

The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?

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Abstract

In the summer of 2017, the International Law Commission adopted a draft article on exceptions to immunity. The draft article adopted provides that immunity *ratione materiae* does not apply with respect to certain international crimes, namely crimes against humanity, the crime of genocide, war crimes, the crime of apartheid, torture and enforced disappearances. These exceptions do not apply to immunity *ratione personae*. The draft article was adopted after a vote and was severely criticised by some members of the Commission. It has also received mixed reaction from States, with some supporting its content while others have opposed it. In the aftermath of the adoption of the draft article, there have also been academic commentary, some of which has been critical. The (main) criticism levelled against the draft article is that it does not represent existing law and has no basis in the practice of States. This article seeks to evaluate the criticism by considering whether there is any State practice in support of the draft article proposed by the Commission.

Key Words:

Immunity, Immunity *ratione materiae*, Exceptions, International Criminal Law, *Jus Cogens*,

1. Introduction

Few issues can claim to have dominated the recent attention of international law, both on academic and practical levels, like the law relating to immunities.¹ The discourse on immunities has focused particularly on the question whether international law, as it currently stands, recognises exceptions to immunities and, if it does not, whether it should.

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¹ See for academic discussions Joanne Foakes 'The Position of Heads of State and Senior Officials in International Law' (OUP, 2014); Rosanne van Alebeek *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (OUP, 2008); Antonio Cassese 'When may Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium Case*' (2002) 13 *European Journal of International Law* 853; Dapo Akande and Sangeeta Shah 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815; Max du Plessis and Dire Tladi 'International Court Must Clear Up Vexed Issue of Bashir's Immunity', 24 August 2017, *Business Day* available at <https://www.businesslive.co.za/bd/opinion/2017-08-24-international-court-must-clear-up-vexed-issue-of-bashirs-immunity/> (accessed 5 March 2017). Dire Tladi 'Of Heroes and Villains, Angels and Demons: The ICC AU Tension Revisited' (2017) 60 *German Yearbook of International Law* (forthcoming).

This debate on immunities, and particularly whether there are or should be exceptions to immunity is a reflection of a broader tussle for the soul of international law.² In this debate, those seeking to build a brave new world in international law, argue for less recognition of immunities and more recognition of exceptions to immunities.³ This approach, it is imagined, will lead to a better, more humane world, in which those that commit atrocious acts against fellow human beings are held to account.⁴ In this world, imagined by those holding out for the brave new international law, leaders, knowing that immunity will not protect them against accountability, will think twice before committing crimes against their own populations. On the other side of the spectrum are those that recall the words of the International Court of Justice that immunity does not mean impunity because, even without creating exceptions to immunity, there are avenues for justice and accountability.⁵ For these commentators and actors, a better world depends on the stability of international relations and not on some nostalgic appeal to values.⁶ They are inspired by the words of the International Court of Justice that immunity 'derive[s] from the principle of sovereign equality of States, which is ...one of the fundamental principles of the international legal order' and 'occupies an important place in international law and international relations.'⁷

This debate has played itself out also in the International Law Commission in its consideration of the topic immunity of state officials from foreign criminal jurisdiction. In the Commission, the debate commenced in 2008 when the topic of immunities was placed on the agenda of the Commission. The debate was particularly pointed in 2011 when the Commission considered then-Special Rapporteur Roman Kolodkin's second report which was centred around the distinction between immunity *ratione personae* and immunity *ratione materiae*,⁸ and in 2013 and 2017 when the Commission took particular decisions on the scope and exceptions of immunity under customary international law. In 2013, the Commission had to decide how wide to cast the scope

² See for discussion Dire Tladi 'Immunity in the Era of "Criminalisation": The African Union, the ICC and International Law' (2015) 58 *Japanese Yearbook of International Law* 17, at 17-20.

³ See, e.g. Max du Plessis 'The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court' in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds.) *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill, 2017).

⁴ This nostalgic account of the brave new world is inspired by John Dugard 'The Future of International Law: A Human Rights Perspective – with Some Comments on the Leiden School of International Law' (2007) 20 *Leiden Journal of International Law* 731, in which Dugard speaks of the 'enthusiasm to create a brave new world' in 'which the community of personkind is governed by the Rule of Law' and in which 'the energy of personkind is addressed towards resolving poverty and inequality.'

⁵ *Case Concerning the Arrest Warrant of 11 April 2000*, Judgment of 14 February 2002, *ICJ Reports* 2002, p. 3, at paras 60-61.

⁶ See for example, the following statements made by members of the UN International Law Commission during the debate on immunities in 2017: Huang (A/CN.4/SR.3364), at 9. See also Nolte (A/CN.4/SR.3365), 3.

⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, *ICJ Reports* 2012, p.123, para 56.

⁸ On the distinction between immunity *ratione materiae* and immunity *ratione personae* see Second Report of the Special Rapporteur (Roman Kolodkin) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/631), especially para 21-37, and Second Report of the Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/661), paras 47-53.

of immunity *ratione personae* – the ‘all-powerful’ type of immunity that applies to both private and official acts committed by certain high-ranking officials. In other words, the Commission had to answer the question which high-ranking officials would have the benefit of this all-powerful type of immunity. That round was won by those erring on the side of stability of international relations, with only three out of thirty-four members opposing the extension of immunity *ratione personae* beyond heads of State to all the troika (heads of State, heads of government and Minister for Foreign Affairs).⁹ In 2017, during the Commission’s sixty-ninth session, the debate re-emerged, this time in the context of whether there were any exceptions to immunity from foreign criminal jurisdiction. Unlike the round on the scope of immunity *ratione personae*, this round would belong to those seeking a brave new world. In this round, against great resistance from some members, the Commission adopted draft article 7, which provided an exception for immunity *ratione materiae* in respect of certain core crimes under international law, such as genocide, crimes against humanity, war crimes and enforced disappearances.¹⁰ These are acts the prohibition of which constitute violations of *jus cogens* norms – for convenience sake, I refer to these crimes as *jus cogens* crimes.

The significance of this decision is demonstrated in the tension and deep divisions in the Commission in the process and following the adoption of draft article 7. The decision was arrived at after two votes – voting is a rare event in the Commission. The initial vote, an indicative vote,¹¹ was required to send the draft article as proposed by the Special Rapporteur in the fifth report to the drafting committee. The adoption of draft article 7 by the Commission was done after a recorded vote accompanied by strongly worded explanations of vote.¹² In the vote, twenty-one members voted in favour of the draft article,¹³ while eight members voted against,¹⁴ with one-member abstaining.¹⁵ The outcome has already been the subject of a symposium published in

⁹ In addition to the current author, Mr Petrič and Mr Murase were the only members of the Commission that supported a restricted scope of immunity *ratione personae*. See para 5 of the commentary to draft article 3 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, ILC Report 2013, Sixty-Fifth Session (‘...some members of the Commission pointed out that the Court’s judgment was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of practice and that several judges expressed opinions that differed from the majority of the Court’).

¹⁰ Draft 7 para 1, Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction provisionally adopted by the Commission, *Report of the International Law Commission on the Work of its Sixty-Ninth Session*, General Assembly Official Records, Seventy-Second Session, Supplement No. 10 (A/72/10).

¹¹ An indicative vote is a vote by a show of hands where the majority view is accepted as consensus decision.

¹² See, *Report of the International Law Commission on the Work of its Sixty-Ninth Session*, *supra* note 10, para 74-75.

¹³ Members voting in favour: Mr Argüello Gómez, Mr Cissé, Ms Escobar Hernandez, Ms Galvão Teles, Mr Gómez-Robledo, Mr Hassouna, Mr Hmoud, Mr Jalloh, Ms Lehto, Mr Murase, Mr Nguyen, Ms Oral, Mr Ouazzani Chahdi, Mr Park, Mr Peter, Mr Reinisch, Mr Ruda Santaloria, Mr Saboia, Mr Tladi, Mr Valencia-Ospina, Mr Vasquez-Bermudez.

¹⁴ Mr Huang, Mr Kolodkin, Mr Laraba, Mr Murphy, Mr Nolte, Mr Petrič, Mr Rajput, Mr Wood.

¹⁵ Mr Sturma.

AJIL Unbound, with contributions that, for the most part, criticise the draft article adopted by the Commission.¹⁶

It is apposite to pause at this point to acknowledge that the disagreement within the Commission was not just about whether draft article 7 was acceptable or not. One of the key questions concerned how to characterise the draft article (if adopted). The Commission has a dual mandate, namely the codification of international law and its progressive development.¹⁷ According to the Statute of the Commission, codification occurs where the Commission systematises ‘*rules of international law* in fields where there already has been *extensive State practice*, precedent and doctrine.’¹⁸ In other words, codification refers to circumstances where the rule in question is *lex lata* or hard law. Progressive development, on the other hand, applies to cases that ‘have not yet been regulated by international law or in regard to which the law has not *yet been sufficiently developed* in the practice of States.’¹⁹ In short, progressive development refers to instances where there is *some practice* but the practice would not, strictly speaking, meet the requirements for customary international law.²⁰ Rules advanced as progressive development may be ‘emerging rules’ but they have to have some basis in State practice. For supporters of draft article 7, draft article 7 constituted either codification or progressive development. However, in its practice, with some exceptions, the Commission has not generally identified individual provisions as either progressive development or codification.²¹ Thus, even if draft article 7 were progressive development and not codification, identifying it as such would not only have the effect of discouraging its use, it would also be inconsistent with the general practice of the Commission. In its practice, the Commission has regarded ‘the distinction between the two processes as unworkable’ and has rather proceeded on the basis of a ‘composite idea of codification and progressive development’.²² For

¹⁶ *AJIL Unbound* ‘Symposium on the Present and Future of Foreign Official Immunity’: Curtis A Bradley ‘Introduction to the Symposium on the Present and Future of Foreign Official Immunity’ 112 *AJIL Unbound* 1 (2018).

¹⁷ Article 1 of the Statute of the International Law Commission.

¹⁸ *Ibid.*, at para 15 (emphasis added).

¹⁹ *Ibid.*

²⁰ Although article 14 of the ILC Statute also refers to cases “that have not been regulated by international law”, this is not applicable to the present topic since immunity, including exceptions thereto, is regulated by international law.

²¹ See for discussion, the contrast between the Commission’s approach in its Draft Articles on the Protection of Persons in the Event of Disasters and the Draft Articles on the Expulsion of Aliens, Dire Tladi ‘The International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?’ (2017) 16 *Chinese Journal of International Law* 425, at 426 (‘The difference in approaches appears to be based, at least in part, on the view of the ILC (or at least some of its members) that the set of Draft Articles on the Expulsion of Aliens does not reflect international law as it currently stands, while the Draft Articles on the Protection of Persons does reflect international law as it stands. The general commentary to the Draft Articles on the Expulsion of Aliens, for example, states that the “entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature” and that the Draft Articles “involve both the codification and progressive development” of the rules of international law. The notion that the Draft Articles on the Expulsion of Aliens amount to ... progressive development is ubiquitous. In contrast with the Draft Articles on the Expulsion of Aliens, the commentary to Draft Articles on the Protection of Persons in the Event of Disasters refers to progressive development only in the context of the preambular paragraph recalling the language of Article 13 ...’)

²² United Nations *The Work of the International Law Commission*, Vol 1 Eighth Edition (2012), 47.

members opposed to draft article 7, however, it constituted neither codification nor progressive development. In their view, draft article 7 constituted ‘new law’ which has no basis whatsoever in the practice of States and therefore ought not to be included. In their view, if adopted, draft article 7 had to be clearly classified as new law or, at best, progressive development.

There are probably many different ways to explain the shift from a ‘pro-stability’ to a ‘pro-brave world’ approach in the Commission in the four years that elapsed between the adoption of draft article 3 on the scope of immunity *ratione personae* and draft article 7 on exceptions to immunity. It might, for example, be argued that the question of the scope of immunity *ratione personae* is different from the question whether there are exceptions to immunity *ratione materiae*. It might also be suggested that the change in the composition of the Commission in 2017 might be responsible for the shift in position. These are empirical questions that call for speculation and fall beyond the scope of this article. This article has a more narrow, doctrinal focus, seeking to evaluate the outcome of the ILC deliberations against the practice of State. In the next section the article will provide a background to draft article 7 adopted by the Commission, including a brief overview of the report on which draft article 7 is based and the various arguments advanced against the adoption of draft article 7. Section 3 of the article will assess, against the background of the debate of the Commission, draft article 7 and whether it has a basis in the practice of States. Finally, the article will offer some concluding remarks.

Before proceeding with the discussion of draft article 7 of the draft articles on immunities of State officials, it is necessary to make a few preliminary remarks delineating the scope of the article. Since this article provides a commentary on the current work of the Commission on immunity of state officials from foreign criminal jurisdiction, its scope will be similar to that of the Commission’s draft articles.²³ Thus, the article will be limited to immunities of officials under customary international law and does not extend the immunity of the state itself, or immunities addressed in treaty regimes such as the immunities of diplomats under the Vienna Convention on Diplomatic Relations. Similarly, since the scope of the Commission’s work address immunity from foreign criminal jurisdiction, the possible immunity from the jurisdiction of international criminal courts is excluded from the scope of the current article.

²³ See for the scope, Draft Article 1 of the Draft Articles on Immunity of State Officials *supra* note 10. For the commentary to that provision see *Report of the International Law Commission on the Work of its Sixty-Fifth Session*, General Assembly Official Records, Seventy-Second Session, Supplement No. 10 (A/68/10).

2. Background to Draft Article 7 Adopted by the Commission

A. *An Overview of the Report of the Special Rapporteur*

The Special Rapporteur submitted her fifth report on immunities, covering exceptions to immunity, during the sixty-eighth session in 2016.²⁴ The report provides a rich overview of treaty practice, national legislation and national judicial decisions as forms of state practice. It also provides an overview of international judicial decisions and the work of the Commission which are sources that the Commission routinely uses as a subsidiary means for the determination of rules of international law. It concludes that under international law there is no exception to immunity *ratione personae*. With respect to immunity *ratione materiae*, the report concludes, ambiguously, that there are either certain exceptions to immunity *ratione materiae* or that there is trend in favour of exceptions to immunity *ratione materiae*. In other words, the report could be read either as proposing that draft article 7 reflects existing law (codification) or that it reflects emerging law (progressive development). On this basis, the Special Rapporteur proposes the following draft conclusion:

Draft Article 7, titled 'Crimes in Respect of which Immunity does not Apply':

1. Immunity shall not apply in relation to the following crimes:
 - (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;
 - (ii) Corruption-related crimes;
 - (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.
2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.
3. Paragraph 1 and 2 are without prejudice to:
 - (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;
 - (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.

The conclusion that international law does not recognise any exceptions to immunity *ratione personae* is not controversial and it is unnecessary to explore the report's basis for this conclusion. It is the conclusion that there are exceptions to immunity *ratione materiae* that resulted in controversy and division with the Commission and which is considered in this article. The article will also not consider the territorial tort exception (article 7(1)(iii)) and the corruption exception (article 7(1)(ii)) proposed by the Special Rapporteur, since these were not adopted by the Commission. The article will thus

²⁴ Fifth Report of the Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/701).

be limited to the proposition that there are exceptions to immunity *ratione materiae* for *jus cogens* crimes such as genocide, crimes against humanity and war crimes.

I begin with the Special Rapporteur's treatment of treaty practice. The Genocide Convention, Torture Convention and Enforced Disappearance Convention are relied upon to illustrate an exception to immunity *ratione materiae* for those crimes.²⁵ The Genocide Convention and the Apartheid Convention, for example, include provisions excluding the relevance of official capacity for criminal responsibility.²⁶ Although there is no similar provision in the Torture and Enforced Disappearance conventions, according to the report both of those conventions foresee the prosecution of State officials by foreign courts, suggesting an implicit waiver of immunity.²⁷

With respect to national legislative practice, the report begins by referring to immunity-specific legislation. Although it notes that immunity of State officials from national jurisdiction 'is not explicitly regulated in most States',²⁸ it does identify a number of national legislation that address immunity of some State officials.²⁹ US, Argentine and Spanish legislation, are said to be particularly relevant.³⁰ In addition to immunity specific legislation, the report considers domestic legislation concerned with the prosecution of international crimes.³¹ It describes a number of domestic legislation implementing the Rome Statute of the International Criminal Court which impact on immunities and identifies two general approaches. In the first approach, the relevant

²⁵ Fifth Report on Immunities, *supra* note 24, para 32 *et seq.*

²⁶ *Ibid.* para 33. Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides that persons 'committing genocide or any other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid provides that 'criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organisations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State.'

²⁷ Fifth Report on Immunities, *supra* note 24, para 33.

²⁸ *Ibid.*, para 44.

²⁹ *Ibid.* The legislation identified by the report as potentially relevant to the question of immunities include United States' Foreign Sovereign Immunities Act of 1976, the United Kingdom's State Immunity Act of 1978, Singapore's State Immunity of 1979, Pakistan's State Immunity Ordinance of 1981, South Africa's Foreign States Immunities Act of 1981, Australia's Foreign States Immunities Act of 1985, Canada's State Immunity Act of 1985, Argentina (Jurisdictional Immunity of Foreign States in Argentine Courts Act of 1995, Japan's Civil Jurisdiction with respect to a Foreign State Act of 2009, Spain's Privileges and Immunities of Foreign States, International Organisations with Headquarters or Offices in Spain Organic Act of 2015.

³⁰ Fifth Report on Immunities, *supra* note 24, paras 47-53. See, e.g. Section 1605A of the United States' Foreign Sovereign Immunities Act of 1976 provides: 'A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment or agency.' The Spanish Organic Act, similarly, establishes an exception to immunity *ratione materiae* in respect of the 'crimes of genocide, forced disappearance, war crimes and crimes against humanity.'

³¹ With respect to immunity *ratione personae*, the report refers to Dutch and Belgian legislation, which it notes explicitly recognise immunity of *ratione personae* and provides no exceptions from it. See Fifth Report on Immunities, *supra* note 24, paras 54-55.

legislation 'recognises that in general no immunity can be invoked against to (*sic*) the exercise of national jurisdiction' regarding crimes within the competence of the International Criminal Court'.³² The second approach identified in the report limits the non-application of immunity to cases involving in cooperation with the ICC.³³ Under this second approach, the report refers to two further sub-categories. In the first sub-category, the exception to immunity for the purposes of cooperation applies only to nationals of States Parties.³⁴ In the second sub-category, immunity is not excluded outright, but the legislation provides for a process of consultation to address any conflict that may arise between the application of immunity and the duty to cooperate with the Court.³⁵

Additionally, the report considers whether domestic judicial decisions provide evidence of exceptions to immunity.³⁶ It states that while national court judgments have been 'less uniform ... it can be concluded that domestic courts, in a certain number of cases, have been accepting the existence of limitations and exceptions to immunity' in respect of 'international crimes, crimes of corruption ... and other crimes of international concern ...'³⁷ In connection with 'international crimes', the report refers to, amongst others, the *Pinochet case* (United Kingdom), *Hussein case* (Germany), *Bouterse case* (The Netherlands) and *Ariel Sharon and Amos Yaron* (Belgium).³⁸ Many of the cases referred to in the report, however, were civil law-related.³⁹

In addition to these examples of State practice, the report also traces the jurisprudence of international courts, including the International Court of Justice. It provides a lengthy analysis of the *Arrest Warrant case*⁴⁰ and the *Jurisdictional Immunities of the State case*,⁴¹ and makes references to the *Certain Questions of Mutual Assistance*,⁴² and

³² *Ibid.*, para 58.

³³ *Ibid.*, para 59. According to the report, States using this approach include Canada, France, Germany, Kenya, New Zealand, Norway, Switzerland and Uganda.

³⁴ *Ibid.*

³⁵ *Ibid.* According to the report, this category of countries includes Argentina, Australia, Austria and Liechtenstein.

³⁶ With regards to immunity *ratione persone*, the Fifth Report on Immunities, *supra* note 24, concludes that there are no exceptions to immunity *ratione personae*. At para 121.

³⁷ *Ibid.*, para 114.

³⁸ *Ibid.* *R v Bartle and the Commissioner of Police for the Police and Others, Ex Parte Pinochet*, Judgment of the UK House of Lord of 24 March 1999; *Prosecutor-General of the Supreme Court v Desiré Bouterse*, Judgment of the Supreme Court of the Netherlands of 18 September 2001; *HSA v VSA, Decision Related to the Indictment of Ariel Sharon, Amos Yaron and Others*, Court of Cassation of Belgium, 12 February 2003; *A v Office of the Public Prosecutor of the Confederation*, Judgment of Federal Criminal Court of Switzerland, 25 July 2012; *Attorney-General v Eichmann*, Judgment of the Supreme Court of Israel, 29 May 1969.

³⁹ *Ibid.*, These include the famous *Samantar v Yousuf*, Judgment of the US Supreme Court, 1 June 2010 and *Letelier v Chile*, Judgment of the US District Court, 11 March 1980

⁴⁰ *Arrest Warrant case supra* note 5. See for discussion, Fifth Report on Immunities, *supra* note 24, paras 61-70.

⁴¹ *Jurisdictional Immunities of the State case supra* note 7. For discussion see Fifth Report on Immunities *supra* note 24, paras 73-86.

⁴² *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment of 4 June 2008, *ICJ Reports* 2008 p. 177. For discussion see Fifth Report on Immunities *supra* note 24, para 71.

Questions Relating to the Obligation to Prosecute or Extradite.⁴³ It is clear from the analysis of the jurisprudence of the Court in the report that, on the whole, the jurisprudence provides little support for exceptions to immunity. The same conclusion arises from the report's description of the jurisprudence of the European Court of Human Rights.⁴⁴

The draft article proposed by the Special Rapporteur avoids the use of either "exception" or "limitations", instead using the phrase 'does not apply to'. In the report, the Special Rapporteur, in the main, refers to 'limitations and exceptions'. The reason for this, according to the Special Rapporteur, is that 'this distinctionhad been controversial in normative terms'.

B. *Consideration of the Report in the Commission*

As described above, the consideration of the report in the Commission was heated and tense. The first substantive point raised in connection with the fifth report concerned the third paragraph of draft article 7 (the without prejudice clause). It was felt by some that it was intended to prejudice on-going disputes concerning the relationship between articles 27 and 98 of the Rome Statute and customary international law rules concerning immunity.⁴⁵ The main issue of debate, however, concerned the content of the first paragraph and its consistency with State practice. It is to this issue to which the article will now turn.

While the debate on the first paragraph of the proposed draft article 7 was broad in scope and rich in depth, it is possible to identify three themes in that debate. The first theme concerned whether the draft article was supported by the authorities relied upon in the report. A second theme running through the debate concerned the criteria for the particular list of crimes provided for in the first paragraph of draft article 7. Finally, the third theme concerned the normative propriety of the paragraph. In addition to these three broad themes, and linked with the last theme, some members of the

⁴³ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012 p. 422. For discussion see Fifth Report on Immunities *supra* note 24, para 72.

⁴⁴ *Ibid.*, para 87-95. The report includes in its analysis *Al-Adsani v United Kingdom*, *McElhinney v Ireland*, *Kalogeropoulou and Others v Greece and Germany* and *Jones and Others v United Kingdom*.

⁴⁵ See statement by statement by Tladi, ILC Summary Records, Meeting of 19 May 2017, (A/CN.4/SR.3361), at 6, stating that while paragraph 3 was drafted as a 'without prejudice', it was 'wholly prejudicial. Why should there be a "without prejudice" clause in draft article 7(3)? If there was going to be a "without prejudice" clause, it should be drafted to apply to the draft articles as a whole, not to just one provision.' Cf. Galvao Teles, IL

C Summary Records, Meeting of 19 May 2017 (A/CN.4/SR.3361) ('She supported the important "without prejudice" clause in paragraph; perhaps, as Mr Tladi had proposed, the "without prejudice" clause should be applied to the whole set of draft articles.'). See, for a contrary position, statement by Jalloh, ILC Summary Records, Meeting of 23 May 2017, who stated that he did not share the concern that the 'provisions of paragraph 3 were prejudicial to ongoing judicial proceedings'. See for an exchange between Jalloh and I, in the context of a mini-debate ILC Summary Records, Meeting of 24 May 2017 (A/CN.4/SR.3363), at 3.

Commission suggested that, though the provision was not acceptable as a matter of current international law, it could be made acceptable if qualified by what was referred to as ‘procedural guarantees’ together with an acknowledgment that it represented proposed new law. I will now consider each of these three themes in turn.

On the question of whether the authorities relied upon in the report support draft article 7, some members of the Commission, including myself, noted that there was a heavy reliance in the report on authorities addressing either civil proceedings or proceedings relating to the immunities of the State itself rather than the immunities of officials in the context of criminal proceedings.⁴⁶ With respect to the case law, for example, Oral observed that the *Certain Questions of Mutual Assistance* case and the *Jurisdictional Immunities of State* case ‘dealt with the immunity of States, and not the immunity *ratione materiae* of individuals’, and that the *Jurisdictional Immunities of State* case was expressly limited to civil proceedings.⁴⁷ This sentiment applies equally to the numerous European Court of Human Rights decisions referred to in the report, including *Al-Adsani v United Kingdom* and *Jones v United Kingdom*.⁴⁸

It should be noted, however, that some members of the Commission, particularly those members that believed there are no exceptions to immunity *ratione materiae* under international law, felt that there should be no distinction between immunity in civil context and immunity in criminal context.⁴⁹ Murphy, for example, observed that to identify whether there were cases in which immunity *ratione materiae* was granted for serious crimes it was necessary to look, not only at criminal cases, but also at civil cases.⁵⁰ In his view, precisely because of the large number of civil proceedings-related authorities, the authorities did not ‘weigh unequivocally in favour of [proposed] draft article 7.’⁵¹ Similarly, Kolodkin, speaking of the *Jurisdictional Immunities of State*

⁴⁶ See generally statement by Tladi (A/CN.4/SR.3361), *supra* note 45; statement of Rajput, ILC Summary Records, Meeting of 24 May 2017 (A/CN.4/SR.3363), 7; statement of Ruda Santaloria, ILC Summary Records, Meeting of 26 May 2017 (A/CN.4/SR.3364), at 13 (‘it was important to distinguish between State immunity *stricto sensu* in situations involving the bringing of civil actions against a State before the courts of another State and the immunity of State officials from foreign criminal jurisdiction’); Huang, ILC Summary Records, Meeting of 26 May 2017 (A/CN.4/SR.3364) (‘there was some confusion over basic concepts, such as international and domestic crimes, criminal and civil proceedings as well as State immunity, the immunity of officials and diplomatic immunity’). Although not questioning the reliance on article 12 of the UN Jurisdictional Immunities Convention, Galvão Teles (A/CN.4/SR.3361), *supra* note 45 also noted that that Convention applied to a different context, at 9 (‘The proposal to include [the territorial exception] on the basis of the [UN Jurisdictional Immunities Convention] was an interesting one ... but ... a more restrictive formulation might be appropriate in the context of immunity of State officials as opposed to immunity of States.’)

⁴⁷ (A/CN.4/SR.3364), *supra* note 46, at 4.

⁴⁸ *Ibid.* See *Al-Adsani v United Kingdom*, Application No. 35763/97, Judgment of the European Court of Human Rights, Grand Chamber, 21 November 2001; *Jones v United Kingdom*, Application No. 34356/06, Judgment of the European Court of Human Rights, 18 September 2009.

⁴⁹ See, e.g. Murphy, ILC Summary Records, Meeting of 23 May 2017 (A/CN.4/SR.3362), at 5.

⁵⁰ *Ibid.* (‘Moreover, the report incorrectly asserted that national courts had granted immunity in only a “small number of cases” involving alleged serious international crimes. In fact, it was possible to identify many such cases, especially by looking at both criminal and civil cases.’ [emphasis added])

⁵¹ *Ibid.*

case, said that the ‘fact that the ruling concerned the immunity of the State from civil, not criminal, jurisdiction, changed nothing.’⁵²

There was also criticism of the report’s reliance on Rome Statute-related authorities. In this regard, Wood asserted that the ‘the implementing laws of the Rome Statute were of dubious relevance, as they had in principle been enacted solely for the purposes of that treaty.’⁵³ Similarly, Rajput argued for the exclusion of legislation implementing the Rome Statute since that legislation ‘related to an international tribunal where immunity did not apply.’⁵⁴ Murphy also observed that while the report ‘mentioned several acts that implemented the Rome Statute, it also noted that many of them are applicable only to the surrender of persons to the Court, listing just five States that have enacted broader implementation statutes.’⁵⁵ There were, however, some members of the Commission that took the view that the principles in the Rome Statute were relevant in determining whether current international law recognised exceptions to immunity *ratione materiae*.⁵⁶ Peter, for example, said that ‘it was the Rome Statute that should set the standard, not an obscure tradition or custom whose evolution, establishment and acceptance was questionable.’⁵⁷

It was also suggested that some of the authorities cited did not support the propositions advanced in the report. Murphy, for example, stated that the ICTY decision in *Blaškić* was incorrectly relied upon in the report.⁵⁸ In his view, *Blaškić* did not concern the right of a State to exercise jurisdiction over a foreign official but rather, the ability of the ICTY to subpoena State officials.⁵⁹ Similarly, Rajput, noted that a number of the cases relied upon in the report – for example *Al-Adsani*, *Kalogeropoulo* and *Pinochet* – did not support the proposition advanced.⁶⁰ Wood observed that the Dutch judgment in *Bouterse* had been set aside by a higher court and could therefore not be relied upon as authority.⁶¹ As described below, these objections are generally flawed.

Many members also raised policy issues with the draft article proposed by the Special Rapporteur.⁶² Wood, for example, recognised that the Commission must ‘strive to strike a proper balance between the need to punish perpetrators of crimes and respect

⁵² Kolodkin, ILC Summary Records, Meeting of 19 May 2017 (A/CN.4/SR.3361), at 7.

⁵³ Statement by Wood, ILC Summary Records of 18 May 2017 (A/CN.4/SR.3360) at 11.

⁵⁴ Rajput, (A/CN.4/SR.3363) *supra* note 45, at 7.

⁵⁵ Murphy (A/CN.4/SR.3362), *supra* note 49 at 5.

⁵⁶ Gómez-Robledo, ILC Summary Records, Meeting of 24 May 2017 (A/CN.4/SR.3363), at 3 (‘Though he was aware that the draft articles were not linked in any way to the establishment of an international court, he wondered whether the Commission could ignore the legal developments brought about by the Rome Statute. Those developments were not vague values or mere ‘fragments’, as Mr Murphy had described them; they constituted positive law, demonstrating that the international community had reached a new consensus on preventing and punishing the most serious international crimes.’)

⁵⁷ Peter, ILC Summary Records, Meeting of 24 May 2017 (A/CN.4/SR.3363), at 10.

⁵⁸ Murphy (A/CN.4/SR.3362), *supra* note 49, at 5.

⁵⁹ *Ibid.*

⁶⁰ Rajput (A/CN.4/SR.3363), *supra* note 54, at 7.

⁶¹ Wood (A/CN.4/SR.3360), *supra* note 53, at 11.

⁶² See Rajput (A/CN.4/SR.3363), *supra* note 54, at 8.

for the sovereignty of States.¹⁶³ In his view, however, before doing so, it was important to be make a ‘clear distinction between the existing law and possible new rules of law.’¹⁶⁴ Kolodkin was more direct, suggesting that the proposed draft articles reflected nothing more than the Special Rapporteur’s policy preferences.¹⁶⁵ Huang, cautioned that the approach proposed by the Special Rapporteur risked disturbing ‘the principles of sovereign equality and non-intervention in the internal affairs of other States.’¹⁶⁶ He suggested that the draft article was likely to be abused by western States ‘which frequently invoked so-called universal jurisdiction in order prosecute or even issue arrests warrants against African leaders.’¹⁶⁷ In response to these policy-based objections, however, Jalloh noted that while ‘the risk of impairment to the stability of international relations’ was often raised to support an expansive approach to immunity, this claim ‘was not supported by empirical evidence’ and it often overlooked ‘the instability and negative impacts caused by atrocity crimes in the affected State, neighbouring States and the international community as a whole ..’¹⁶⁸ Along the same lines, Galvão Teles stressed that it was important to strike ‘a balance between the principles of sovereign equality, stability in the conduct of international relations and immunity, on the one hand, and combating impunity for the most serious international crimes, on the other.’¹⁶⁹ In Park’s view ‘it could no longer be denied that the protection of persons against widespread and grave violations of human rights was becoming an essential value that the international community must pursue.’¹⁷⁰

Questions were also asked raised about the choice of crimes. It was not clear on what basis some crimes were included while others were excluded.¹⁷¹ Some members, for

⁶³ Wood (A/CN.4/SR.3360), *supra* note 53, at 10.

⁶⁴ *Ibid.*

⁶⁵ Kolodkin (A/CN.4/SR.3361), *supra* note 52, at 6 (‘At the end of every speech, Cato the Elder used to say *Cathago delenda est* – “Carthage must be destroyed”. Slightly modified to become “Immunity must be destroyed”, the phrase that could be used to end and begin not only the fifth report of the Special Rapporteur, but all of them. The fifth report was entirely predicated upon the destruction of immunity, which the Special Rapporteur used as justification for limitations or exceptions to immunity. ...he noted the skill with which the Special Rapporteur challenged all, or nearly all arguments in favour of immunity, including those contained in the rulings of the International Court of Justice ... [the report was] a strong case against immunity *ratione materiae*, cleverly constructed by a Grand Master of the law’). See also Laraba (A/CN.4/SR.3363), at 9 (‘Special Rapporteur was to be commended on her efforts to produce an objective, impartial and balanced report.... It was not certain, however, that she had achieved this objective.’)

⁶⁶ Huang, (A/CN.4/SR.3364), *supra* note 46, at 9. See also Nolte, ILC Summary Records, Meeting of 39 May 2017 (A/CN.4/SR.3365), at 3 (‘the basic principle of international law that safeguarded sustainable international cooperation was the sovereign equality of States A perception of bias could, however, easily occur if the courts of one State adjudicated claims involving official acts by another State.’).

⁶⁷ Huang (A/CN.4/SR.3364), *supra* note 46, at 9

⁶⁸ Jalloh (A/CN.4/SR.3362), *supra* note 45, at 11. See also Oral (A/CN.4/SR.3364), *supra* note 46, at 3.

⁶⁹ Galvão Teles (A/CN.4/SR.3361), *supra* note 45, at 9. See also Hassouna, ILC Summary Records, (A/CN.4/SR.3361) *supra* note 45, at 11. See also Valencia-Ospina, (A/CN.4/SR.3361) *supra* note 45, at 15; Vásquez-Bermúdez, (A/CN.4/SR.3362), *supra* note 49, at 4 and Lehto, (A/CN.4/SR.3362), *supra* note 49, at 10.

⁷⁰ Park, (A/CN.4/SR.3360), *supra* note 53, at 8.

⁷¹ Ouazzani Chahdi, (A/CN.4/SR.3364), *supra* note 46, at 16 (‘With regard to draft article 7, like other Commission members, he would like to know what criteria the Special Rapporteur had used as a basis for the list of international crimes that she proposed.’). Valencia-Ospina (A/CN.4/SR.3361), *supra* note 69, at 14 (‘The conclusive list of crimes in respect of which immunity did not apply ... was a matter of

example, noted that the report gives no reason for the exclusion of the crime of apartheid in the list of crimes.⁷² Other members argued for the inclusion of the crime of aggression.⁷³ The question was asked whether the inclusion of the crime of corruption, even on a grand scale, was of greater concern to the international community than, say human trafficking or sexual slavery.⁷⁴

Finally, some members opposed to draft 7 suggested that if the Commission sought to 'make new law', then the provision should be accompanied by, and considered together with, procedural guarantees.⁷⁵ In making the case for linking draft article 7 with procedural safeguards, Murphy referred to the case concerning Ehud Barak, former Defence Minister of Israel, in the United States for alleged torture and extrajudicial killings:

Both the Israeli and the United States' Governments had supported Mr Barak's claim to immunity on the grounds that he acted in his official capacity. In granting Mr Barak immunity and dismissing the case, the District Court of the Central District of California held that the defendant was entitled to immunity where the sovereign State had officially acknowledged and embraced the official's act.⁷⁶

Other members questioned Murphy's illustration of the importance of the procedural safeguards, arguing that it is deeply flawed. First, it was pointed out that the illustration pertains not so much to the question of exceptions but more to what constitutes an official act, so that if there is any issue that should be linked with procedural safeguards following the illustration it should be the question of official act and not exceptions.⁷⁷ Second, and related, the example illustrates that procedural safeguards *could* be linked to multiple areas of the topic and it is not clear why only the question of exceptions must be held ransom to the procedural safeguards issue.

As indicated above, the Commission agreed by consensus, after an indicative vote, to refer draft article 7 to the drafting committee. The drafting committee managed to reach agreement on a simplified version of draft article 7 which was provisionally adopted by the Commission after a recorded vote. Draft article 7, adopted by the Commission and which is discussed in the next section, provided as follows:

deep concern... If the Commission was to decide to include such a list, the choice of what to include and what to exclude must be made with the greatest possible care.' See also Oral (A/CN.4/SR.3364), *supra* note 45, at 4, wondering 'why other serious international crimes had been omitted.'

⁷² Nguyen, (A/CN.4/SR.3360), *supra* note 53, at 14; Ruda Santaloria (A/CN.4/SR.3364), *supra* note 46, at 14; Ouazzani Chahdi (A/CN.4/SR.3364), *supra* note 46, at 16.

⁷³ Valencia-Ospina (A/CN.4/SR.3361), *supra* note 69, at 14; Nguyen (A/CN.4/SR.3361), *supra* note 72, at 14; Tladi (A/CN.4/SR.3361), *supra* note 61, at 6; Hassouna (A/CN.4/SR.3361), *supra* note 69; Jalloh (A/CN.4/SR.3362), *supra* note 45; Ouazzani Chahdi (A/CN.4/SR.3364), *supra* note 46, at 16.

⁷⁴ See, e.g., Tladi (A/CN.4/SR.3361), *supra* note 45.

⁷⁵ Wood (A/CN.4/SR.3360), *supra* note 53, at 13; Kolodkin (A/CN.4/SR.3361), *supra* note 45 at 8; Murphy (A/CN.4/SR.3362), *supra* note 49, at 7.

⁷⁶ Murphy (A/CN.4/SR.3362), *supra* note 49, at 7.

⁷⁷ Tladi (A/CN.4/SR.3362), *supra* note 49, at 7.

Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crimes of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid
- (e) torture;
- (f) enforced disappearance.

3. Evaluation of Draft Article 7 Adopted by the Commission

Before providing an evaluation of draft article 7 adopted by the Commission, it is useful to briefly describe the reception that draft article has received so far outside the Commission. First, at adoption, some members opposed to the draft article, sought a recorded vote and offered explanations of vote. From a doctrinal perspective, these members expressed that the view that draft article 7 had no basis in international law as it stood or in State practice.⁷⁸ From a normative perspective they feared that the draft article would be abused and would not contribute to the fight against impunity.⁷⁹ At least one member argued that the draft article should not be adopted since it did not have the support of the most powerful States and members of the Commission from those (more) States.⁸⁰ Other members, while supporting the text, provided

⁷⁸ See Kolodkin, ILC Summary Records, Meeting 20 July 2017 (A/CN.4/SR.3378), at 9 ('..draft article 7 was constructed on quasi-legal theoretical premises, neither having a basis in or reflecting existing international law, nor did it reflect any real, discernible trend in State practice or international jurisprudence ..'); Murphy, ILC Summary Records, Meeting of 20 July 2017 (A/CN.4/SR.3378), at 9 ('The essential problem was that the exceptions identified in the draft article were not grounded in existing international law, nor could it be said that there was a trend towards such an exception. The Commission was proceeding with draft article 7 even though there was only a handful of national laws and cases and no global treaties or other forms of State practice supporting such exceptions ..'); Wood, ILC Summary Records, Meeting of 20 July 2017 (A/CN.4/SR.3378), at 10 ('..the text did not reflect existing international law or a trend ...'); Rajput (A/CN.4/SR.3378), *supra* note 54, at 12 ('It was clear from the statements in plenary that there was neither support in State practice nor any trend [in support of the text], since there was an inconsequentially small number of cases from domestic jurisdiction and no examples of domestic legislation or treaties ...').

⁷⁹ Kolodkin (A/CN.4/SR.3378), *supra* note 78, at 9 ('Of great concern was the fact that the draft article and the way in which the Commission intended to present it to the General Assembly invited unilateral actions which were contrary to international law and had a very slim potential of contributing to the fight against impunity and the protection of human rights and might be genuinely detrimental to inter-State relations.'). Wood (A/CN.4/SR.3378), *supra* note 78, at 10 ('the text was not desirable as new law and should not be proposed to States..'); Huang, (A/CN.4/SR.3378), *supra* note 78 at 11 ('Draft article 7 was a critical article and, if not handled properly, risked undermining the draft articles as a whole, to the detriment of inter-State relations..').

⁸⁰ Huang (A/CN.4/SR.3378), *supra* note 78, at 10. See for responses to this explanation of vote Mr Gómez-Robledo (A/CN.4/SR.3378), *supra* note 78, at 12; Ruda Santaloria (A/CN.4/SR3378), *supra* note 78, at 12.

explanations of vote after the adoption to register their concern at the exclusion of specific crimes, in particular aggression⁸¹ and corruption⁸² respectively.

States have also since had the opportunity to comment on the adoption of draft article 7 in the context of the Sixth Committee of the General Assembly debate on the report of the Commission.⁸³ It is unnecessary, at this stage, to provide a detailed account of the various views of States, but it has been reported that of the States that commented on draft article 7, twenty three had 'a predominantly positive attitude' towards the content of draft article 7, with twenty one States having a 'predominantly negative attitude' and a further five having a 'reserved or ambiguous attitude'.⁸⁴ Like those members of the Commission that opposed draft article 7, ten States are reported to have explicitly stated that draft article 7 does not reflect customary international law or is not grounded in the practice of States.⁸⁵ It is this claim that the remainder of this section will test. The views expressed in the Sixth Committee are not considered in the assessment of the Commission's mainly because they come after the fact. The question is whether is, at the time of its adoption, the Commission's draft article was

⁸¹ Tladi, (A/CN.4/SR.3378), *supra* note 78 at 13 *et seq.* ('There was no legal reason whatsoever that other crimes had been included, yet aggression, a crime that had featured in the work of the Commission since 1950, had been excluded. If the criteria by which crimes had been included concerned their *jus cogens* nature, there was no question that the crime of aggression ought to have been included. ... If the criterion by which crimes were included was gravity, there was again no question that the crime of aggression ought to have been included There was no reason that the crime of aggression had been singled out for exclusion. The only reason that he could seewas that it was a crime most likely to be committed by the powerful. The Commission had just taken the decision that the most powerful ought to be beyond the reach of justice.');

Mr Hmoud, (A/CN.4/SR3378), *supra* note 78, at 14 ('would have preferred aggression to be included ... Although it could be an act of State, it was a criminal act committed by an individual. In that sense it was different from other crimes of international concern committed by individuals when exercising governmental authority such as crimes against humanity or war crimes.');

Mr Jalloh, (A/CN.4/SR.3378), *supra* note 78, at 14 *et seq.* ('not convinced by the explanations given by the Special Rapporteur in her fifth report on immunity as to why she wished to exclude the crime of aggression. The other core Rome Statute crimes, namely genocide, crimes against humanity and war crimes, had been included in the list of exceptions contained in draft article 7, but, arguably the most serious crime known to international law, the crime of aggression had been excluded.');

Mr Murase (A/CN.4/SR.3378), *supra* note 78, at 14 ('wished to express dissatisfaction over the fact that the crime of aggression had not been included in draft article 7');

Mr Hassouna, (A/CN.4/SR.3378), *supra* note 78, at 15 ('would have strongly supported the inclusion of the crime of aggression');

Mr Ouazzani Chahdi, (A/CN.4/SR.3378), *supra* note 78, at 15 ('voted in favour draft article 7 but was disappointed at the politicised climate surrounding the discussion and deplored the fact that the crimes of aggression and corruption had not been included in the list of exceptions to immunity.');

Mr Park, (A/CN.4/SR.3378), *supra* note 78, at 15 ('believed the crime of aggression should have been included in the list of exception.');

Mr Nguyen, (A/CN.4/SR.3378), *supra* note 78, at 16 ('wished to express his deep regret that the crime of aggression had not been included in the list of exceptions to immunity, even though that crime had more serious and negative consequences for many countries than other crimes, such as the crime of apartheid.')

⁸² Cisse, (A/CN.4/SR.3378), *supra* note 78, at 15.

⁸³ See Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly on the Report of the ILC during its Sixty-Ninth Session (A/CN.4/713). There is also a more detailed, but informal, analytical summary prepared by Georg Nolte's assistants. See Janina Barkholdt and Julian Kulaga 'Analytical Presentation of the Comments and Observations by States on the Report of the International Law Commission on its Sixty-Ninth Session (2017) regarding the topic Immunity of State Officials from Foreign Criminal Jurisdiction, UNGA, 6th Committee, 2017' (unpublished on file with author, 2018).

⁸⁴ Barkholdt and Kulaga, *supra* note 83, at 1.

⁸⁵ *Ibid.*, at 10.

grounded in State practice. Finally, the adoption of draft article 7 has also already been the subject of academic debate.⁸⁶

There seems to be a fair bit of consensus, based largely on the *Arrest Warrant* case and the acceptance by States of that judgment, that there are no exceptions to immunity *ratione personae* including in relation to *jus cogens* crimes.⁸⁷ This view is also generally accepted in literature.⁸⁸ The only outstanding issue therefore is whether there is, in the practice of States, a recognition of exceptions to immunity *ratione materiae* for serious international crimes of *jus cogens* nature.⁸⁹

Prior to assessing draft article 7, three preliminary points need to be made. First, it is, of course, possible to study the question of exceptions from the perspective of the meaning of 'official act'. The argument has been made that the commission of serious crimes of concern to the international community (what is termed here *jus cogens*

⁸⁶ See, e.g. Sean D Murphy 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' 112 *AJIL Unbound* 4 (2018); Quinmin Shen 'Methodological Flaws in the ILC's Study on Exceptions to Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction' 112 *AJIL Unbound* 9 (2018); Phillipa Webb 'How Far Does Systemic Approach to Immunities Take Us?' 112 *AJIL Unbound* 16 (2018); Mathias Forteau 'Immunities and International Crimes before the ILC: Looking for Innovative Solutions' 112 *AJIL Unbound* 22 (2018); Rosanne van Alebeek 'The "International Crime" Exception to the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?' 112 *AJIL Unbound* 27 (2018).

⁸⁷ *Arrest Warrant* case, *supra* note 5. A notable exception in this regard appears to be the South African Supreme Court of Appeal judgment in *Minister of Justice and Constitutional Development Others v Southern African Litigation Centre and Others*, Judgment of the South African Supreme Court of Appeal, 2016 (4) *BCLR* 487 (SCA), although even that judgment is a little more complicated. That judgment recognises that under customary international law there are no exceptions to immunity *ratione personae*, but then concludes that the South African legislature intended to depart from the rules of customary international law by establishing an exception in relation to the Rome Statute crimes. See for discussion Dire Tladi 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 *African Human Rights Law Journal* 16, at 310.

⁸⁸ See, for example, Akande and Shah *supra* note 1, at 819-820 who note that absolute nature of immunity *ratione personae* is 'uncontroversial and has been widely applied by national courts ... [and has been] upheld in State practice.' See also Pierre d'Argent 'Immunity of State Officials and Obligation to Extradite' *Cashier du Cedit Working Papers* No. 2013/04, 5-6.

⁸⁹ In the *AJIL Unbound* Symposium, Murphy, *supra* note 86, at 5, makes an interesting and novel argument suggesting that the *Arrest Warrant* case offers support for the non-existence of exception to immunity *ratione materiae*: ('Further [the Fifth Report] cites to just one national court case and 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'). However, the ICJ case concerned immunity *ratione personae* and not immunity *ratione materiae*. It is true that, at the time, the official concerned was no longer Foreign Minister, but the case concerned the circulation of the arrest warrant at the time he was Foreign Minister. But more importantly, there is nothing in the paragraph to which Murphy refers (para 61 of the *Arrest Warrant* case), that suggests that the Court took the four circumstances it provides as exhaustive. For example, the Court does not mention the possibility that a former Foreign Minister may be prosecuted in a *foreign domestic court* on the strength of a Chapter VII authorisation of the UN Security Council.

crimes) do not constitute 'official acts' and are therefore not covered by immunity.⁹⁰ This line of reasoning is not considered in the current analysis for two reasons. First, the Commission has, in my view correctly, not adopted the approach that the commission of certain crimes can never constitute official acts, because surely, they can. Leaving aside that the Torture Convention defines the *jus cogens* crime of torture as an official act, a state can decide to engage in a policy of genocide and it is not clear why, when an official of that State is prosecuted for his or her participation in such acts, it should be disputed that the acts for which he or she is being prosecuted were undertaken in an official capacity.⁹¹ Second, *exceptions* to immunity presupposes that an act is covered by immunity in the first place. If the act in question is not covered by immunities, then we cannot speak of exceptions in the first place.

As a second preliminary point, it should be emphasised that the work of the Commission, including draft article 7 on exceptions to immunity, is to be assessed on the basis of practice. In particular, the question should be whether there is sufficient practice to form the basis of the exception, either as codification or as progressive development of international law. As described earlier, in the case of codification, what is required is proof of '*extensive State practice, precedent and doctrine*'. For progressive development, the existing practice need not be extensive, well-developed or even consistent. What matters is that there is *some support* in the practice of States. Since the Commission has adopted a composite approach to 'codification and progressive development' of international law, in which it does not (and should not) identify specific provisions as constituting either codification or progressive development, the assessment of draft article 7 requires only some evidence of practice. The evidence need not be conclusive, widespread or consistent.

The third preliminary point concerns the role of international tribunals and principles emanating from those tribunals.⁹² These include, not only the Rome Statute, but also the Nürnberg Principles and the first Draft Code of Offences against the Peace and Security of Mankind.⁹³ While these sources would support the general argument

⁹⁰ See, e.g. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case supra* note 5, at para 85. See for discussion, *Memorandum of the Secretariat on Immunity of State Officials from Foreign Criminal Jurisdiction* 31 March 2008 (A/CN.4/596), paras 191-193.

⁹¹ Pavel Caban 'Immunity of State from Foreign Criminal Jurisdiction -Exceptions to Immunity *Ratione Materiae*' (2016) 7 *Czech Yearbook of International Law* 315

⁹² See for an example of decisions based on the law of international criminal tribunals, *Decision Pursuant to Article 87(7) on the Failure of Republic of Malawi to Comply with the Cooperation Request Issued by the Court With Respect to the Arrest and Surrender Omar Hassan Ahmed Al Bashir: The Prosecutor v Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; *Décision Rendue en Application de l'article 87(7) de la Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour Concernant l'arrestation et la Remise d'Omar Hassan Ahmad Al Bashir: L'Procureur v Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2001;

⁹³ Principles of International Law Recognised in the Charter of Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, Vol II, para 97, Principle III ('The fact that a person who committed an act under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law') and the Draft Code of Offences against the Peace and Security of Mankind (1954), *Yearbook of the International Law Commission*, 1950, Vol II, Article III.

adopted in this article, as a legal proposition they are inapplicable to the case of immunity from *foreign* criminal jurisdiction since they concern the jurisdiction of international courts. Practice from international tribunals is therefore excluded, save where it expressly concerns immunity from national authorities.

The report, and members of the Commission – both opposed to and in support of the draft article – have advanced a variety of sources, including both civil and criminal proceedings-related authorities. The report, for example, relies on authority concerning civil proceedings and immunity of the State to justify the conclusion that there is a territorial tort exception to immunity *ratione materiae*.⁹⁴ Members of the Commission opposed to the draft article have similarly advanced civil cases and cases concerning the immunity of the State rather than the immunity of State officials.⁹⁵ Yet, since the topic is concerned with immunity of State *officials* from foreign *criminal* jurisdiction, our search for practice must be centred around materials relating to the immunity, first, of officials – and not the State itself – and, second, in the context of criminal proceedings.

In the third report on peremptory norms of general international law (*jus cogens*) (hereinafter the ‘third report on *jus cogens*’), the special rapporteur, provided *some* State practice and international jurisprudence on exceptions to immunity of officials *ratione materiae* in the context of criminal proceedings.⁹⁶ Although the Special Rapporteur, in responding to the debate, proposed the replacement of the draft conclusion concerning immunity with a without prejudice clause,⁹⁷ it is useful still to refer to the authorities that formed the basis of those draft conclusions.

There are many cases involving the invocation of immunity of officials *ratione materiae* in the context of criminal proceedings before domestic courts.⁹⁸ Cases under the 1945 Royal Warrant of the United Kingdom, decreed for the purposes of bringing to trial war criminals from the second world war have been referred to as notable examples.⁹⁹ Those prosecuted included military personnel of foreign States who would, most

⁹⁴ See, e.g., Fifth Report on Immunities, *supra* note 24, paras 24-30 and 44-50.

⁹⁵ See, e.g., Murphy (A/CN.4/SR.3362), *supra* note 49 at 7; Rajput (A/CN.4/SR.3363), *supra* note 45 at 7.

⁹⁶ Third Report by the Special Rapporteur (Dire Tladi) on Peremptory Norms of General International Law (*Jus Cogens*) (A/CN.4/714), paras 121-132. The analysis that follows is based on this report.

⁹⁷ The proposal to replace the relevant draft conclusions with a without prejudice was not done for substantive reasons, but rather for procedural and strategic reasons. First, as a procedural reason, the *jus cogens* topic was intended to address methodological issues and not substantive questions concerning consequences of specific *jus cogens* norms. Second, as a strategic point, the Special Rapporteur conceded that including a provision on immunity *ratione materiae* in criminal proceedings, would require a provision that there were no exceptions from immunity *ratione personae* and no exceptions in relation to civil proceedings in connection with *jus cogens* crimes. Since, these conclusions, which were undeniably *lex lata*, would have the effect of freezing this rule and preventing the further development of the law in this area. See, Tladi (Special Rapporteur), ILC Summary Records, Meeting of 9 July (A/CN.4/SR.3425), at 12-16

⁹⁸ See para 5 commentary to draft article 7 of the Draft Articles on the Immunity of State Officials, *supra* note 10, especially footnote 762.

⁹⁹ See APV Rogers ‘War crimes under the Royal Warrant: British Practice (1945-1949)’ (1990) 39 *International and Comparative Law Quarterly* 780, especially at 790 *et seq.*

certainly, have possessed immunity *ratione materiae*.¹⁰⁰ Cassese also provides a catalogue of domestic courts' jurisprudence in which immunity *ratione materiae* was lifted for *jus cogens* crimes.¹⁰¹ Some of the more famous cases in which persons ostensibly with immunity *ratione materiae* were subject to the jurisdiction of domestic courts include the *Eichmann trial* (Israel),¹⁰² *Barbie* (France),¹⁰³ *Bouterse* (The Netherlands) – although the latter was overturned, it was not due to the immunity question, but solely due to the rule against retroactive application of the law,¹⁰⁴ *Pinochet* (Spain), *Guatemala Genocide case* (Spain),¹⁰⁵ *Scilingo* (Spain),¹⁰⁶ amongst others. Perhaps, the case most synonymous with the principle of loss immunity *ratione materiae* for purposes of *jus cogens* crimes is the *Pinochet case* in the United Kingdom. In that case Lord Brown-Wilkinson, Lord Hope, Lord Phillips in their Opinions, all emphasised the non-applicability of immunity *ratione materiae* to an international crime of a *jus cogens* nature.¹⁰⁷

In the course of the Commission debate on the fifth report, some members of the Commission sought to impugn some of the authorities referred to above as irrelevant. It was, for example, pointed out that *Bouterse* and *Pinochet* did not support the contention that immunity *ratione materiae* was inapplicable for serious crimes under international law.¹⁰⁸ With respect to *Bouterse* it was said that the judgment was irrelevant since it had been overturned on appeal. This assertion, which is undeniably true, is however, misleading. The Supreme Court of Appeal of the Netherlands did not overturn the judgment in *Bouterse* on account of immunity. The judgment was overturned on account of the principle of non-retroactive application of laws. Immunity is a procedural bar to prosecution which prohibits the consideration of the substantive issues. The consideration of whether the laws could be applied retrospectively itself indicates the non-applicability of immunity. It should be recalled that what is at issue is *not* whether the Court stated that immunity is or isn't applicable. What is at issue is whether the court exercised jurisdiction, and, in the case of *Bouterse*, it clearly did but found that there were no grounds for prosecution because the law could not be applied retroactively.

With respect to *Pinochet*, these members have pointed out that the opinions were not based on *jus cogens* as such but rather on a treaty obligation arising under the

¹⁰⁰ See, *ibid.*, referring to *Rauer and Others*, *Peleus* trial, the trials of Helmuth von Ruchteschell and von Manstein.

¹⁰¹ Cassese, *supra* note 1, at 870 *et seq.*

¹⁰² *Attorney-General of the Government of Israel v Eichmann*, Judgment of the Supreme Court of Israel of, English translation in (1968) 36 *International Law Reports* 277.

¹⁰³ See for further discussion, Nicholas R Dorman 'Aftermath of Nuremburg: The trial of Klaus Barbie' (1989) 60 *University of Colorado Law Review* 499.

¹⁰⁴ *Bouterse*, Judgment of the Supreme Court of the Netherlands of 18 September 2001.

¹⁰⁵ *Guatemala Genocide, Menchú Tumm and Others v Tow Guatemalan Government Officials and Six Member of the Guatemalan*, Judgment of the Constitutional Court of Guatemala of 26 September 2005.

¹⁰⁶ *Scilingo Manzorro (Alolfo Francisco) v Spain*, Judgment of the Supreme Court of Spain of 1 October 2007.

¹⁰⁷ *R v Bartle and the Commissioner of Police for the Police and Others, Ex Parte Pinochet, Judgment of the UK House of Lord of 24 March 1999*, Lord Brown-Wilkinson (para 56); Lord Hope (para 196); Lord Millet (para 330 *et seq.*) and Lord Phillips (para 366).

¹⁰⁸ Draft Articles on the Immunity of State Officials, *supra* note 10, para 8 of commentary to draft article 8, especially footnote 765.

Convention against Torture. However, in *Pinochet*, three of the opinions specifically raised the *jus cogens* nature of the crime as a basis for the non-applicability of immunity. Moreover, they were all based on the nature of the crime, torture, which has been widely accepted to be a *jus cogens* crime.¹⁰⁹ At any rate, whatever the basis of the finding, it constitutes practice which, together with other evidence of practice, must contribute to the assessment of whether draft article 7 is based on the practice of States. Moreover, the Convention against Torture, to the extent that it establishes an exception from the customary international law rule on immunity *ratione materiae*, itself constitutes practice that must be taken into account in the assessment of draft article 7.

There is also some support in 'international practice' for the position adopted by the Commission in draft article 7. The ICTY, for example, in *Blaškić* seemed unequivocal that 'immunity from *national or international* jurisdiction' could not be invoked in respect international crimes such as crimes against humanity, genocide and war crimes even if the perpetrators were 'acting in official capacity.'¹¹⁰ The *Institut de Droit International*, in its resolution of 2001 on the Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, recognised that former heads of State will continue to enjoy immunity 'in respect of acts which are performed in the exercise of official functions.'¹¹¹ The resolution, however, stated that a former head of state, enjoying immunity *ratione materiae*, may nonetheless, 'be prosecuted and tried when the acts alleged constitute a crime under international law'.¹¹²

Members of the Commission opposed to draft article 7 have also argued that even if there are cases in which immunity was not applied, the practice is uneven since there are also cases in which immunity was upheld. There are, of course, national court cases upholding immunity in criminal proceedings. The French Court of Cassation, for example, in the *Gaddafi* case held that 'qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de "immunité de juridiction des chefs d'Etat étrangers en exercice."¹¹³ Similarly, in several post-*Pinochet* judgments, the UK courts have upheld immunity of State officials, for example in the *Mugabe* case.¹¹⁴ It will be noted, however, that these

¹⁰⁹ See, e.g. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012 p. 422, para 99.

¹¹⁰ *The Prosecutor v Tihomir Blaškić: Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, para 41 (emphasis added). Although Murphy (A/CN.4/SR.3362), *supra* note 49, suggested that the case did not concern the right of a state to exercise jurisdiction, it is clear that in that part of that judgement, the Chamber was concerned with "the general rule ...namely the right of a state to demand for its organs functional immunity".

¹¹¹ Institut de Droit International, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, 2001, Article 13(2)

¹¹² *Ibid.*

¹¹³ *Gaddafi case*, Judgment of the French Court of Cassation of 13 March 2001 (no. 00-87215) (2001) 125 *International Law Report* 490, para 9 ('Under international law, regardless of the gravity of the crime denounced, there is no exception to the principle of immunity from jurisdiction for incumbent heads of State in foreign courts.'). See also *H.S.A et al v S.A., et al (Ariel Sharon case)*, Judgment of 12 February 2003, No. P.02.1139.F, pp. 599-600.

¹¹⁴ Decision *In Re Mugabe*, Judgment of UK Bow Street Magistrates Court of 14 January 2004 ('I am satisfied that that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he

decisions involve incumbent heads of State entitled to immunity *ratione personae*. These cases are, therefore, not authority for the upholding of immunity *ratione materiae*.

Moreover, the *Gaddafi* and *Mugabe* cases in fact (implicitly) stand for the proposition that there is an exception to immunity *ratione materiae* in cases of serious crimes. In both of these cases, the courts suggest that, where the individuals in question no longer occupy their positions as heads of State – a scenario under which the Commission has determined immunity *ratione materiae* would apply¹¹⁵ – their claim to immunity would not be upheld. In *Gaddafi*, for example, the Court explicitly states that the protection offered by the immunity is for ‘incumbent heads of State’.¹¹⁶ In *Mugabe*, the Court states that the applicable immunity can only be relied upon by Mugabe ‘whilst he is head of State.’¹¹⁷

Mugabe and *Gaddafi* cases were both cases involving heads of State. It is thus not surprising that in those cases immunity *ratione personae* was upheld. There have, however, also been decisions upholding immunity of non-heads of State. These include cases decided by the UK Magistrates Court in *Re Bo Xilai* and *Re Mofaz*.¹¹⁸ Yet, in both of these cases, the courts proceeded from the premise, rightly or wrongly, that the officials in question, Minister of Defence (Mofaz) and Minister of Commerce and Trade (Bo Xilai), were entitled to immunity *ratione personae*. In *Mofaz* for example, the court concluded that ‘a Defence Minister would automatically acquire ...immunity in the same way as that pertaining to a Foreign Minister.’ Similarly, in *Bo Xilai*, having recalled the judgment of the International Court of Justice in the *Arrest Warrant* case, determined that the Chinese Minister of Commerce’s functions are ‘equivalent to those exercised by a Foreign Minister’. Given the invocation of immunity *ratione personae*, these cases can also not be authority in respect of rules relating to immunity *ratione materiae*.

Perhaps, the best example of a national case upholding immunity *ratione materiae* is the case of Hissène Habré’s extradition request.¹¹⁹ In that case, Habré, as a former head of State, no longer enjoyed immunity *ratione personae* but only (the residual) immunity *ratione materiae*. There, the Court determined that although Habré was no longer head of State, the immunity that he enjoyed remained.¹²⁰ Though this decision most definitely serves as a practice against draft article 7, it should be pointed out that the decision erroneously relies on the *Arrest Warrant* case.¹²¹ While in the case of

is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for.’)

¹¹⁵ Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, para 3 of draft article 6, *General Assembly Officials Records, Seventy-First Session, Suppl No. 10 (A/71/10)*.

¹¹⁶ *Gaddafi* case, *supra* note 113, at para 9 (emphasis added).

¹¹⁷ *Mugabe* case, *supra* note 114.

¹¹⁸ *Re Mofaz*, Judgment of UK Bow Street Magistrates Court of 12 February 2004; *Re Bo Xilai*, Judgment of UK Bow Street Magistrates Court of 8 November 2005.

¹¹⁹ *Hissène Habré Request*, Judgment of the Court of Appeal of Dakar of 25 November 2005.

¹²⁰ *Ibid.*, para 6.

¹²¹ *Hissène Habré*, *supra* note, para 5 (‘*Considérant que Hissène Habré doit alors bénéficier de cette immunité de juridiction qui, loin d’être une cause d’exonération de responsabilités pénales, revêt*

Habré the relevant immunity was immunity *ratione materiae*, the *Arrest Warrant case* concerned immunity *ratione personae*. Indeed, the majority judgment in the *Warrant case* specifically excluded cases of persons who no longer held office.¹²² Thus, while *Habre case* undoubtedly constitutes practice, it should not be accorded too much weight as a subsidiary means of determining the rules of law since it is based on a misunderstanding of the primary ICJ judgment on which it is based.¹²³

Even discounting the incorrect reliance of the *Habré case* on the *Arrest Warrant case*, the description above suggests that the balance of authorities support the notion that there is, for criminal proceedings, an exception to immunity *ratione materiae*. There is, however, the problem of the *logic of Jurisdictional Immunities of State case*. That logic would seem to apply to immunity in the context of both civil and criminal matters. In other words, there is no *a priori* reason why the rule enunciated in *Jurisdictional Immunities of the State case* would apply to civil but not criminal matters. Three brief points can be made in response. First, the distinction between *jure gestionis* and *jure imperii* applies to civil matters but apparently not criminal matters. Thus, there are certainly differences between the two-types of procedures in relation to the application of immunities. Second, and more importantly, if what is at issue are rules of customary international law, then what matters is the practice of States and if the practice suggests an exception to immunity in relation to criminal but not civil proceedings, then whether the logic of the *Jurisdictional Immunities case* could apply or not is insignificant. It is particularly important to observe, in this regard, that some cases upholding immunity in civil matters, have noted that different rules may apply to criminal matters.¹²⁴ Third, and related to the previous points, the ICJ in the *Jurisdictional Immunities case* itself makes it clear that the scope of its judgment is limited to civil proceedings against the *State itself* and does not necessarily extend to criminal proceedings against the officials of a State.¹²⁵

simplement uncaractère procedural au sans de l'arrêt Yéro Abdoulaye Ndombasi du 14/02/2002 rendu parla Cour Internationale de Justice dans le litige opposant le Royaume de Belgique à la République Démocratique de Congo [‘Considering that Hissène Habré must then benefit from this immunity from jurisdiction, which was not an impunity for criminal responsibility, but merely a procedural characteristic within the meaning of the Yéro Abdoulaye Ndombasi judgment of 14 February 2002 delivered by the International Court of Justice in the dispute between the Kingdom of Belgium and the Democratic Republic of Congo...’]

¹²² See *Arrest Warrant case*, *supra* note 5, para 60 (‘Thirdly, after the person ceases to hold [the relevant office], he or she will longer enjoy all of the immunities accorded by international law ...’)

¹²³ See Draft Conclusions on the Identification of Customary International Law, Report of the International Law Commission, Sixty-Eighth Session, Official Records of the General Assembly, Sixty Seventy-First Session, Supplement No 10 (A/71/10), para 3 (‘The value of such decisions varies greatly ... depending both on the quality of the reasoning of each decision ...and on the reception of the decision by States by other courts).

¹²⁴ See, for example *Al-Adsani v United Kingdom* [2001] ECHR 761, para 61. See also *Yousuf v Samantar*, 699 F.3d 763, 776-77 (4th Cir. 2012) p. 20 (‘A number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged jus cogens violations’ while noting that ‘the *jus cogens* exception appears to be less settled in the civil context’). For a criticism of this position see Alexander Orakhelashvili ‘Audience and authority – The merit of *jus cogens*’ (2015) 46 *Netherlands Yearbook of International Law* 115, at 139.

¹²⁵ *Jurisdictional Immunities of the State case*, *supra* note 7, at para 91. See also para 87.

There is also an abundance of literature supporting the idea that there are exceptions to immunity *ratione materiae*.¹²⁶ It is the case that writers supporting the idea of exceptions arrive at that conclusion through different pathways. Bianchi, for example, relies, *inter alia*, on analogical use of the principle of systemic integration in article 31(3)(c) of the Vienna Convention on the Law of Treaties, as a principle of ‘reasonable and or even necessary aspect of legal reasoning’.¹²⁷ This principle of legal reasoning would require that, not just treaties, but all rules of international law are ‘interpreted against the wider background of the international normative order’, thus giving pre-eminence to norms of *jus cogens*.¹²⁸ Others, for example, Orakhelshvili, have relied on the need to give effect to the hierarchically superior norms of *jus cogens* over normal customary international law rules of immunity.¹²⁹ Bassiouni, on the other hand, has relied on the universal jurisdiction applicable to the respective crimes as the basis for the exclusion of immunity.¹³⁰ Still others have argued that *jus cogens* violations cannot be recognised as official acts.¹³¹ Whatever the reasoning, the majority of writers seem to accept that immunity *ratione materiae* is not available for *jus cogens* crimes. There are, however, authors who argue that immunity *ratione materiae* continue to apply for all official acts irrespective of the type of crime.¹³² Fox, for example, has advanced the substance/procedure dichotomy relied upon by the International Court of Justice in *Jurisdictional Immunities of the State case*.¹³³ Nonetheless, by far, the majority of authors except that there is an exception to immunity *ratione materiae* in respect of *jus cogens* crimes.¹³⁴

It is the case that there have been cases where prosecutions have not been pursued because of immunity *ratione materiae*.¹³⁵ Yet the weight of the authorities support the content of Draft Article 7. The practice outlined lays a sufficient basis for draft article 7 as adopted by the Commission, whether as codification or progressive development.

¹²⁶ Cherif Bassiouni ‘International Crimes: “*Jus Cogens*” and “*Obligatio Erga Omnes*”’ (1996) 59 *Law and Contemporary Practice* 63, at 63; Alexander Orakhelshvili ‘State Immunity and International Public Order’ (2002) 45 *German Yearbook of International Law* 227; Sevrine Knuchel ‘State Immunity and the Promise of *Jus Cogens*’ (2010/2011) 9 *Northwestern University Journal of Human Rights* 149;

¹²⁷ Andrea Bianchi ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 *European Journal of International Law* 491, at 504.

¹²⁸ *Ibid.*

¹²⁹ Orakhelshvili *supra* note 126, at 263.

¹³⁰ Bassiouni *supra* note 126.

¹³¹ Rosanne van Alebeek *The Immunities of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford, 2008), 241. See also Andrea Bianchi ‘Denying State Immunity to Violators of Human Rights’ (1994) 46 *Austrian Journal of Public International Law* 195;

¹³² Gionata Buzini ‘The Enduring Validity of Immunity *Ratione Materiae*: A Reply to Professor Pisillo Mazzechi’ (2015) 17 *Questions of International Law* 33. See also Caban *supra* note 91.

¹³³ Hazel Fox *The Law of State Immunity* 2nd Edition (Oxford, 2008), at 525. See also Andreas Zimmermann ‘Sovereign Immunity and Violations of International *Jus Cogens* – Some Critical Remarks’ (1994/1995) 16 *Michigan Journal of International Law* 433.

¹³⁴ See *Secretariat Memorandum supra* note 90

¹³⁵ See, e.g. the decision of the 2007 District Prosecutor of France not to initiate prosecution against Donald Rumsfeld as well as the decision of the Dutch authorities not to prosecute Pinochet in 1994 described in the *Secretariat Memorandum on Immunities supra* note 90.

4. Conclusion

The issue of immunities under customary international law, in particular whether there exist exceptions to immunity for serious crimes under international law, is an emotive one. This is illustrated by the fact that the Commission, a collegiate body that normally adopts decisions by consensus, only managed to adopt draft article 7 after a vote, accompanied by strong – and some may say acrimonious – explanations of vote. The issue is emotive because it is a microcosm for the long-standing battle for the soul of international law: will international law – at its core – protect sovereignty and the immunity implied by it or will it pursue a brave new world by promoting accountability and justice for the victims of atrocity crimes.

Proponents of sovereignty are quick to point to the unevenness of practice and decisions of domestic courts that uphold immunity as evidence that international law remains jealously protective of immunity and continues to be grounded in the unshakeable foundations of sovereignty. Proponents of the brave new world in international law have resorted to making normative arguments about ‘the good life’ and the fight against impunity. This article has tried to show that the pursuit of a brave new world in international law does not depend on a radical departure from state-centric, sovereignty-respecting international law. States through their practice – a manifestation of sovereignty – have shown that they are not indifferent to the plight of human suffering and have themselves promoted this brave new world in which the imperatives of immunity are moderated by the desire for justice and accountability. In the context of the immunity, State practice reveals that, in the limited case of criminal proceedings, there is a basis for the recognition of exceptions to immunity *ratione materiae*. Whether this recognition will lead to other exceptions, e.g. immunity *ratione personae*, immunity in civil proceedings and immunity of the State itself, remains to be seen. But for now, it can be said, that the adoption of draft article 7 by the International Law Commission paves the way for the advancement of a brave new world in international law.