

## SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

### METHODOLOGICAL FLAWS IN THE ILC'S STUDY ON EXCEPTIONS TO IMMUNITY *RATIONE MATERIAE* OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

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In July 2017, the UN International Law Commission (ILC) provisionally adopted [Draft Article 7](#) on exceptions to immunity *ratione materiae* of state officials from foreign criminal jurisdiction, by a recorded vote of twenty-one votes in favor, eight votes against, and one abstention.<sup>1</sup> In the view of the majority of ILC members, immunity *ratione materiae* does not apply to the six international crimes listed in the draft article—genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance—either because of a limitation or because of an exception.<sup>2</sup> The unusual practice of adopting a draft article by recorded vote<sup>3</sup> demonstrated the deep controversy among the ILC members themselves. After all, exceptions to official immunity lie at the core of the project of “Immunity of State Officials from Foreign Criminal Jurisdiction” that was started [a decade ago](#) by the ILC.<sup>4</sup> This divisive Draft Article 7 naturally garnered criticism and equally deep [controversy among states](#) in discussions on the ILC's work report at UN General Assembly Sixth Committee in late October 2017.<sup>5</sup>

This essay aims to analyze the methodology used by the majority of ILC members to reach their conclusions on exceptions to official immunity, and it points out that the evidence adduced by them in Draft Article 7 and its Commentary cannot pass scrutiny.

#### *Methodological Flaws*

Some ILC members, apparently in the minority, have already indicated in general some drawbacks and flaws in the methodology used in the study, such as a lack of state practice, the irrelevance of the practice of international criminal courts and state immunity proceedings, the limited significance of sporadic treaty practice, and the lack of explicit provisions depriving official immunity in established treaties on international crimes.<sup>6</sup> This author still feels

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<sup>1</sup> Int'l Law Comm'n, [Report on the Work of Its Sixty-Ninth Session](#), UN Doc. A/72/10 (Sept. 11, 2017) [hereinafter ILC Report A/72/10].

<sup>2</sup> *Id.* at 184.

<sup>3</sup> China, France, Germany, Indonesia, Iran, Israel, Poland, Republic of Korea, Spain, the United Kingdom, and the United States pointed out this exceptional method of adopting the draft article in their official statements during the UN General Assembly Sixth Committee's discussion on the ILC's annual report in October 2017.

<sup>4</sup> At its 2940th meeting on July 20, 2007, the ILC decided to include the topic in its program of work. *See* Int'l Law Comm'n, [Report on the Work of Its Sixty-Second Session](#) para. 378, UN Doc. A/62/10 (2007).

<sup>5</sup> For the national statements, see [Sixth Committee, 72nd Session](#), UNMEETINGS.

<sup>6</sup> [ILC Report A/72/10](#), *supra* note 1, at 181–83.

compelled to illustrate those flaws with concrete examples and add some comments to explain the thin and fragile grounds on which the majority of ILC members base their assertions.

Although both the Special Rapporteur and the final work product of Draft Article 7 and its Commentary avoid the conclusion that the six exceptions to official immunity have been established as customary international law, they all strongly hint at such a conclusion or at least a trend in that direction. The Special Rapporteur, clearly with the support of the majority of ILC members, claimed that “the [state] 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.”<sup>7</sup> The Commentary in this regard states that Draft Article 7 reflects “a discernible trend towards limiting the applicability of immunity,”<sup>8</sup> supported by ostensible long lists in footnotes on state practice in judicial decisions, national legislation, and jurisprudence of international courts. But a heavy barrage from some ILC members accused that “the Commission should not portray its work as possibly codifying customary international law.”<sup>9</sup> A minority of ILC members questioned whether there is such a trend at all.<sup>10</sup>

No one who has read through the Commentary would fail to point out that the Commentary only cites nine court cases in Footnote 762 to support its broad claim of six exceptions to official immunity. In addition, the Commentary actually acknowledges that the domestic judicial decisions cited “do not all follow the same line of reasoning.”<sup>11</sup> National legislation and jurisprudence of international courts are presented in long lists in Footnotes 763 and 764,<sup>12</sup> without any concrete analysis of their content and context. If one applies the strict and rigorous methods as prescribed in the ILC’s own study product on “[Identification of Customary International Law](#)”<sup>13</sup> to scrutinize the Commentary, there are only pretensions to those approaches or a sheer lack of any sound approach at all.

### *State Immunity Versus Official Immunity*

Exceptions to official immunity are distinct from exceptions to state immunity. Although the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 provides in Article 2.1 that a “state” entitled to immunity includes “representatives of the State acting in that capacity,” generally speaking state immunity is distinguishable from official immunity. It is apparent that while a foreign state may not be accorded immunity in cases of exceptions as listed in the 2004 UN Convention, such as commercial transaction, personal injury, or damage to property, the officials that act as that state’s agent may well be entitled to invoke official immunity in those cases. On the other hand, assuming the interpretation of the Torture Convention by the *Pinochet III* case is sound, a state official cannot claim immunity before foreign courts for acts of torture committed in his or her own country, but the state for which this official acts as agent is still entitled to invoke immunity in a civil case since no exception in the 2004 UN Convention applies to that state.

The U.S. Foreign Sovereign Immunities Act and the State Immunity Act of Canada cited in the Commentary as national legislative examples of a trend toward exceptions to official immunity<sup>14</sup> are all aimed at regulating state immunity rather than official immunity. Indeed, the U.S. Supreme Court specifically decided in *Samantar* in 2010

<sup>7</sup> *Id.* at 166–67, para. 83.

<sup>8</sup> *Id.* at 178.

<sup>9</sup> *Id.* at 181.

<sup>10</sup> *Id.* at 170.

<sup>11</sup> *Id.* at 179.

<sup>12</sup> *Id.* at 181 nn. 762–64.

<sup>13</sup> Int’l Law Comm’n, [Report on the Work of Its Sixty-Eighth Session](#) 78, UN Doc. A/71/10 (Sept. 19, 2016).

<sup>14</sup> [ILC Report A/72/10](#), *supra* note 1, at 179–80 n. 763.

that official immunity is not covered by that statute.<sup>15</sup> How can such legislation help the ILC establish an exception to official immunity from foreign criminal jurisdiction? Alas, no further elaboration or analysis has been done by the Commentary to show the relevance of these legislative practices.

The Commentary also claims that Act No. 24488 of Argentina on foreign state immunity does not prohibit the Argentine courts from hearing “a claim against a State for violation of international human rights law.”<sup>16</sup> Even assuming that this is a correct interpretation of the Argentine legislation, how is this statute related to official immunity? Two other cases cited by the Commentary, *Ferrini v. Germany* and *Jones v. Saudi Arabia*,<sup>17</sup> both involve issues of state immunity, and their *obiter dicta* on exceptions to official immunity for serious international crimes either did not reflect extensive analysis or were simply a repetition of the previous *Pinochet III* interpretation of a treaty. Unfortunately, the Commentary isolated those *obiter dicta* remarks and took them at face value.

#### *Immunity from International Jurisdiction Versus Immunity from Foreign State Jurisdiction*

Even if official immunity is denied in proceedings before international courts and tribunals, such immunity from foreign criminal jurisdiction is still left intact. Otherwise, states would not be willing to agree to treaties like the Rome Statute that grant an international court jurisdiction over crimes, for fear that this treaty might grant other states equal jurisdiction over such crimes and ensuing chaos might sink the whole treaty project. Contrary to this common sense, the Commentary has a long list of national implementation legislation of the Rome Statute of the International Criminal Court by various states.<sup>18</sup> Minority members of the ILC rightfully pointed out the irrelevance of these practices.<sup>19</sup> Moreover, even if such national implementation legislation is relevant to the extent it relates to lifting official immunity for treaty crimes in proceedings before national courts, this is still treaty practice, far from being “a [general practice accepted as law](#),”<sup>20</sup> which is what is required to establish customary international law.

#### *The Irrelevance or Inadequacy of Treaty Practice*

The *Pinochet III* case cited by the Commentary as an example of a trend toward exceptions to official immunity<sup>21</sup> is merely a case involving an interpretation of the Torture Convention. Even today there are still [lingering problems](#) in its reasoning and scant follow-on suits by courts of other countries.<sup>22</sup> For the *Jones* case decided in a UK court, the Commentary emphasizes that “although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture.”<sup>23</sup> But the *Jones* court was simply reiterating the judgment of *Pinochet III* and added nothing to what *Pinochet III* had already established as a case involving an interpretation of the Torture Convention.<sup>24</sup>

<sup>15</sup> [Samantar v. Yousuf](#), 560 U.S. 305 (2010).

<sup>16</sup> [ILC Report A/72/10](#), *supra* note 1, at 179–80 n. 763.

<sup>17</sup> *Id.* at 179 n. 762.

<sup>18</sup> *Id.* at 179–80 n. 763.

<sup>19</sup> *Id.* at 182 n. 766.

<sup>20</sup> [Statute of the International Court of Justice](#) art. 31.1.b.

<sup>21</sup> [ILC Report A/72/10](#), *supra* note 1, at 179 n. 762.

<sup>22</sup> For example, see Qinmin Shen, [Lingering Issues of Foreign Official Immunity in Enforcing Prohibition Against Torture in Domestic Courts: Pinochet's Reasoning Reassessed](#), 16 CHINESE J. INT'L L 311 (2017).

<sup>23</sup> [ILC Report A/72/10](#), *supra* note 1, at 179 n. 762.

<sup>24</sup> In fact, the court in *Jones* specifically distinguished the case before it from *Pinochet III*. Lord Bingham of Cornhill in *Jones* stated that “I would not question the correctness of the decision reached by the majority in *Pinochet* (No 3). But the case was categorically different from

Of course, treaty practice can be valuable in discerning a rule of customary international law. The ILC's own study on the identification of customary international law adopted sixteen draft conclusions on first reading in 2016.<sup>25</sup> Draft Conclusion 11 provided that "the fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law." To prove the existence of customary international law derived from a treaty rule, one has to prove that this treaty rule "(a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*)." But the Commentary does not even bother to analyze the true value of such treaty practice as in *Pinochet III* or *Jones*, let alone to identify any rule of customary international law using approaches prescribed by the ILC's own work product.

One counterexample to the Commentary's use of *Pinochet III* is a recent decision in the *Bashir* case by the International Criminal Court. There, that court, in examining whether South Africa violated provisions of the Rome Statute by refusing to surrender [President Bashir of Sudan](#) to the Court when he visited South Africa, distinguished clearly between customary international law and treaty provisions as a source of law to decide on head of state immunity.<sup>26</sup> As a result, that court ruled that South Africa violated treaty obligations, while head of state immunity under customary international law remains unaffected.

### *Criminal Proceedings Versus Civil Proceedings*

Many of the court cases and national legislation cited in the Commentary in support of the establishment of exceptions to official immunity are related to civil proceedings, rather than criminal proceedings, rendering them irrelevant to the issue of official immunity from foreign criminal jurisdiction. One example is the U.S. Torture Victim Protection Act,<sup>27</sup> which not only does not amend the U.S. Foreign Sovereign Immunities Act as asserted by the Commentary, but also lays down only civil action procedures in U.S. courts to enforce the prohibition against torture and extrajudicial killing committed by officials of foreign nations. Simply put, this legislation has nothing to do with criminal proceedings and thus is totally irrelevant to the issue of official immunity from foreign criminal jurisdiction.

Similarly, the Commentary uses some *obiter dicta* of the European Court of Human Rights<sup>28</sup> in the *Jones* case brought up from the UK court, in order to buttress the ILC's claim of a trend towards exceptions to official immunity. But those words of the European Court of Human Rights dealt with immunity issues in civil proceedings instead of criminal proceedings. A Greek civil case<sup>29</sup> and an [Italian civil case](#)<sup>30</sup> were also cited for the same

the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the 1978 Act (the State Immunity Act 1978)." See [Jones v. Saudi Arabia](#) para. 19, [2006] UKHL 26.

<sup>25</sup> Int'l Law Comm'n, [Report on the Work of Its Sixty-Eighth Session](#) 78, UN Doc. A/71/10 (Sept. 19, 2016).

<sup>26</sup> [Prosecutor v. Al-Bashir](#), Case No. ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir 27 para. 71 (July 6, 2017).

<sup>27</sup> [ILC Report A/72/10](#), *supra* note 1, at 179 n. 763.

<sup>28</sup> *Id.* at 180 n. 764.

<sup>29</sup> *Id.* at 183 n. 770 ("Prefecture of Voiotia v. Federal Republic of Germany, Court of First Instance of Livadeia (Greece), judgment of 30 October 1997.").

<sup>30</sup> *Id.* at 179, Note 762 ("The Italian Supreme Court has ... asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction" citing (Corte di cassazione (Cass.), 11 marzo 2004, n. 5044/04 [Ferrini v. Ger.](#), 128 ILR 674) (It.).

purpose, despite the fact that in both cases state immunity was pleaded and official immunity from foreign criminal jurisdiction was not at issue at all.<sup>31</sup> In a later development, [Germany sued Italy](#) before the ICJ for the denial by an Italian court of state immunity enjoyed by Germany and won this case.<sup>32</sup> But the Commentary failed to direct our attention to this development and the discounted value of those two cases cited.

#### *Cases of Immunity Denial Versus Cases of Immunity Upholding*

All in all, the Commentary only cites a few cases in which immunity *ratione materiae* of state officials is dealt with restrictively, which does not show widespread state practice. Moreover, in the *Tibet* case, in which the National High Court of Spain allowed a prosecution against Chinese President Hu Jintao to proceed following the end of President Hu's term as the head of state of China, this unilateral assertion of nonapplication of immunity for a former head of state was immediately rebutted by China the following day as "[intervention in China's internal affairs](#)."<sup>33</sup>

Furthermore, if viewed in a broader frame of reference, there is a strong tendency in the Commentary toward selective invocation of state practice of judicial decisions, giving lopsided weight to a handful of cases in which immunity was denied while ignoring much more numerous instances of state practice of judicial decisions that upheld immunity. The ILC minority pointed out that national court decisions upholding immunity *ratione materiae* are not given due regard.<sup>34</sup>

Some ILC members prudently suggested that cases in which prosecutors declined to prosecute due to official immunity should be further explored.<sup>35</sup> One telling example would be China's situation where not a single criminal case has been prosecuted in courts involving the issue of immunity *ratione materiae* of foreign state officials. Does this or similar situations of East Asian countries count as state practice when assessing whether there is a trend toward limiting and withholding official immunity?

#### *Majority Opinions Versus Minority Opinions*

The Chinese delegate's statement at the Sixth Committee of the UN General Assembly observed that "the references to certain judicial decisions selectively highlight the minority opinions against immunity, whereas the majority opinions in favour of immunity are not given due attention."<sup>36</sup> Probably this is directed against the ILC Commentary Footnote 764 where a minority's separate opinion of the ICJ in *Arrest Warrant* is cited to prove the trend toward limiting official immunity for international crimes.<sup>37</sup> In fact, the separate opinion only tangentially hinted at an emerging trend discussed in the publicists' literature and several sporadic court cases.

<sup>31</sup> Minority members of the ILC explained that "the relevance for the topic of civil cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7." [ILC Report A/72/10](#), *supra* note 1, at 181 n. 765.

<sup>32</sup> [Jurisdictional Immunities of the State](#) (Ger. v. It.), 2012 ICJ REP. 99 (Feb. 2)

<sup>33</sup> See [Hua Chunying](#), TAKUNGPAO (2013) (China).

<sup>34</sup> [ILC Report A/72/10](#), *supra* note 1, at 181–82 n. 765.

<sup>35</sup> *Id.* at 169 para. 98.

<sup>36</sup> Statement by Chinese delegate Director-General XU Hong of the Department of Treaty and Law of Chinese Foreign Ministry at 72nd Session of the UN General Assembly on 27 October 2017 on Agenda Item 81 "Report of the International Law Commission on the work of its 69th session: Cluster 2: Chapters VI and VII & Cluster 3: Chapters VIII, IX and X" [hereinafter Chinese Delegate Statement].

<sup>37</sup> [ILC Report A/72/10](#), *supra* note 1, at 180 n. 764 ("The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000*" citing [Arrest Warrant of 11 April 2000](#) (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 88 para. 85 (Feb. 14)).

More importantly, as is well known, the ICJ in *Arrest Warrant* confirmed the procedural nature of official immunity and endorsed expansive immunity for officials rather than limiting it, counter to the Commentary's assertion of a limiting trend. But the Commentary nowhere gives the attention which *Arrest Warrant* deserves in shedding light on any trend in areas of official immunity law, except a footnote acknowledging the procedural nature of immunity rules stressed by the minority of ILC members.<sup>38</sup>

#### *Arbitrary Selection of Listed Crimes*

The Commentary exerts efforts to explain why these six crimes fall within heinous international crimes that have the effect of lifting official immunity from foreign criminal jurisdiction. For the first three (genocide, crimes against humanity, and war crimes), the *jus cogens* nature of their prohibition, the judicial practice of states “in relation to cases in which the issue of immunity *ratione materiae* has been raised,” and their inclusion in the Rome Statute of the International Criminal Court<sup>39</sup> were rationales to include them. For the last three (apartheid, torture, and enforced disappearance), that they are the subject of treaties that establish a special legal regime, the lack of their incorporation in the Rome Statute, and the official nature of the crimes of torture and enforced disappearance are counted as rationales to merit their inclusion.<sup>40</sup>

Even if these were all legitimate and reasonable rationales, why are some other crimes, like slavery, piracy, or terrorism, not included in this list since the same rationales are applicable to these other crimes? For example, terrorism is a crime that several states like the United States have already legislated on as precluding official immunity. Does slavery or piracy “not fully correspond to the definition of crimes under international law *stricto sensu*”? Is not piracy included in a treaty that establishes a special legal regime to tackle it? To say the least, the selection of crimes to which official immunity does not apply is arbitrary and not well-founded since no clear and practice-based criteria are presented here.

#### *Lack of Consistency in Criteria About Whether or Not to List Corruption*

The chapeau of Draft Article 7 uses the phrase “shall not apply” (meaning that immunity *ratione materiae* shall not apply in respect of listed crimes), instead of the phrase “immunity cannot be invoked” as employed in the UN Convention on Jurisdictional Immunities of States and Their Property of 2004. The Commentary explains that this is because the former phrase is broader in scope and covers two different possible interpretations: that those listed crimes are not “performed in an official capacity” (absence of immunity at all), or are acts necessarily “performed in an official capacity” (exclusion of existing immunity).<sup>41</sup> Thus the listed crimes in Draft Article 7 contain criminal acts either performed in an official capacity or not performed in an official capacity. According to this criterion, the crime of corruption qualifies to be listed there. But the Commentary states that “the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute acts performed in an official capacity, but are acts carried out by a State official solely for his or her own benefit.”<sup>42</sup> This inconsistent reasoning creates confusion regarding the exact scope of Draft Article 7 and calls into doubt the consistency and coherence of this study.

<sup>38</sup> [ILC Report A/72/10](#), *supra* note 1, at 182 n. 768.

<sup>39</sup> *Id.* at 185 para. 17.

<sup>40</sup> *Id.* at 186–87 para. 19.

<sup>41</sup> *See id.* at 183.

<sup>42</sup> *Id.* at 188 para. 23.

### *Conclusion*

As made clear in the above discussion, the state practice reflected in the cases and national legislation cited by the ILC are neither “widespread” nor “representative” to [adequately identify](#) any rule of customary international law.<sup>43</sup> It is unsurprising that so many states voiced their reservations during the discussion in the Sixth Committee at the 72<sup>nd</sup> Session of the UN General Assembly. It is not only China that categorically rejected Draft Article 7 as a reflection of customary international law.<sup>44</sup> The U.S. delegate remarked in the same vein that “the resulting language [Draft Article 7] cannot be said to represent customary international law or even the progressive development of existing law.”<sup>45</sup> Similar views were also expressed by a number of other delegates. The future of this draft article looks very bleak in terms of state support for its wider acceptance. More importantly, the serious flaws that permeate the methodology for this ILC study not only create doubts about the existence of any trend towards an exception to official immunity, but also call into question the ILC’s own authority and legitimacy. Hopefully at its next session the ILC can improve on both the methodology and content of its study of this important topic in international law.

<sup>43</sup> The ILC’s own requirement of ample practice in the identification of customary international law is reflected in the Draft Conclusion 8 (1) of the Draft Conclusions on Identification of Customary International Law, Int’l Law Comm’n, [Report on the Work of Its Sixty-Eighth Session](#) 94, UN Doc. A/71/10 (Sept.19, 2016) (“The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.”).

<sup>44</sup> Chinese Delegate Statement, *supra* note 36.

<sup>45</sup> Statement by Richard Visek, Acting Legal Adviser to US Department of State, at 72nd General Assembly Sixth Committee on Agenda Item 81 “Report of the International Law Commission on the Work of its 69th Session” on October 25, 2017.