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SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

IMMUNITY *RATIONE MATERIAE* OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION: WHERE IS THE STATE PRACTICE IN SUPPORT OF EXCEPTIONS?

Sean D. Murphy*

In the summer of 2017, the UN International Law Commission adopted [Draft Article 7](#) and an associated draft annex for its project on immunity of state officials from foreign criminal jurisdiction.¹ The draft article identifies six “crimes under international law in respect of which immunity *ratione materiae* shall not apply”: genocide; crimes against humanity; war crimes; crime of apartheid; torture; and enforced disappearance. Given the divergences within the Commission when considering and adopting Draft Article 7 (as evidenced by the plenary debate in 2016 and 2017, the unusual recorded vote on whether to refer the matter to the Commission’s drafting committee, and the Commentary²), it is difficult to conclude that the Commission is expressing a view that Draft Article 7 reflects *lex lata*.

But there is a further reason to doubt its status as *lex lata*: the lack of state practice—let alone [widespread, representative, and consistent state practice](#)³—in support of denying immunity for those crimes under customary international law. The lack of practice may be seen by scrutinizing the materials cited in the Commission’s commentary⁴ and in the [Fifth Report](#) of the Special Rapporteur⁵ that purportedly support each exception. This exercise is difficult because both the Commentary and the Fifth Report aggregate disparate practice into lengthy footnotes that are not targeted to the individual exceptions and that contain references to sources that are not directly germane to the issue at hand (such as citing to civil rather than criminal cases, or citing to national laws on immunity of foreign states rather than of foreign officials).⁶

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

² For a discussion of the process leading up to adoption of Draft Article 7 and its Commentary, see Sean D. Murphy, [Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission](#), 111 AJIL 970 (2017).

³ The Commission’s current project on identification of customary international law indicates that the “relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.” See Int’l Law Comm’n, [Report on the Work of Its Sixty-Eighth Session](#), UN Doc. A/71/10 (Sept. 19, 2016) (Draft Conclusion 8(1)).

⁴ [2017 Report](#), *supra* note 1, at 178-91 (Commission’s Commentary to Draft Article 7 and the associated draft annex).

⁵ Concepción Escobar Hernández (Special Rapporteur for Immunity of State Officials from Foreign Criminal Jurisdiction), [Fifth Report](#), UN Doc. A/CN.4/701 (June 14, 2016) [hereinafter Fifth Report].

⁶ For the lengthy footnotes, see [2017 Report](#), *supra* note 1, at 179-80 nn.762-64. For a critique of those footnotes by some members, see *id.* at 181-82 nn.765-68.

State Practice in Support of the Six Exceptions

With respect to genocide (Draft Article 7(1)(a)), the Commission's Commentary and the Fifth Report cite to provisions in just six national laws that provide an exception for immunity *ratione materiae* in national criminal proceedings for this crime.⁷ As a general matter, states have not included exceptions to such immunity in either their general criminal codes or in their legislation implementing the [Rome Statute](#) of the International Criminal Court.⁸ Further, the Commission's Commentary and the Fifth Report cite to just one national court case⁹ and no international court case supporting an exception to immunity *ratione materiae* in a national criminal proceeding for the crime of genocide. There is no international treaty containing such an exception for the crime of genocide.¹⁰ Although the Rome Statute is cited in the draft annex to define the crime, the Rome Statute itself is silent on the issue of immunity of a state official from prosecution in a foreign criminal jurisdiction.¹¹

With respect to crimes against humanity (Draft Article 7(1)(b)), the Commission's Commentary cites to the same six national laws containing an exception for immunity *ratione materiae* in national criminal proceedings for such crimes.¹² Further, it cites to just one national court case¹³ and to no international court decision supporting such an exception. To the contrary, the ICJ in the [Arrest Warrant](#) case indicated circumstances where a former foreign minister might be prosecuted for crimes against humanity, but those circumstances did not include prosecution in a foreign criminal jurisdiction for an official act undertaken while in office.¹⁴

With respect to war crimes (Draft Article 7(1)(c)), the Commission's Commentary again cites to just six national laws containing an exception for immunity *ratione materiae* in a national criminal proceeding for war crimes.¹⁵ It cites to no international court decision and to just four national court cases supporting such an exception, all of which are

⁷ The six national laws referenced in the Commission's commentary, *id.* at 179-80 n.763, and in the [Fifth Report](#), *supra* note 5, at para. 58 n.144, that expressly address immunity *ratione materiae* of a foreign state official from criminal jurisdiction for the crime of genocide are those of Burkina Faso, Comoros, Ireland, Mauritius, South Africa, and Spain. Other statutes listed in the Commission's Commentary or in the Fifth Report address state (not individual) immunity, address procedures in relation to the surrender of an individual to the International Criminal Court (not prosecution in a national court), or do not expressly deny immunity.

⁸ The Commission's Commentary concedes that national laws addressing the issue constitute "rare cases." [2017 Report](#), *supra* note 1, at 179. Likewise, the Fifth Report accepts that "[i]mmunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts." [Fifth Report](#), *supra* note 5, at para. 42.

⁹ [2017 Report](#), *supra* note 1, at 179 n.762; [Fifth Report](#), *supra* note 5, at para. 114 n.230 (citing to *H.S.A. v. S.A. (Ariel Sharon)* (Belgium), a judgment rendered prior to the 2003 amendment to Belgium's statute).

¹⁰ [The Convention on the Prevention and Punishment of the Crime of Genocide](#), art. 4, Dec. 9, 1948, 78 UNTS 277, is silent on the issue. Article IV addresses substantive criminal responsibility, but not procedural immunity. *See 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 para. 109 (July 6, 2017).

¹¹ [Rome Statute of the International Criminal Court](#), art. 27(2), July 17, 1998, 2187 UNTS 90, addresses the lack of immunity of state officials before the International Criminal Court, not the immunity of state officials from foreign criminal jurisdiction.

¹² *See* the six national laws referenced *supra* note 7. The Fifth Report also cited to a seventh national law, that of Nigeria. *See* [Fifth Report](#), *supra* note 5, para. 56.

¹³ [2017 Report](#), *supra* note 1, at 179 n.762; [Fifth Report](#), *supra* note 5, at para. 114 n.230 (again citing to *H.S.A. v. S.A. (Ariel Sharon)* (Belgium)). The Fifth Report also cited to the *Eichmann* case (Israel). [Fifth Report](#), *supra* note 5, at para. 114, n.233.

¹⁴ [Arrest Warrant of 11 April 2000](#) (Dem. Rep. Congo v. Belg.), 2002 ICJ REP 3, para. 62 (Feb. 14) ("Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.").

¹⁵ *See* the six national laws referenced *supra* note 7.

from European courts.¹⁶ Here, too, the *Arrest Warrant* case suggests otherwise, as the foreign minister in that case was also alleged to have committed war crimes.¹⁷ Further, in the *Jurisdictional Immunities of the State* case, the ICJ found no exception for war crimes, albeit in the context of state immunity.¹⁸ There is no international treaty containing an exception to immunity *ratione materiae* of a state official from foreign criminal jurisdiction for war crimes. The 1949 Geneva Conventions and their Additional Protocols, as well as the Rome Statute, are all silent on this issue.

The crime of apartheid (Draft Article 7(1)(d)), was something of a surprise entry on the list of crimes appearing in Draft Article 7, given that no proposal on this crime was made by the Special Rapporteur in her Fifth Report (rather, it was proposed in the plenary debate and added in the drafting committee). Neither the Commission's Commentary nor the Fifth Report cite to any national law, national case law, or international case law, supporting an exception for immunity *ratione materiae* in a national criminal proceeding for the crime of apartheid. There is also no international treaty containing such an exception.¹⁹

With respect to the crime of torture (Draft Article 7(1)(e)), neither the Commission's Commentary nor the Fifth Report cite to any national laws containing an exception to immunity *ratione materiae* in a national criminal proceeding for the crime of torture. The Commission's commentary cites to just five national court cases supporting such an exception;²⁰ of those five cases, two are from the United Kingdom,²¹ two are from the Netherlands,²² and one is from Belgium. Neither the Commentary nor the Fifth Report cites to any international court decision supporting such an exception. Although there are no international court cases directly on point, the European Court of Human Rights has indicated that state immunity will not be lifted for civil claims just because torture has been alleged.²³ There is no international treaty containing such an exception.²⁴

¹⁶ [2017 Report](#), *supra* note 1, at 179 n.762; [Fifth Report](#), *supra* note 5, at para. 114 n.230 (citing to *H.S.A. v. S.A. (Ariel Sharon)* (Belgium); *H. v. Public Prosecutor, Hoge Raad* (Netherlands); *Lozano v. Italy* (Italy); *A. v. Office of the Public Prosecutor* (Switzerland)). The Fifth Report also cited to the *Eichmann* case. [Fifth Report](#), *supra* note 5, at n.233.

¹⁷ [Arrest Warrant of 11 April 2000](#), *supra* note 14, at para. 78.

¹⁸ [Jurisdictional Immunities of the State](#) (Ger. v. It.), 2012 ICJ REP 99, para. 139 (Feb. 2); see [Kalogeropoulou v. Greece & Ger.](#), 2002-X Eur. Ct. H.R. 1. The Commission's Commentary seeks to draw support for Draft Article 7 from some national laws on state immunity from civil actions, such as the U.S. Foreign Sovereign Immunities Act (FSIA). See [2017 Report](#), *supra* note 1, at 179 n.763. The FSIA, however, does not contain as exceptions to state immunity any of the exceptions appearing in Draft Article 7.

¹⁹ [The International Convention on the Suppression and Punishment of the Crime of Apartheid](#), Nov. 30, 1973, 1015 UNTS 243, is silent on the issue. Article III provides that "[i]nternational criminal responsibility shall apply ... to ... representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State." As was the case for the [Convention against Genocide](#), *supra* note 10, Article III addresses substantive criminal responsibility of the individual, not his or her procedural immunity from foreign criminal jurisdiction.

²⁰ [2017 Report](#), *supra* note 1, at 179 n.762; [Fifth Report](#), *supra* note 5, at para. 114 n.230 (citing to [R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte \(No. 3\)](#), [1999] UKHL 17 [hereinafter referred to as *Ex parte Pinochet*]; *Re Pinochet* (Belgium); *H. v. Public Prosecutor* (Netherlands); *In re Bouterse* (Netherlands); *FF v. Director of Public Prosecutions (Prince Nasser case)* (United Kingdom)). The Fifth Report also cites to the *Fujimori* case, [Fifth Report](#), *supra* note 5, at para. 114 n.230, which did not involve a foreign state official.

²¹ The UK cases were based on the view that by ratifying the Convention against Torture, states parties implicitly agreed to waive immunity; indeed, it was decided that extradition could not be based on crimes allegedly committed before the convention entered into force between the United Kingdom and Chile, when only customary international law would apply.

²² One of these cases was subsequently overturned on jurisdictional grounds on appeal, with the reasoning of the lower court remaining an untested *obiter dictum*. See [Case No. A07178 \(Rotterdam Dist. Ct. Apr. 7, 2004\)](#), 2001 NETH. Y.B. INT'L L. 282.

²³ [Jones v. UK](#), 2014 EUR. CT. H.R. 176; [Al-Adsani v. UK](#), 2001-XI Eur. Ct. H.R. 761.

²⁴ [The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), Dec. 10, 1984, 1465 UNTS 85, is silent on the issue. The Convention defines the crime of torture as being committed by "a public official or other person acting in an official capacity," and then obligates states parties to exercise jurisdiction over an offender who turns up in its territory.

For enforced disappearance (Draft Article 7(1)(f)), the Commission's Commentary and the Fifth Report cite to just one national law that denies immunity *ratione materiae* for allegations of enforced disappearance.²⁵ The Fifth Report cites to no national or international case law supporting such an exception. Although there is such an exception in the [1994 Inter-American Convention on Forced Disappearance of Persons](#),²⁶ when states negotiated the [2006 International Convention for the Protection of All Persons from Enforced Disappearance](#)²⁷ (which occurred after entry into force of the Rome Statute), the negotiators expressly considered and rejected [a proposal](#)²⁸ that would deny immunity to state officials.

Reactions by States

In October 2017, forty-nine states²⁹ debated the Commission's work at a [meeting of the UN General Assembly's Sixth Committee](#). Having attended most of the debate, and thereafter reviewed the written statements, my impression is that twenty-three states expressed a largely positive view regarding Draft Article 7(1), although eleven of those states expressed certain reservations, such as the need to link Draft Article 7 with procedural safeguards. By contrast, an almost equal number (twenty-one states) expressed a largely negative view. The remaining five states expressed an ambiguous view. As for whether Draft Article 7(1) reflects existing customary international law, only five states seemed to say that it did, while sixteen states essentially said that it did not. The remaining states did not directly address the point, but twenty-one of the forty-nine states maintained that Draft Article 7(1) was not based on sufficient state practice, while even more (twenty-six of the forty-nine states) expressed reservations or criticism regarding the Commission's method or procedure when adopting the text.

Such provisions have prompted some national court judges to assert that adherence to the Convention against Torture essentially constitutes a waiver by the state party of the immunity of its officials. *See, e.g., Ex parte Pinochet*, *supra* note 20, at para. 55 (opinion of Lord Browne-Wilkinson) (holding that the object and purpose of the Convention against Torture to prevent safe havens for torturers would be defeated if immunity from foreign criminal jurisdiction was not lifted for a former President of Chile); *Fang v. Jiang Zemin*, [2007] NZAR 420 (N.Z.) (finding the Convention contained an implicit waiver of immunity from foreign criminal jurisdiction for former General Secretary of the Communist Party of China). Other national courts, however, have not accepted this interpretation. *See, e.g., Zhang v. Jiang Zemin*, [2010] NSWCA 225 (Australia) (finding the Convention did not contain an implicit waiver of immunity with respect to allegations of torture against the former General Secretary of the Communist Party of China).

²⁵ Spain's statute, *supra* note 7.

²⁶ [Inter-American Convention on Forced Disappearance of Persons](#), June 9, 1994, 33 I.L.M. 1429. Article IX reads, in relevant part: "Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations."

²⁷ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Dec. 20, 2006, 2716 UNTS 3.

²⁸ *See* [Draft International Convention for the Protection of All Persons from Enforced Disappearance](#), art. 10(2), UN Doc. E/CN.4/Sub.2/1998/19, annex (Aug. 19, 1998) ("No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations.").

²⁹ Australia, Austria, Belarus, Chile, China, Cuba, Czech Republic, El Salvador, Estonia, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Malawi, Malaysia, Mexico, Netherlands, New Zealand, Norway (on behalf of the five Nordic countries), Peru, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Thailand, Ukraine, United Kingdom, United States, Vietnam. The written statements can be accessed at [Sixth Committee, 72nd Session](#), UNMEETINGS.

Conclusion

All told, the state practice in support of the six exceptions listed in Draft Article 7 is not widespread, representative, or consistent. Rather than relying on existing practice, the Commission justifies Draft Article 7 on two grounds. First, it claims that there is a “discernible trend” towards limiting such immunity,³⁰ a claim that also is not borne out by the extremely limited practice cited. Second, the Commission claims that its draft articles must be shaped to fit “an international legal order whose unity and systemic nature cannot be ignored.”³¹ That vague and cursory claim does not explain how the text of Draft Article 7 takes account of rules that seek to avoid interstate conflict, nor why some crimes are “in” (apartheid) while other crimes are “out” (slavery, trafficking in persons, aggression). What both claims do suggest, however, is that Draft Article 7 is not grounded in law, but in policy-making by the Commission. The divided views within the Sixth Committee appear to suggest the same. In that light, Draft Article 7 might be regarded as a proposal by the Commission for a new rule that could be embodied in a treaty, which states might choose to accept or reject. It cannot be regarded, however, as reflecting existing law.

³⁰ [2017 Report](#), *supra* note 1, at 178-80, para. (5).

³¹ *Id.* at 181, para. (6).