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SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

THE “INTERNATIONAL CRIME” EXCEPTION IN THE ILC DRAFT ARTICLES ON THE IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION: TWO STEPS BACK?

Rosanne van Alebeek*

In addressing the topic of the immunity of state officials from foreign criminal jurisdiction, the International Law Commission (ILC) took on one of the most contentious issues in contemporary international law. The question whether functional immunity applies when officials are accused of having committed international crimes has divided courts and scholars alike, and the ILC was deeply split. The “international crimes” exception set forth in [Draft Article 7 was, exceptionally, put up for a vote](#), with twenty-one votes cast in favor of provisional adoption, one abstention, and eight negative votes.¹ Because the ILC has a mandate to both codify and progressively develop international law,² these figures do not help resolve what was arguably the real bone of contention: whether or not the exception is already part of customary international law—that is, whether it is *lex lata*.

The views of individual members of the ILC on this question might be discerned by perusing the summary records of the ILC debates. But national courts are unlikely to undertake this exercise, and even if they did so, the position of the members is not always explicated and is at times hard to grasp. In this contribution, I attempt to map and unravel the various positions advanced in the relevant ILC debates with a view to establishing the majority consensus on that point.³ As I explain, the drift of the majority view in the plenary debates seems to have changed between 2011, when [the second report of Special Rapporteur Kolodkin](#) was discussed, and 2016-2017, when [the fifth report of Special Rapporteur Escobar Hernández](#) and Draft Article 7 were up for discussion. Ironically perhaps, there is now less consensus in favor of recognizing international crimes limitations on immunity as *lex lata*. Reflecting on that shift, I will submit that the waning support for the *lex lata* approach is at least partly due to fact that the Special Rapporteur seemed to concede that the content of customary international law should first and foremost be derived from state practice, and that the principal arguments in favor of the “international crimes” exception were only relevant outside that framework.

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¹ Int'l Law Comm'n, [Report on the Work of Its Sixty-Ninth Session](#) para. 74, UN Doc. A/72/10 (Sept. 11, 2017). The text of the draft article can be found on *id.* at 176.

² [Statute of the International Law Commission](#) art. 1.1, Nov. 21, 1947, GA Res. 174 (II).

³ In this short essay, references will take the form of the surname of the ILC member, followed by the number of the meeting in which the view was advanced.

Tracing Consensus in the 2011 and 2016-2017 Plenary Debates

The first Special Rapporteur on the topic was of the opinion that “it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law, just as, however, it is impossible to assert definitively that there is a trend toward the establishment of such a norm.”⁴ He did not find any of the principal arguments in support of an international crimes exception convincing.⁵ Further restrictions on immunity *de lege ferenda* were furthermore not “desirable,” he concluded, because they could “impair . . . friendly international relations.”⁶ At best, he wrote, “the Commission could consider, alongside the codification of customary international law currently in force, the question of drawing up an optional protocol or model clauses on restricting or precluding the immunity of State officials from foreign criminal jurisdiction.”⁷

The Report triggered responses along three distinct lines. Of those Commission members who formulated a substantive response,⁸ four broadly agreed with the approach and conclusions of the Special Rapporteur.⁹ Of those that were critical, four, maybe five, members were of the opinion that there were strong arguments for the ILC to support the international crimes exception, not as a codification of *lex lata* but as a matter of progressive development,¹⁰ and thirteen members criticized the approach of the Rapporteur to identifying the *lex lata* on the subject.¹¹ While there were distinct differences of opinion within this third group, these members all seemed to argue that the ILC should adopt a different concept of international law than the “hyper-Westphalian concept”¹² presented by the Special Rapporteur. Nine members of this third group had no doubts that the ILC could adopt the international crimes exception within the realm of existing customary international law,¹³ while four were more tentative in their appraisal.¹⁴ According to some members, international crimes did not belong to the functions of the state, or were not official acts.¹⁵ Other members reasoned in terms of a clash between immunity and human rights and international criminal law, which had to be decided in favor of the latter norms in view of the

⁴ Anatolevich Kolodkin (Special Rapporteur Immunity for of State Officials from Foreign Criminal Jurisdiction), [Second Report](#) para. 90, UN Doc. A/CN.4/631 (2011).

⁵ *Id.* at paras. 56-80.

⁶ *Id.* at para. 91.

⁷ *Id.* at para. 93.

⁸ Not all thirty-four members contributed to the debates. Ten members (Belle Adoke; Al-Marri; Candioti; Comissário Afonso; Huang; Kemicha; Niehaus; Saboia; Vázquez-Bermúdez; Wako) did not take the floor. In addition Galicki (3088) did not take a position in his contribution.

⁹ Vasciannie (3087, even though he thought the reasoning in regards to the rejection of the exception as a matter of progressive development required more elaboration); Wood (3088); Perera (3088); Singh (3113).

¹⁰ Jacobsson (3087); Petrič (3087); Hassouna (3088, although his contribution did not make this point with so many words, his reaction fits this category best); Fomba (3115). The response of Valencia Ospina (3088) is not easy to qualify, and could possibly also be seen to fit the next category.

¹¹ See *infra* nn. 13 and 14.

¹² Pellet (3087).

¹³ Dugard (3086, while he referred to progressive development, he in essence argued in favor of an alternative approach to the establishment of the scope of customary international law); Melescanu (3086); Vargas Carreño (3087); Pellet (3087); Gaja (3087); Cafisch (3088); Wisnumurti (3088); Escobar Hernández (3088, although her response included some ambiguous elements, like the closing sentence “exceptions to the general rule of immunity should be treated *de lege ferenda*”); Hmoud (3114).

¹⁴ McRae (3087); Nolte (3088); Kamto (3088, although his reasoning seems to indicate that he believes the exception is part of *lex lata*, he is not explicit in this regard); Murase (3113).

¹⁵ Escobar Hernandez; Vargas; Carreño, Wisnumurti; Melescanu.

hierarchically superior status of *jus cogens*.¹⁶ Yet others limited their reasoning to treaty law, arguing that treaties concerning the suppression of international crimes should be interpreted as not allowing for the defense of functional immunity.¹⁷ A couple of members in the third group did point out that an international crimes exception opened the door to abuse and politically inspired prosecutions and that any exception should go hand-in-hand with the adoption of adequate safeguards.¹⁸

In view of the critical reception of the Second Kolodkin report, the new Special Rapporteur decided to revisit the issue of an international crimes exception.¹⁹ She proposed to “analyse the connection between international crimes and the immunity of State officials from foreign criminal jurisdiction, from two separate perspectives: (a) the existence of an international custom marking the contours of such limitation or exception; and (b) the systematic recognition of international crimes as a limitation or exception to immunity.”²⁰ Within the first perspective, the Rapporteur argued that an inductive analysis of state practice and *opinio juris* allowed the conclusion that “the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.”²¹ Next, the Rapporteur shifted to deductive reasoning, or to “a systemic analysis of the relationship between immunity and international crimes in contemporary international law” in order to “show . . . that there are various arguments in favor of such a norm,”²² “whether or not it is concluded that international custom establishes such a limitation or exception.”²³

This Report triggered heated debates within the Plenary, spreading out over two sessions.²⁴ Again, responses divided along three principal lines of arguments.²⁵ Only four, maybe five, members of both the 2016 and 2017 ILC²⁶ expressed unqualified support for the approach and the conclusions of the Special Rapporteur. Six members of the 2016 ILC²⁷ and thirteen of the 2017 ILC²⁸ expressed support for the inclusion of the “international crimes” exception as a matter of progressive development. In this group, there were members who explicitly

¹⁶ Dugard; Kamto; Hmoud.

¹⁷ Gaja.

¹⁸ E.g., Murase (3113).

¹⁹ Concepción Escobar Hernández (Special Rapporteur Immunity for of State Officials from Foreign Criminal Jurisdiction), [Preliminary Report](#) para. 68, UN Doc. A/CN.4/654 (2012).

²⁰ Concepción Escobar Hernández (Special Rapporteur Immunity for of State Officials from Foreign Criminal Jurisdiction), [Fifth Report](#) para. 180, UN Doc. A/CN.4/701 (June 14, 2016) [hereinafter Fifth Report Escobar Hernández].

²¹ *Id.* at paras. 181-89.

²² *Id.* at para. 190.

²³ *Id.* at para. 217.

²⁴ Thirteen members were replaced at the 2017 elections. Of the 2016 ILC, ten members did not take the floor (Belle Adoke; Al-Marri; Caffisch; Comissário Afonso; El-Murtadi Suleiman Gouider; Forteau; Jacobsson; Niehaus; Wako; Wisnumurti); of the 2017 ILC this was five members (Al-Marri; Argüello Gómez; Aurescu; Reinisch; Wako). One member of the 2016 ILC spoke without taking a position. Kittichaisaree (3330) merely said that it was advisable for the Commission to clearly indicate which provisions fell into the category of customary international law and which fell into the category of progressive development.

²⁵ Two members of both the 2016 and 2017 ILC that spoke out in support of Draft Article 7 did so without any reference to the dual task of the Commission and without explicit support for the reasoning advanced by the Rapporteur which made it impossible to rely on their contributions for the purposes of this inquiry: Valencia Ospina (3361); Peter (3363).

²⁶ Murase (3328 & 3363); Saboia (3330); Hmoud (3331); Vázquez-Bermúdez (3362); Gómez-Robledo (3363), referring to progressive development but reasoning predominantly in terms of *lex lata*.

²⁷ See *infra* nn. 29, 31, 35.

²⁸ See *infra* nn. 30, 31, 32, 36.

rejected a *lex lata* analysis (three members of the 2016 ILC²⁹ and six members of the 2017 ILC³⁰); two members in both the 2016 and 2017 ILC who did not do so, but who did state that they regarded the exception to constitute progressive development;³¹ four members of the 2017 ILC who were of the opinion that codification and progressive development elements in the ILC's work cannot be neatly distinguished but who acknowledged that the exception ventured into the progressive development mandate;³² and even members who said that the Rapporteur *herself* had admitted that the exception was not part of existing law.³³ The response of nine members of the 2016 ILC³⁴ and eight of the 2017³⁵ ILC was overall, and at times scathingly, critical. In their view, the proposed exception was not part of customary international law, there was not even a trend in that respect, and the exception was not even desirable as a matter of progressive development.³⁶ Some of the critics of Draft Article 7 were of the opinion that it should have been discussed in tandem with the procedural provisions and safeguards to be proposed in the Sixth Report in 2018.³⁷ While several of the members who voted in favor of the draft article equally underlined the need to put in place procedural guarantees to prevent politically motivated prosecutions,³⁸ these members did not consider this to stand in the way of referral of Draft Article 7 to the Drafting Committee.

So, where in 2011 57 percent of the members who participated in the debate expressed support for adopting some form of “international crimes” exception *de lege lata*,³⁹ in 2017 that support had dwindled to 21 percent.⁴⁰ Almost 70 percent of those who spoke out in favor of Draft Article 7 in 2017 did so on the understanding that the Commission was engaging in progressive development of the law.⁴¹ Add to that the members who rejected the draft article altogether, and 78 percent of the members did not accept that the exception is part of existing customary international law.

This fact is however nowhere explicitly recorded. The summary of the general debate in the report on the work of the sixty-ninth session merely indicates that “a number of members,” “several members,” or “some members” expressed a certain opinion.⁴² As a concession to the critical members, the Commentary came to state that “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*,”⁴³ but it takes a particularly astute reader to appreciate that as a caveat. Similarly, the acknowledgement in the Commentary that with Draft Article 7 the Committee is pursuing “its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method”⁴⁴ is hardly informative.

²⁹ Park (3360); Tladi (3361); Hassouna (3361).

³⁰ Park; Tladi; Hassouna; Galvão Teles (3361); Jalloh (3362); Cissé (3364).

³¹ 2016: Candioti (3330 & esp. 3331); Šturma (3331, 3362, 3378). 2017: Šturma; Ouazzani Chahdi (3364).

³² Nguyen (3360); Oral (3364); Grossman Guiloff (3364); Ruda Santolaria (3364).

³³ 2016: McRae (3331). 2017: Lehto (3362).

³⁴ Huang (3330, 3364, 3378); Singh (3331); Kamto (3331); Wood (3360, 3378); Kolodkin (3361, 3378); Murphy (3362, 3378); Laraba (3363); Nolte (3365, 3378); Petrić (3378, 3387).

³⁵ Huang; Wood; Kolodkin; Murphy; Laraba; Nolte; Petrić; Rajput (3363, 3378).

³⁶ Petrić and Laraba were less outspoken on this latter point.

³⁷ E.g., Wood.

³⁸ E.g., Hmoud; McRae; Vázquez-Bermúdez; Jalloh; Grossman.

³⁹ Thirteen of twenty three members (eleven members did not take position).

⁴⁰ Six of twenty-three members (six members did not take position)

⁴¹ Thirteen of nineteen members.

⁴² Int'l Law Comm'n, [Report on the Work of Its Sixty-Ninth Session](#) ch. VII, UN Doc. A/72/10 (Sept. 11, 2017).

⁴³ Commentary, para. 1, (emphasis added), *id.* at 178.

⁴⁴ Commentary, para. 7, *id.* at 181.

Making Sense of the Conservative Turn

The shifting majorities may in theory be explained by the changing composition of the ILC—the 2011 and 2017 ILC share just fourteen members. Also, the still explorative nature of the 2011 debates could help explain the shift. It is often noted that the ILC, as a subsidiary organ of the UN General Assembly, “operates in a specific context, driven mainly by orthodox attitudes toward international law,”⁴⁵ and a common piece of advice for the ILC is not to take “great leaps forward” so as to ensure state acceptance of its work.⁴⁶ With that in mind, perhaps it was always to be expected that the ILC would in the end proceed more cautiously than, for example, the *Institut de Droit International*, which explicitly adopted the “international crimes” exception *de lege lata* in 2009.⁴⁷ However, if that were the case, one would expect the ILC to make clear the progressive nature of the draft article. Moreover, as Roger O’Keefe cautioned in 2015, “there is little diplomatic appetite for foreign prosecutions for alleged international crimes of state officials,”⁴⁸ not even when presented as a proposal for reform.

At least part of the explanation may stem from the argumentation advanced in support of Draft Article 7 in the Fifth Report. The attempt to ground the exception in state practice and *opinio juris* must already have put members on guard concerning the methodological soundness of the reasoning of the Special Rapporteur. But the bigger problem lies with the second leg of the argumentation. The various arguments—*ius cogens*, access to justice, obligation to prosecute—were presented as a potpourri that might not independently, but at least when taken together constitute “sufficient grounds . . . to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.”⁴⁹

While presented as “systemic interpretation,” the Report does not succeed in explaining the exception in terms of interpretation of existing customary international law. This is mainly because the Report does not take an unambiguous position on the rationale for the rule of functional immunity, leaving its relation to the development of concepts like individual responsibility and universal jurisdiction obscure. This is reflected in the conclusion on the second leg of the argumentation: “Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity,” the Rapporteur writes, “a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm.”⁵⁰ Therewith, the arguments slip out of the interpretation framework into the muddy waters of policy arguments, and the exception appears to be postulated as a rule of *lex lata* on the basis of abstract principles.

In addition, Draft Article 7 should not have been severed from the issue of procedural safeguards. Discussing them in tandem would in all likelihood have reduced resistance to the article, but more importantly, when the “international crimes” exception is formulated in terms of systemic interpretation of the rule of functional immunity and the concepts of individual responsibility for international crimes, universal jurisdiction over international crimes, and the obligation to prosecute international crimes, the limits on the exercise of universal jurisdiction by national courts are arguably part and parcel of the scope of the exception.

⁴⁵ Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, 109 AJIL 498, 502-03 (2015).

⁴⁶ Christian Tomuschat, *The International Law Commission - An Outdated Institution?*, 49 GERMAN Y.B. INT’L L. 77, 87 (2006).

⁴⁷ Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, art. III.1 (2009).

⁴⁸ Roger O’Keefe, *An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL UNBOUND 167, 170-71 (2015).

⁴⁹ *Fifth Report Escobar Hernández*, *supra* note 20, at para. 217.

⁵⁰ *Id.* at para.190.

Conclusion

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 [Pinobet](#) case,⁵¹ 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.

⁵¹ [R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte \(No. 3\)](#), [1999] UKHL 17.