The Battle for Immunity

Revival of the Debate on State Officials' Immunity from Foreign Criminal Jurisdiction

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04.05.2024 doi: 10.59704/44faa2a60ef2bbfd

In a timely fashion, the International Law Commission (ILC) is getting ready to continue the discussion on the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, in its upcoming 75th summer session. This issue is of importance as armed conflicts are on the rise, and with them so is international criminal law. In particular, universal jurisdiction was already invoked in the context of Russia-Ukraine (e.g. in Germany, Sweden, Spain), and it is expected to be used also in relation to the Israel-Hamas war.

This post will discuss the approaches in relation to the Draft Articles, with a focus on two issues: the scope of immunity, and its exceptions. As I will show, there is a broad spectrum of competing State views, and academic discourse, which indicates that the questions at hand are far from being resolved. In this state of flux, a common ground is needed to move forward.

In my view, the ILC should balance between the obligation to prosecute international crimes, and between considerations of State sovereignty, legal validity, international stability and the maintenance of friendly relations. As long as there is no common ground between States, the work of the ILC should at best be seen as a progressive development of international law. Consequently, the ILC should offer a treaty-based mechanism that States can join, which will include mechanisms that aim at safeguarding pillars of the international system, and preventing misuse or arbitrariness in the enforcement of international crimes by domestic courts. Such mechanisms can include a principle of complementarity, an obligation to negotiate before prosecution, and guidance on how to determine the appropriate forum in the case of competing jurisdictions.

The Draft Articles on Immunity of State Officials

The ILC is discussing Immunity of State Officials since 2007. The current version of the draft articles was adopted by the ILC in 2022. This work will continue this summer, in the 75th session of the commission, and there is growing interest and discourse leading to it.

State sovereignty is key in a Westphalian, or State-centered, decentralized international system, in which the central development and enforcement of the law is the exception and not the rule (see here). The regime of immunity, particularly, is fundamental as it stands at the intersection between sovereignty, criminal jurisdiction, and diplomatic relations. This issue invites a delicate balance between ensuring accountability and the necessity to safeguard international cooperation, in the sense that the conduct of official functions without fear of legal implications is crucial for maintaining sovereign equality among nations and promoting multilateralism.

Regarding immunity *ratione personae*, the draft articles state that Heads of State, Heads of Government and Ministers for Foreign Affairs will enjoy immunity (article 3) that will cover all acts performed in private or official capacity during or prior to their term of office (article 4). As noted in the commentary, some members of the Commission have suggested that immunity *ratione personae* should also cover the minister of defense or international trade (p. 217). This interpretation is rooted in the ICJ's *Arrest Warrant of 11 April 2000* case (Belgium v. Congo) that stated that "certain holders of high-ranking office in a

State, such as Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States" (para.51). By comparison, in the *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), the ICJ rejected the notion that the procureur general of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti are entailed to personal immunity (para.194). Indeed, this issue is a matter of an ongoing debate (see e.g., here, p. 1311; here, p.864; here, pp. 820-821).

Regarding immunity *ratione materiae*, the articles suggest that State officials acting as such enjoy immunity (article 5) that encompasses acts performed in an official capacity, which will continue to apply after their term as well (article 6). A "State official" is an individual who represents the State or who exercises State functions (article 2).

The ILC suggested an exception to this rule on immunity *ratione materiae*, in respect to international crimes: genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearance (article 7). While the commentary mentions that article 7 IS subject to "long debate" (p.230), it notes two reasons for its inclusion: (1) a "discernible trend" towards limiting the applicability of immunity *ratione materiae* to exclude international crimes (p.232); (2) the immunity regime is intended to apply in an international legal order where "unity and systemic nature cannot be ignored" (p.234). These justifications are not without a problem.

As per the first reason, in the view of Qinmin Shen, if one evaluates the assertion relating to an alleged trend, by the methodical standard prescribed by the ILC in its study on Identification of Customary International Law, it seems that "there are only pretensions to those approaches or a sheer lack of any sound approach at all". Relating to the second reason, it was noted by Philippa Webb, that while the "The quest for coherence is admirable… a systemic approach can also go too far – stretching analogies and ignoring differences, seeing a trend where there is none."

Broadly speaking, the objection to the exceptions suggested in article 7, also noted by some members of the ILC (pp.234-236), derives from several reasons, including but not only: (1) this exception cannot be seen as customary international law (CIL), as it is not reflected in State practice nor in *opinio juris* (for an illuminating detail, see former ILC member Sean Murphy); (2) immunity does not depend on the gravity of the act in question, as it is a procedural matter (see, from another former ILC member, Mathias Forteau); (3) the lack of immunity before international criminal courts is not automatically applicable to relevant to national courts (as noted by Philippa Webb, each type of immunity is a world and beyond, and immunity *ratione materiae* was developed largely through domestic case law – rather than a top down enterprise which derives from an international consensus like diplomatic immunity).

Scope of Immunity

While the ILC eventually came to the conclusion that immunity is limited, this stance is debatable, as national courts have expanded its scope, mainly relating to senior positions (see here, pp.559-560 and here). For example, an English court has granted Shaul Mofaz, the former Israeli minister of defense, immunity *ratione personae*, while noting that "a Defence Minister would automatically acquire [S]tate immunity in the same way as that pertaining to a Foreign Minister."

The need for immunity for State officials, even low-ranking ones, was presented by Russia which advocates for immunity to all State officials "whose duties are closely connected with international cooperation and/or with fundamental issues of State sovereignty" (p.11). Israel also advocates for a flexible criterion based on functional roles. The UK, in comparison, expressed the need to "explore this area further" (p.8), similarly to the Netherlands (p.2). As for the United States, it suggested that there is no basis to assert that we are dealing with CIL, and that "unresolved matters is not only important to enhance the utility of the Draft Articles to States but also is

necessary to avoid the destabilization of foreign relations" (p.7, 11).

In South Africa v. Israel, quotes from high ranking political, including the Minister of Defense, were utilized for South Africa assertions (Application instituting proceedings, para.101). The same quotes can serve as a basis for the future exercise of universal jurisdiction (as attempted in the past), in which the question of immunity *ratione personae* will be crucial. This is far from being a new issue, as already in 2001 there was an attempt to prosecute in Belgium former Israel Prime Minister, Ariel Sharon, for his role in the Sabra and Shatila massacre (see Hurwitz; Mallat). Notably, the case against Sharon did not proceed due to his immunity as the Prime Minister of Israel (see Cassese).

Exceptions to immunity?

One of the most heated topics of debate, if not the main one, is that of article 7 which provides exceptions for immunities. 23 States have supported the inclusion of restrictions to immunities when it comes to international crimes (for an overall assessment of State approaches, see here), but at the same time over then 20 presented a negative view of the article, with 11 of them completely objecting to it (*inter alia* Brazil, France, Iran, Japan, Russia, Saudi Arabia, United Arab Emirates, United Kingdom, and the United States). In the view of Brazil, for example, the existing *status quo* on immunity is crucial for the "stability of international relations, as it prevents the abusive, arbitrary and politically motivated exercise of criminal jurisdiction to be used against State officials". Similarly, Russia suggested that article 7 opens the door to "politically motivated or improper use of exceptions to immunity".

Israel noted that article 7 reflects *Lex ferenda*, at best, while suggesting that immunities serve as an instrument to "preventing serious international friction and political abuse of legal proceedings" (para. 2). The United States and the United Kingdom emphasized the lack of consensus within the commission and the problems with the provided case law to demonstrate practice (a perspective shared partially by Japan). Another important issue was raised by Saudi Arabia, which explained that the lack of a consensus on the content of some international crimes "could open the door to an expanded interpretation of these crimes and thus lead to an increase in arbitrary accusations against officials of foreign States, creating serious tensions in international relations." Similarly, it was suggested by Singapore that differences of opinions between States should be resolved through consultations.

There is a problem, though, with the view of States that allege for "blanket immunity", without any exception whatsoever for immunity *ratione materiae*, like Iran, Russia and Singapore. Such a view goes against international obligations, like the duty to prosecute or to extradite international criminals (*aut dedere aut judicare*). In that sense, the interpretation fails to propose a proper balance between prosecution of international breaches of *jus cogens* norms and immunity (see here, p.265, and here, pp.832-834). This concern was presented in Germany' position which stated that "the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed is a *conditio sine qua non* for the application of international criminal law in national courts" (para.7) (this view was criticized for vagueness). Indeed, it was noted by Aziz Epik and Julia Geneuss that the recognition of the exclusion of functional immunity for crimes under international law proved of tremendous value for the development of international criminal law, and they welcome the recent decision of the German Federal Court of Justice to exclude the functional immunity of foreign state officials in the case of international crimes.

The Way Ahead

The nature and norms of International law, a decentralized State-centered legal order, is in constant evolution and it should accordingly be continuously evaluated. The wide spectrum of views expressed regarding immunities, reveals deep lack of consensus on core issues of the debate.

The way ahead requires a common ground, or harmonization, in order to account for issues impacted by the regime of immunity. There is a balance to be struck between the need to promote the prosecution of international crimes, the maintenance of state sovereignty and the promotion of the validity, stability and friendly relations between states, and it is for the ILC to attempt and strike that balance. Some balance is reached by the fact that international criminal courts, like the ICC, do not recognize immunity. But, States need guidance when it comes to their domestic courts. As noted in the ILC commentary, such a balance "will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law".

If no common ground can be located in the upcoming discussions of the ILC, it will be best to recognize article 7 for what it is – progressive development of international law. As such, a logical step forward suggested by scholars, like Forteau, and States, like Brazil, is that the ILC will recommend a new treaty-based rule, rather than asserting the existence of a customary norm notwithstanding the objection of numerous States and contradicting views of experts, including members of the ILC.

In this treaty, the ILC can safeguard against abuse or arbitrariness through mechanisms like complementarity, provide guidance for situations of competing jurisdictions and include a duty to negotiate before prosecution in order to maintain friendly relations and promote legal validity and stability. This option relieves the ILC of the need to reconcile conflicting State practices and present a proposed path for States to choose – one that balances the imperative need to promote accountability without undermining pillars of the international system, such as sovereignty, or impeding friendly relations and, more broadly, multilateralism.

SUGGESTED CITATION
Mimran, Tal: The Battle for Immunity: Revival of the Debate on State Officials' Immunity from Foreign Criminal Jurisdiction, Verfassungsblog, 04.05.2024, doi: 10.59704/44faa2a60ef2bbfd.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240504-185141-0.