

SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

HOW FAR DOES THE SYSTEMIC APPROACH TO IMMUNITIES TAKE US?

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The International Law Commission (ILC) explains in its 2017 Commentary to [Draft Article 7](#) of its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction that the draft articles are “intended to apply within an international legal order whose unity and systemic nature cannot be ignored.”¹ The quest for coherence is admirable. It enhances legal certainty and predictability in an evolving area of the law. But a systemic approach can also go too far—stretching analogies and ignoring differences, seeing a trend where there is none. The trajectory of the ILC’s work on Draft Article 7 illustrates certain dangers.

The Relationship Between State Immunity, Diplomatic Immunity, and Immunity Ratione Materiae

The [Secretariat Memorandum](#) prepared at the outset of the ILC’s work on the draft articles notes that “the various immunities have all followed a varied, albeit interconnected historical trajectory.”² State immunity, diplomatic immunity, and immunity *ratione materiae* all derive from the principle of sovereign equality and apply by reference to some kind of division between acts of a private and public nature, whether sovereign versus commercial or official versus personal. They are immunities that can only be waived by the state.

The [1961 Vienna Convention on Diplomatic Relations](#) (VCDR) notes that the purpose of diplomatic immunities “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”³ Once a diplomat’s functions come to an end, his or her immunity resembles immunity *ratione materiae*.⁴ At the same time, important differences exist between diplomatic immunity and immunity *ratione materiae*. The former is “[based on international consensus established by writers and governmental practice over many centuries](#),”⁵ now codified in the VCDR. Immunity *ratione materiae* is a creature of customary international law, developed largely through domestic case law. Diplomatic immunity is more [akin to](#) immunity *ratione personae*,⁶ has no exception with respect to criminal proceedings, and is subject to three narrow exceptions in the case of civil

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

² [Secretariat Memorandum](#) para. 17, UN Doc. A/CN.4/596 (2008).

³ [Vienna Convention on Diplomatic Relations](#) preamb. para 4, Apr. 18, 1961, 500 UNTS 95 [hereinafter VCDR].

⁴ *Id.* art. 39(2) (it is narrower than immunity *ratione materiae* in that it only exists with respect to the jurisdiction of the receiving state).

⁵ [Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah](#), [2017] UKSC 62, para. 40.

⁶ For the close relationship with immunity of a head of state, see JOANNE FOAKES, [THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW](#) 43–7 (2014).

proceedings.⁷ As the UK Supreme Court recently observed in a case on diplomatic immunity, the immunities of diplomatic agents are wide because “their purpose is to remove from the jurisdiction of the receiving state persons who are within its territory and under its physical power.”⁸ Diplomats are “[h]uman agents” with a “corporeal vulnerability not shared by the incorporeal state which sent them.”⁹ State officials are also human agents, but (with important exceptions such as for military personnel) they are usually not expected to live and work overseas, which reduces their corporeal vulnerability to foreign prosecution. Diplomatic immunity is also underpinned and sustained by the principle of reciprocity to a greater degree than immunity *ratione materiae*.

As for state immunity, there is an ongoing debate about whether immunity *ratione materiae* enjoyed by state officials is an integral part of state immunity or a discrete immunity that could be enjoyed by individuals in cases where the state has no immunity.¹⁰ There are questions regarding the relationship between attribution of responsibility and the definition of acting in an official capacity, whether the sole ability of the state to waive immunity means that immunity *ratione materiae* is an inseparable element of state immunity, and the extent to which the exceptions to immunity *ratione materiae* track those of restrictive doctrine. State immunity is not codified to the same extent as diplomatic immunity, but a dozen or so states have state immunity legislation and it is also the subject of the 1972 European Convention on State Immunity as well as the [2004 United Nations Convention on Jurisdictional Immunities of States and Their Property](#) (UNCSI), which, although it has not yet entered into force, has been referred to by international and national courts as evidence of customary international law, at least for certain of its provisions.

The Influence of State and Diplomatic Immunity on Draft Article 7

The complex relationship between the immunities of states, diplomats, and state officials suggests a careful approach to borrowing, translating, or adapting rules from one regime to the other. The [Fifth Report](#) of the Special Rapporteur reveals extensive crosspollination among the different types of immunities.¹¹ This is reflected, to a lesser extent, in the 2017 ILC Report, including its Commentary to Draft Article 7.

As regards diplomatic immunity, the Fifth Report notes the features of the VCDR and the absence of a distinction between “limitations and exceptions.”¹² Both the Fifth Report and the 2017 ILC Report cite the *Tibet* case of the National High Court of Spain which held that former Chinese President Hu Jintao no longer enjoyed “diplomatic immunity.”¹³ The case is presented as evidence of a “trend” of national courts not recognizing immunity from jurisdiction *ratione materiae* for certain international crimes.

On state immunity, the Fifth Report notes that national legislation on jurisdictional immunities “usually refer basically to immunities of the State” and contain exceptions that are “only indirectly relevant to criminal jurisdictions” or may “expressly bar their application in criminal proceedings.”¹⁴ Yet the Report goes on to discuss various national laws on state immunity and the 2017 Commentary cites the U.S. Foreign Sovereign Immunities Act

⁷ [VCDR](#), *supra* note 3, art. 31.

⁸ [Reyes v. Al-Malki](#), [2017] UKSC 61, para. 28.

⁹ *Id.*

¹⁰ For a good overview, see FOAKES, *supra* note 6, at 8–9.

¹¹ Concepción Escobar Hernández (Special Rapporteur for Immunity for of State Officials from Foreign Criminal Jurisdiction), [Fifth Report](#), UN Doc. A/CN.4/701 (June 14, 2016) [hereinafter Fifth Report].

¹² *Id.* at paras. 24–25, 173

¹³ *Id.* at 50 n. 233; [2017 ILC Report](#), *supra* note 1, at 179 n. 762.

¹⁴ [Fifth Report](#), *supra* note 11, at paras. 44, 45. See also *id.* at para. 26 where the Special Rapporteur observes that UNCSI is “in principle less relevant . . . since it refers to immunity from jurisdiction of the State.”

(FSIA), Argentina's Act No. 24488 on Foreign State Immunity, and the Canada State Immunity Act as evidence of the abovementioned "trend" towards an exception to immunity *ratione materiae* for certain international crimes.¹⁵ However, the 2017 ILC Report also records that some members of the ILC disagreed with the analysis of the Special Rapporteur, finding that laws focused on the immunity of states were "irrelevant."¹⁶

The influence of state and diplomatic immunities on the work of the Special Rapporteur is most apparent when it comes to the so-called "territorial tort exception." In the Fifth Report, the Special Rapporteur explained:

The "territorial tort exception" had its origin in the law of diplomatic immunities and was later extended to State immunity. It has been incorporated into all national laws governing immunity, with the exception of those of Pakistan, and into the United Nations Convention on Jurisdictional Immunities of States and Their Property. It can be considered that the content of this exception is described in article 12 of the Convention.¹⁷

Article 12 UNCSI, referred to by the Rapporteur, provides:

Personal Injuries and Damage to Property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

The Special Rapporteur proposed translating this "territorial tort exception" to state immunity, applicable only in civil proceedings, into an exception to immunity *ratione materiae* for state officials applicable in criminal proceedings. This was not an easy translation, and it was ultimately rejected by the ILC.¹⁸ Even the name of the claimed exception—the "territorial tort exception"—was confusing; it brought to mind minor wrongs and insurable losses rather than acts subject to criminal proceedings.

The Special Rapporteur argued that even though the "territorial tort exception" was intended to be applied mainly in the context of diplomatic relations and was later extended to the acts of agents and officials of international organizations and to the immunity of the state, it is certainly possible to find examples of state practice in which the courts of the forum state have relied on the "territorial tort exception" to conclude that immunity from jurisdiction is not applicable to the officials of a foreign state.¹⁹ In a crucial footnote to this paragraph, the Special Rapporteur cited cases in which, she said, "courts have denied immunity, despite recognizing the person concerned as a State official and establishing a connection between the State of the official and the act in question."²⁰ On closer examination, the cited case law did not in fact support such an exception under international law. Of the

¹⁵ [2017 ILC Report](#), *supra* note 1, at 179–80 n. 763.

¹⁶ *Id.* at 182 n. 766.

¹⁷ [Fifth Report](#), *supra* note 11, at para. 225.

¹⁸ See *infra* note 27.

¹⁹ [Fifth Report](#), *supra* note 11, at para. 227.

²⁰ *Id.*

ten cases cited: [three cases were brought](#) against states and concerned state immunity from civil proceedings;²¹ in four cases, the states involved [did not invoke](#) immunity;²² one case was related to civil, not criminal, proceedings against an official and the “territorial tort exception” was not mentioned;²³ one case concerned the entirely separate question of the subpoena powers of an [international criminal tribunal](#), and upheld the immunity *ratione materiae* of the state official.²⁴ In the remaining case, the English High Court decision in [Khurts Bat v. Investigating judge of the German Federal Court](#),²⁵ the consideration of the claimed exception was in the context of an extradition request.

The Special Rapporteur’s proposed “territorial tort exception” proved controversial within the ILC. The records of the [ILC debates](#) in 2016 and 2017 showed the divided views of the ILC members.²⁶ Many members felt that the proposed exception represented at most *lex ferenda* rather than *lex lata* and was not supported by state practice. The ILC Drafting Committee omitted the proposed exception from the text of Draft Article 7 that was provisionally adopted on July 10, 2017. This position was maintained by the [ILC Plenary](#) when it provisionally adopted Draft Article 7 a few days later.²⁷ The 2017 ILC Report records that some members noted that the “territorial tort exception” was “well established in civil proceedings, but not in the criminal sphere” and that the authorities cited by the Special Rapporteur mostly referred to civil cases.²⁸

The “Systemic Nature” of the International Legal Order

How far does appealing to the “systemic nature” of international law take us? In [The Law of State Immunity](#),²⁹ [Lady Hazel Fox and I](#) described the varied scope of the different types of immunities enjoyed by different emanations of the state, and we posed a question: is the loss of a single unifying concept of immunity to be deplored or welcomed?

In my view, a single unifying concept of immunity is neither realistic nor desirable. But it is equally undesirable to have a splintering of concepts. The struggle between these two approaches is evident in judicial decisions and treaty-making.

²¹ [Letelier v. Chile](#), 748 F.2d 790 (2d Cir. 1984); Corte di cassazione (Cass.), 11 marzo 2004, n. 5044/04 [Ferrini v. Ger.](#), 128 ILR 674 (It.) and Cass., Areios Pagos [A.P.] [Supreme Court] 11/2000 [Prefecture of Voiotia v. Ger.](#) (Greece), 129 ILR 513.

²² Federal Constitutional Court of Germany, May 15, 1995 (This is not an inter-state case and Germany did not claim immunity. It was a constitutional question of proportionality, not immunity); *R v. Mafart and Prieur*, (N.Z.) (Nov. 22, 1985) (France did not claim immunity on behalf of its officials); [Jiménez v. Aristeguieta](#), 311 F.2d 547 (5th Circuit, 1962) (this was an extradition case based on a 1922 bilateral treaty. The doctrine in question was act of state, not immunity); Corte di cassazione (Cass.), 29 novembre 2012, n. 46340/2012, ILDC 1960 (IT 2012) (It.) (The United States did not invoke immunity for its officials and the territorial exception was not discussed).

²³ *Jane Doe I v. Liu Qi, Plaintiff A, v. Xia Deren*, United States District Court, N.D. California (C 02-0672 CW, C 02 -0695 CW).

²⁴ [Prosecutor v. Blaškić](#), Case No. IT-95-14-AR108 bis, Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber Judgment para. 41 (Oct. 29, 1997).

²⁵ [Khurts Bat v. Investigating Judge of the German Federal Court](#), [2011] EWHC 2029 (Admin).

²⁶ See [Sixty-Ninth Session](#), INTERNATIONAL LAW COMMISSION.

²⁷ Int’l Law Commission, [Immunity of State officials from foreign criminal jurisdiction: Titles of Parts Two and Three, and texts and titles of draft Article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session](#), UN Doc. A/CN.4/L.893 (2017). The (recorded) vote was twenty-one in favor, eight against, one abstention. See also Giulia Bernabei, [Nobody’s Land: Where All Step but No One Settles](#), ILAWYER BLOG (Dec. 10, 2017).

²⁸ [2017 ILC Report](#), *supra* note 1, at para 126.

²⁹ HAZEL FOX & PHILIPPA WEBB, [The Law of State Immunity](#) 620 (3d ed 2015).

In its *Jurisdictional Immunities* judgment, a case involving state immunity for serious violations of international law, the ICJ referred to the possibility of an immunity of a different scope being available to a state official in criminal proceedings in respect of the commission of the same acts as a state:

[T]he Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.³⁰

Other courts have followed and applied the *Jurisdictional Immunities* judgment in cases concerning the [immunities of international organizations](#)³¹ and [state officials](#) from civil proceedings.³²

UNCSI expressly has a harmonizing purpose,³³ but—like the ILC’s draft articles³⁴—it also expressly leaves untouched a long list of immunities other than state immunity: the immunities of diplomatic missions, consular posts, special missions, missions to international organizations, delegations to organs of international organizations/conferences, and persons connected with them; the immunities of heads of state *ratione personae*; and immunities enjoyed by a state with respect to aircraft or space objects.³⁵ The [General Assembly resolution](#) that adopted UNCSI provided that it does not apply to criminal proceedings.³⁶

In a recent case, *Reyes v. Al-Malki*, the UK Supreme Court was confronted with the question whether the employment contract exception to state immunity could be translated or “read into” the exception for “professional or commercial activity . . . outside [of] official functions” to diplomatic immunity.³⁷ The case was ultimately decided on the basis of the residual immunity of a diplomat who has left his post, with the court holding that employment of a domestic servant in a diplomat’s residence was not covered by this immunity.³⁸ The Court therefore did not have to decide on the scope of the exception for professional or commercial activity that applied to diplomats in post.

The parties in *Reyes* engaged with practice (case law, legislation, and treaties) concerning state, diplomatic, and consular immunities. Two judges (Lords Neuberger and Sumption) did not find the analogy between state and diplomatic immunity helpful.³⁹ But another judge (Lord Wilson), with whom two others agreed (Lady Hale and Lord Clarke), was more open to taking notice of developments in other areas of the law on immunity.⁴⁰ And for this reason, he was able to notice divergences that seemed incoherent: “I cannot readily explain why proceedings relating to a contract of employment entered into by a foreign state, for performance in the UK, will not in principle attract immunity in circumstances in which, if the contract is entered into by a diplomat, it will in principle attract immunity.”⁴¹

Interestingly, Lord Wilson saw the ILC as the key to a systemic approach. He suggested that the ILC “be invited . . . to consider, and to consult and to report upon, the international acceptability of an amendment to

³⁰ [Jurisdictional Immunities of the State](#) (Ger. v. It.), 2012 ICJ REP. 99, para. 91 (Feb. 2).

³¹ [Stichting Mothers of Srebrenica v. Neth.](#) para. 158, App No. 65542/12 (Eur. Ct. H.R., June 11, 2013).

³² [Jones v. UK](#), 2014 EUR. CT. H.R. 176, para 92; [Kazemi Estate v. Iran](#), [2014] S.C.R. 176 (Can.).

³³ Expressed in its third preambular paragraph.

³⁴ See Draft Article 1(2) and Commentary thereto.

³⁵ [United Nations Convention on Jurisdictional Immunities of States and Their Property](#) art. 3, Dec. 2, 2004, GA Res. 59/38.

³⁶ [GA Res 59/38](#) para. 2 (2004).

³⁷ *Reyes*, *supra* note 8. Compare Article 11 UNCSI and Article 31(1)(c) VCDR.

³⁸ [VCDR](#), *supra* note 3, art. 39(2).

³⁹ *Reyes*, *supra* note 8, at paras. 26–33.

⁴⁰ *Id.*, at paras. 63–5.

⁴¹ *Id.*, at para. 65.

article 31 [of the VCDR] which would put beyond doubt the exclusion of immunity in a case such as that of Ms Reyes.”⁴² Such an invitation is unlikely to be made, but if it did eventuate, the ILC should tread a more careful line than it did in its consideration of Draft Article 7.

Conclusion

The common origin of immunities in international law is the state. The diplomat is the state’s representative abroad, the official is the means through which the state acts, the head of state is the embodiment of the state, in all its dignity. But from this common origin, the nature and scope of each actor have evolved differently through treaties, practice, case law and the work of the ILC.

We should be searching for an organizing principle that allows us to discern and justify the differences between immunities in a systematic way. This approach would yield the least fragmentation in outcomes, but would not subsume differences for the sake of uniformity. The goal is coherence, which would still allow space for variations and adaptation.

⁴² *Id.* at para. 68.