SYMPOSIUM ON THE IMMUNITY OF STATE OFFICIALS
FOREIGN OFFICIAL IMMUNITY IN THE INTERNATIONAL LAW COMMISSION: THE MEANINGS OF "OFFICIAL CAPACITY"

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Of all the issues facing the International Law Commission (ILC) in its work on the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction," how to define "act performed in an official capacity" is certainly one of the most difficult and important. If serious international crimes, like torture, are considered acts performed in an official capacity, then foreign officials responsible for such crimes may (unless an exception applies) be immune from criminal jurisdiction in other states for such acts even after they leave office.[1]

In May 2015, Special Rapporteur Concepción Escobar Hernández published a Fourth Report addressing the issue of "official capacity" in detail.[2] There is much to praise in the Fourth Report. In a shift from the position taken by her predecessor, the Special Rapporteur rejected the argument that any conduct attributable to the State for purposes of state responsibility is necessarily an act performed in an official capacity and therefore entitled to immunity.[3] The Fourth Report also recognizes and endorses what it calls the "single act, dual responsibility" model, under which both the State and its official may be responsible for a single act.[4] These positions should have led the Special Rapporteur to exclude serious international crimes from the definition of acts performed in an official capacity. But in the end she resisted that conclusion and suggested that such crimes should instead be considered as exceptions to immunity.[5] This essay argues that the scope of immunity for serious international crimes—those crimes over which nations may exercise universal jurisdiction to prescribe under international law—is best addressed in the definition of "official capacity."

Customary international law recognizes two basic types of foreign official immunity: status-based immunity (immunity *ratione personae*) and conduct-based immunity (immunity *ratione materiae*). Status-based immunity attaches based on the *status of a person* as head of state, head of government, or foreign minister (the so-called

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[1] The ILC has limited its work to "the immunity of State officials from the criminal jurisdiction of another State." International Law Commission, Analytical Guide to the Work of the International Law Commission, Immunity of State officials from foreign criminal jurisdiction. The scope of this essay is similarly limited and the essay will not address the immunity of state officials from the jurisdiction of the courts of their own States or from the jurisdiction of international tribunals.

[2] Int'l Law Comm'n, Fourth report on the immunity of State officials from foreign criminal jurisdiction, U.N. Doc. A/CN.4/686 (2015) [hereinafter "Fourth report"].

[3] *Id.* at paras. 111-17. Compare Int'l Law Comm'n, Second report on immunity of State officials from foreign criminal jurisdiction, U.N. Doc. A/CN.4/631, at para. 24 (2010) ("The Special Rapporteur considers it right to use the criterion of the attribution to the State of the conduct of an official in order to determine whether the official has immunity *ratione materiae* and the scope of such immunity.").

[4] Fourth report, *supra* note 2, at paras. 99, 101.

[5] *Id.* at paras. 125-26.

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"troika").[6] Status-based immunity covers "all acts" of such foreign officials, including their private acts and acts done prior to taking office, but it continues "only during their term of office."[7] Conduct-based immunity, by contrast, attaches based on the *character of the act*, which is to say, "only with respect to acts performed in an official capacity."[8] Thus, conduct-based immunity covers not just the troika but also lower level officials, and it continues even after the official has left office.[9]

As the Fourth Report recognizes, international law relies on the concept of "official capacity" in many different contexts, and the phrase may have a different meaning and scope depending on the context. As just noted, "official capacity" defines the scope of conduct-based immunity for foreign officials. The international law of state responsibility also employs a concept of "official capacity" to define the conduct that may be attributed to a State. Under Article 7 of the ILC's 2001 Draft Articles on State Responsibility, if a person is "empowered to exercise elements of the governmental authority" and "acts in that capacity," his conduct is attributable to the state even if he "exceeds [his] authority or contravenes instructions."[10] The international law of human rights also uses a concept of "official capacity" to define certain international crimes. The Convention Against Torture, for example, defines torture for purposes of the Convention to include only severe pain and suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[11] But the fact that a person is acting in an official capacity within the definition of torture does not necessarily mean that he is entitled to conduct-based immunity for those acts of torture. And the fact that a person acts in an official capacity for purposes of state responsibility does not necessarily absolve him of his own responsibility by cloaking him with conduct-based immunity. The concept of "official capacity" must take its meaning in each context from the purpose it is intended to serve.

The Fourth Report acknowledges that context matters. It rejects the proposition that any act attributable to the State under the international law of state responsibility is necessarily an official act entitled to conduct-based immunity.[12] This is consistent with the ILC's own Draft Articles on State Responsibility, which make clear in Article 58 that the rules of state responsibility "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."[13] State officials may not "hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them."[14] Thus, the Fourth Report—like the Draft Articles and several other ILC texts—embraces a model of "single act, dual responsibility."[15]

The Fourth Report might similarly have noted that context distinguishes the concept of "official capacity" used to define certain international crimes like torture from the concept of "official capacity" relevant to the scope of conduct-based immunity. In the context of human rights law, "official capacity" is often used to

[6] Int'l Law Comm'n, Immunity of State officials from foreign criminal jurisdiction, Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, UN Doc. A/CN.4/L.814 (2013).

[7] *Id.*; see also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 3, 55, 61 (Feb. 14).

[8] Int'l Law Comm'n, Immunity of State officials from foreign criminal jurisdiction, Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, UN Doc. A/CN.4/L.814 (2013).

[9] *Id.*

[10] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 7, Report of the International Law Commission on the work of its fifty-third session, 19 UN GAOR Suppl. No. 10, at 43, UN Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, UN Doc. A/CN.4/SER.A/2001/Add. 1 [hereinafter "Draft Articles on State Responsibility"].

[11] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 UNTS 85.

[12] See Fourth report, *supra* note 2, at paras. 111-17.

[13] Draft Articles on State Responsibility, *supra* note 10, art. 58.

[14] *Id.* art. 58, commentary para. 3.

[15] Fourth report, *supra* note 2, at paras. 99, 101.

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distinguish crimes that are of international concern from similar crimes that are the concern only of domestic law.[16] In the context of conduct-based immunity, "official capacity" is used to distinguish acts for which the State alone should bear responsibility from acts for which an individual should bear joint or sole responsibility. Thus, the fact that torture is inflicted by a person acting in an official capacity—the very fact that makes the torture a violation of international law and a concern of other nations—does not simultaneously immunize the torturer from the jurisdiction of other nations' courts.

In its discussion of international crimes, however, the Fourth Report conflates these different concepts of "official capacity." It says "the argument that torture, enforced disappearances, extrajudicial killings, ethnic cleansing, genocide, crimes against humanity and war crimes are devoid of any official or functional dimension in relation to the State is at odds with the facts" because "such crimes are committed using the State apparatus" and because "the participation of State officials is an essential element of the definition of some forms of conduct characterized as international crimes under contemporary international law."[17] This confuses the concept of "official capacity" in human rights law with the concept of "official capacity" in the law of foreign official immunity, concepts intended to serve different purposes. The Fourth Report goes on to say "the assertion that an international crime cannot be considered as having been performed in an official capacity could perversely, and doubtless unintentionally, give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator."[18] This confuses the concept of "official capacity" in the law of foreign official immunity with the concept of "official capacity" in the law of state responsibility, concepts the Fourth Report carefully and persuasively distinguishes.[19] It may seem odd to read the same phrase to mean different things under different bodies of international law, but those bodies of law cannot accomplish their distinct purposes and work properly in combination unless we do so.

Although the Fourth Report says that international crimes may be considered "acts performed in an official capacity," it does not conclude that they are necessarily entitled to conduct based immunity. "On the contrary, given the nature of those crimes and the particular gravity accorded to them under contemporary international law, there is an obligation for them to be taken into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction."[20] Accordingly, the Special Rapporteur proposes to deal with international crimes, not in the definition of "official capacity," but rather in the context of exceptions to immunity, which will be the subject of her Fifth Report.[21]

I would suggest that this analytical approach to international crimes, though well-intentioned, is unfortunately misguided. Characterizing international crimes as "acts performed in an official capacity" shifts the baseline for analysis, making it more difficult to deny immunity for international crimes.[22] As Judges Higgins, Kooijmans, and Buergenthal noted in their joint separate opinion in the *Arrest Warrant Case*, jurisdiction is the rule under international law and immunity is the exception.[23] This fundamental principle goes back at least to *The Schooner*

[16] Some crimes, like genocide, violate international law even if not committed in an official capacity. See Convention on the Prevention and Punishment of the Crime of Genocide art. II (defining "genocide"), Dec. 9, 1948, 78 UNTS 277; see also Fourth report, *supra* note 2, at para. 71 (noting that the Genocide Convention "does not include the 'official status' of the perpetrator as an element of the definition of the crime").

[17] Fourth report, *supra* note 2, at para. 124.

[18] *Id.* at para. 125.

[19] *Id.* at paras. 111-17.

[20] *Id.* at para. 126.

[21] *Id.*

[22] On the significance of baselines in the context of immunity, see Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 FORDHAM L. REV. 605 (2011).

[23] Arrest Warrant of 11 April 2000 (Dem Rep. Congo v. Belg.), Judgment, 2002 ICJ REP. 3, 71 (Feb. 14) (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.) ("[I]mmunity . . . is an exception to a jurisdiction which normally can be exercised and it

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Exchange, where Chief Justice Marshall wrote that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and that "all exceptions" (by which he meant immunities) "must be traced up to the consent of the nation itself."[24] The Fourth Report takes the same view, noting that immunity "constitutes an exception to the general rule on the exercise of jurisdiction by the forum State."[25]

If jurisdiction is the rule and immunity the exception, then international crimes should be entitled to conduct-based immunity only if there is a general and consistent practice of States granting such immunity from a sense of legal obligation. As the Special Rapporteur's thorough and careful review of state practice makes clear, no such practice exists.

> In a number of cases, courts have considered that crimes under international law are not part of the functions of the State and, consequently, they have not recognized immunity. In other cases, however, courts have considered that these are acts clearly exercised in an official capacity, even if they are illegal and abusive, and have therefore granted immunity.[26]

If national courts "have not adopted a consistent position" with respect to immunity for international crimes,[27] then it should follow logically that customary international law does not require immunity for such crimes.

To characterize international crimes as "acts performed in an official capacity," as the Fourth Report does, changes the baseline. Now the question becomes whether there is a general and consistent practice of states recognizing an exception for international crimes. We know from experience how that analysis is likely to run. In the *Arrest Warrant Case*, the International Court of Justice concluded that status-based immunity under customary international law extended to foreign ministers.[28] Turning to the question of exceptions, the ICJ "carefully examined State practice, including national legislation and those few decisions of national higher courts," but was "unable to deduce from this practice that there exists under customary international law any form of exception" for war crimes or crimes against humanity.[29] Of course the status-based immunity in the *Arrest Warrant Case* had attached based on the defendant's position as foreign minister and covered all of his acts, making it necessary for the ICJ to frame the question as whether an exception existed. The same approach is not necessary for conduct-based immunity, which invites consideration of the character of the acts in determining whether immunity has attached to begin with.

The better course would be for the ILC to revise the definition of "act performed in an official capacity" to include only acts performed by a State official in the exercise of "legitimate" state authority.[30] As the Fourth

can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception."); see also Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) ("It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires . . . .").

[24] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

[25] Fourth report, *supra* note 2, at para. 112.

[26] *Id.* at para. 57.

[27] *Id.* at para. 121.

[28] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ REP. 3, 51-55 (Feb. 14).

[29] *Id.*. at 58. The ICJ's analysis of state immunity in the Jurisdictional Immunities Case followed a similar pattern. Having concluded that the acts of German armed forces were *acta jure imperii* generally entitled to state immunity, see Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 ICJ REP. 99, paras. 60-61 (Feb. 3), the court turned to exceptions and found no general and consistent state practice supporting an exception for violations of *jus cogens* norms. See *id.* at para. 96.

[30] "Legitimate" is a term of art, intended to exclude only serious international crimes—i.e. those crimes over which other nations may exercise universal jurisdiction to prescribe under international law—as the commentaries to the draft articles would need to explain. Conduct-based immunity would still extend to other crimes over which other nations may not exercise universal jurisdiction, giving appropriate content to this form of foreign official immunity.

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Report aptly notes, a teleological approach to conduct based immunity requires that "the acts covered by such immunity must also have a link to the sovereignty that, ultimately, is intended to be safeguarded."[31] The international community has no interest in safeguarding the sovereignty of States to violate humanitarian and human rights law by allowing their officials to commit serious international crimes. As Judges Higgins, Kooijmans, and Buergenthal noted in their *Arrest Warrant* opinion, there is a growing view "that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform."[32]

The principle of "single act, dual responsibility"[33] requires international law to adopt definitions of "official capacity" ensuring that both the State and its officials are held responsible for serious international crimes. The international law of state responsibility does this through a broad definition of "official capacity" making the State internationally responsible for the acts of its officials "even if [they] exceed [their] authority or contravene[] instructions."[34] The international law of human rights does this by making certain acts violations of international law, and therefore a concern of other nations, when committed by persons acting in an "official capacity."[35] The international law of foreign official immunity must do likewise—not by adopting the same definition of "official capacity" used in those other contexts, but by adopting a definition appropriate to accomplish the same goal of dual responsibility.

Some may argue that immunity from foreign criminal jurisdiction need not mean impunity because state officials may be prosecuted in their own courts or before international criminal tribunals.[36] But as Judges Higgins, Kooijmans, and Buergenthal have noted, the chances of such prosecutions are slim.[37] Meaningful responsibility will sometimes require other States to exercise jurisdiction. Moreover, the serious international crimes in question are those that *every State* has an interest in suppressing—those subject to universal jurisdiction to prescribe under international law. The ILC should exclude such crimes from its definition of "act[s] performed in an official capacity."

[31] *See* Fourth report, *supra* note 2, at para. 118.

[32] Arrest Warrant of 11 April 2000 (Dem Rep. Congo v. Belg.), Judgment, 2002 ICJ REP. 3, 85 (Feb. 14) (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.) 85 (Feb. 14) (citing Andrea Bianchi, Denying State Immunity to Violators of Human Rights, 46 AUSTRIAN J. PUB. & INT'L L. 227, 227-228 (1994)); see also Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 309-10 (Israel S. Ct. 1962) (holding that crimes against humanity "in point of international law . . . are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission"); 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.").

[33] Fourth report, *supra* note 2, at para. 99.

[34] Draft Articles on State Responsibility, supra note 10, art. 7.

[35] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 UNTS 85.

[36] *Cf.* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ REP. 3, 61 (Feb. 14) (noting that Foreign Ministers "enjoy no criminal immunity under international law in their own countries" and "may be subject to criminal proceedings before certain international criminal courts").

[37] *See id.* at 78 (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.) ("The chance that a Minister for Foreign Affairs will be tried in his own country . . . is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare . . . .").

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