⁵ *ILC Report 2017*, *supra* note 1, at Commentary on Draft Article 7, para. 5 and nn. 762, 763 and 764.

¹⁶ *Id.* at para. 8 and nn. 765, 766 and 767.

¹⁷ *Id.* at para. 133: “The Special Rapporteur noted that other forms of State practice, such as decisions by prosecutors or diplomatic demarches, were typically not available in the public domain and could thus not be considered as relevant practice.”

¹⁸ See *ILC Report 2017*, *supra* note 1, at para. 78: exceptions and limitations to immunity “had been the subject of recurrent debate over the years in the Commission and in the Sixth Committee, eliciting diverse, and often opposing, views.”

¹⁹ Reaching the same conclusion, see HAZEL FOX & PHILIPPA WEBB, *The Law of State Immunity* 571–76 (2013); DROIT INTERNATIONAL PÉNAL 562–64 (Hervé. Ascensio et al. eds., 2012).

investigations and prosecutions, which are the primary addressees of the draft articles on immunity from criminal jurisdiction, need clarity as regards the content of existing law on the topic. For them, progressive development could prove more harmful than helpful if it does not provide clear answers. This is the reason why the ILC should look for alternatives in the course of the next steps of its work on the topic, in order to be more helpful to State authorities in charge of enforcing immunities.

Looking for Alternatives

The main reason why the current work of the ILC raises concerns results from the binary approach it follows (there would be either no exception or exceptions to immunity from criminal jurisdiction). This simplistic approach is hardly compatible with the current status of international law on the topic. As the European Court of Human Rights put it, “State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases.”²⁰ To that extent, there is some indeterminacy of the law and thus some need for granting a margin of appreciation to state authorities in charge of regulating immunities, provided that there is some legal security. Inspired by the idea of “*dédoublement fonctionnel*” according to which state organs are in charge of enforcing both domestic and international law and are to be seen as the primary addressees of international rules, the ILC should adopt a “subsidiarity” or a “federal” approach consisting in seeking to *frame* state practice rather than *impose* rigid rules.²¹ So far, the Special Rapporteur and the Commission have not really explored such alternative solutions. Debates have been caught in a fruitless battle between pro and anti-exceptions to immunity. A number of alternative solutions, however, could be considered.

A first category of alternative solutions would consist in letting states decide on the definition of the regime of exceptions to immunities from criminal jurisdiction, on the ground that state practice and *opinio juris* are not yet mature enough. It could take the form of a clause without prejudice to any further development of international law,²² or the ILC could simply recommend the adoption of Draft Article 7 as a new treaty rule. A more robust outcome could consist in proposing a more elaborated treaty regime, including procedural safeguards and/or procedural preconditions.²³ Following that approach, an interesting suggestion was made within the ILC to set forth a “treaty-based duty to ‘waive or prosecute.’”²⁴ In a more ambitious way, one may also think of an international mechanism of settlement of disputes that claimants could trigger to challenge immunities invoked before domestic courts.²⁵ Admittedly, for the ILC to propose a new treaty regime could be interpreted, *a contrario*, rightly or wrongly, as implying that there is no exception to immunity in existing international law, but on the other hand it would provide the maximum degree of legal security for states accepting the new treaty regime.

A second category of solutions would require accepting that existing state practice is divergent and that, as a result, it is vain to try to impose any prescriptive rule (be it the rejection or the acceptance of exceptions to immunities). The objective should rather be to help domestic organs in charge of investigation and prosecution,

²⁰ [Jones v. UK](#), 2014 EUR. Ct. H.R. 176, para. 213.

²¹ Bearing in mind that in some instances, in federal systems, state practice is more progressive and liberal than federal rules (see in particular William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1976–1977)).

²² Following the model of Article 54 of the Articles on State Responsibility ([GA Res. 56/83](#) (Dec. 12, 2001)).

²³ See for a similar approach the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property, Int'l Law Comm'n, [Report on the Work of Its Forty-Third Session](#), UN Doc. A/46/10, in particular 22, para. 1 of the Commentary on Article 4, and 23, para. 3 of the Commentary on Article 5 (1991).

²⁴ See [ILC Report 2017](#), *supra* note 1, at paras. 111 and 119.

²⁵ See the interesting example of the [Additional Protocol to the European Convention on State Immunity](#), May 16, 1972, ETS No. 074A (which, admittedly, did not attract many ratifications).

including domestic courts, by offering them some *guidance*, which in turn would permit to frame future state practice on the matter. The ILC could for instance adopt a guideline to the effect that domestic organs should be permitted not to grant immunity when international crimes are at stake provided that certain conditions—in particular procedural safeguards—are met (for instance, an absence of alternative means of redress before domestic courts of the territorial state or the state of nationality, and the existence of a number of credible allegations by relevant international organizations that international crimes have been or are committed). Such a permissive provision would frame state practice in a way which would be reasonably respectful of other states' sovereignty while at the same time providing tools for fighting impunity.²⁶ It could take the form of a recommendation, bearing in mind that recommendations can be drafted in a more efficient way by being more detailed and nuanced than a clear-cut, abrupt obligation and that in some cases they could achieve better results than prescriptive rules when disagreements between states are too strong.²⁷ Another option could be to regulate indirectly immunities by limiting them by other relevant rules, without explicitly providing for exceptions.²⁸

Conclusion

In practice, immunities are an issue to be addressed primarily by state authorities, and to that extent, as other private international law matters (such as conflicts of laws or conflict of jurisdictions), relevant rules are primarily defined by these authorities. At the same time, it has to be assured that relevant international rules and principles are duly taken into account. To that extent, there is some value in considering that the regime of immunities from criminal jurisdiction should result from a collaborative product of international and domestic efforts according to which state authorities should have some margin of appreciation in developing state practice provided that they act under the guidance of international law, in particular the necessity to fight impunity. Such an approach would be more consistent with the current nature of international law, which is based on an increasingly close interplay between domestic and international levels.

²⁶ In the *Genocide* case, the ICJ followed a similar approach by considering that the Genocide Convention does not oblige States to exercise extra-territorial jurisdiction but at the same time “does not prohibit States” to exercise it ([Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide](#) (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43, para. 442 (Feb. 26)).

²⁷ A convincing example is Article 19 of the Draft Articles on Diplomatic Protection, entitled “Recommended Practice” (Int'l Law Comm'n, [Report on the Work of Its Fifty-Eighth Session](#), UN Doc. A/61/10, at 94 (2006)), which has eventually been endorsed, in part, by the ICJ in 2012 in *Diallo* ([Case Concerning Ahmadou Sadio Diallo](#) (Guinea v. Dem Rep. Congo), 2012 ICJ REP. 324, para. 57 (June 19)).

²⁸ See, *mutatis mutandis*, as a possible source of inspiration and concerning civil claims, Institut de Droit International, [Universal Civil Jurisdiction with regard to Reparation for International Crimes](#) art. 5 (2015), stating that “The immunity of States should not deprive victims of their right to reparation.”