

Council of Europe Seminar
Immunity of State officials from foreign criminal jurisdiction
(21 March 2014)

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I welcome this seminar on the immunity of State officials from foreign criminal jurisdiction, which is arguably the most important topic on the International Law Commission's current programme of work, at least measured in terms of its practical interest for States. It may yet also prove to be one of the most difficult.

I shall say a few words about the Commission's methodology as it applies to this topic; and then a word about the 'Troika' or 'Troika plus', and special missions. And I shall end, as requested, with a word about the *Jones and others* case in the European Court of Human Rights.

A. Points concerning the Commission's methodology in relation to this topic

The following general methodological points strike me as important for this topic. Indeed, I think Professor Escobar Hernández's introduction reflected some of these, and so too did Dr O'Keefe.

First, the Commission is very conscious that, as was said at the beginning of the 'Fragmentation' Study, "International law is a system".¹ One of the great contributions of the Commission, it seems to me, has been to the systematization and structure of the law. This is apparent, for example, in the care with which the Commission approaches questions of terminology, the concepts and indeed the very language of the law (in the six official languages of the United Nations). Examples

¹ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Conclusion (1), commentary: YBILC 2006, Vol. Two, Pt. II.

include the expression ‘circumstances precluding wrongfulness’ in the Articles on State Responsibility, and the term ‘countermeasures’. Even terms which today are universally used and understood, such as the ‘territorial sea’, were a source of confusion in the past. This contribution to the common language that is international law should not be underestimated.

A central feature of the Commission’s work lies in its privileged relationship with States. We rely heavily on States for information on their practice and case-law, and also for their reactions to what we produce, both in the Sixth Committee and in writing. We greatly appreciate the statements made in the Sixth Committee debate. These are studied very carefully by members of the Commission. It is good that the verbatim texts are now placed promptly on the ‘PaperSmart portal’ of the Sixth Committee,² and are thus more readily available.

States seem less good at making written comments. I strongly echo Professor Escobar’s appeal for replies; welcome what is said in the Sixth Committee

As I have written elsewhere,

“It may be thought that the International Law Commission is a potentially dangerous place. It is not dangerous in itself; it is the attitude of others, including courts and tribunals, that makes it so, in the sense that undue homage is sometimes paid to its work, whether that work is good, bad or indifferent, and whatever stage it has reached.”³

In other words, the Commission’s work is sometimes given more weight than it deserves. This is true not only of its final outcomes, but even of work in progress.⁴

The risk is particularly acute in a field, like that of immunities, where domestic courts

² <http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda/>

³ M. Wood, “‘Weighing’ the Articles on Responsibility of International Organizations”, in M Ragazzi (ed.), *The Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), p. 55, at p. 65.

⁴ A notorious example being the ICJ’s reliance, in the *Gabčíkovo* case upon the Commission’s first reading draft article on state of necessity as a ground for precluding the wrongfulness of an act: see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 at pp. 40-41, paras. 51-52.

are likely to be referred to the Commission's work.⁵ The danger is not of the Commission's own making. It is the fault of States, courts and others who use its product. Nevertheless, it means there is a need for particular care on the part of the Commission, particularly when it approaches a controversial issue or an issue that may well be addressed by national courts.

It follows that the texts that the Commission adopts, the articles, commentaries, report of the drafting committee (which I am pleased to see was mentioned by Ireland in the Sixth Committee last year) need to be written with great care. The need to do so in six official languages inevitably complicates the task. Yet sometimes there is insufficient time, at least for adequate collective input. A heavy responsibility then lies with the Special Rapporteur.

The Commission's commentaries are an integral part of its work product, and are often seen to be as important, if not more so, than the articles, guidelines, conclusions, etc. The latter can be very concise, and are often by no means self-explanatory. Interpreters, including the international courts and tribunals, routinely have recourse to the commentaries. Yet sometimes the Commission has relatively little time to consider the commentaries. They are not usually considered in the Drafting Committee or in a special working group (an exception being those prepared by Professor Crawford for the Articles on State Responsibility). Special Rapporteurs themselves may be hard pressed to find as much time as they would like to work up the commentaries. And the rest of the membership is lucky if it has the draft commentaries more than a couple of days before they come up for adoption in the plenary of the Commission. Then the opportunity to reformulate them is limited. It has to be done on the floor of the Commission, in public session, with summary records, and with a very limited time available. This was unfortunately the case with the commentaries on the first reading draft articles 1, 3 and 4 on the immunity of State officials from foreign criminal jurisdiction. The practical difficulty is compounded since the commentaries are naturally drafted in one working language (in the case of

⁵ For an extraordinary example of a national court paying regard to its own (mistaken) view of preliminary debates in the Commission, see the *Nezzar* case before the Swiss Federal Criminal Tribunal: Judgment of 25 July 2012 (BB.2-11-140).

the present topic, Spanish), which may or may not be the Special Rapporteur's mother tongue and very quickly translated by those who are not lawyers.

The present commentaries are of course those adopted on first reading. First reading commentaries may sometimes reflect differences of view, whereas those adopted at the final stage should be more consensual. It is particularly important that there be adequate time and consultation on the commentaries at second reading. Yet even those adopted on first reading may be influential and should be adopted with great care.

According to its Statute, the Commission's object is the promotion of the progressive development of international law and its codification. In the case of the topic *Immunity of State officials from foreign criminal jurisdiction*, the question has been raised whether the Commission should be seeking to state the *lex lata*, or engaging in *lex ferenda*. And should it, at least for this topic, distinguish clearly between the two?⁶ Differing views were expressed by States in the Sixth Committee in 2013. For example, Germany said:

“... Germany reiterates its position that the Commission should base its work on *lex lata*. The rules of immunity are predominantly rooted in customary international law. This is not without reason. Questions of immunity are politically highly sensitive as they refer to the delimitation and mutual respect of sovereign powers of States. Hence, a fine balancing of the sovereign rights of the States concerned is required. The rules of *lex lata* have proven to fulfil these prerequisites.”⁷

And Germany continued -

“We look forward to the third report, which will focus on the normative elements of immunity *ratione materiae* and also on the issue of exceptions to immunity. In this regard we would like to underline the paramount importance of specifically identified *opinio iuris* and relevant state practice in any analyses of these issues.”

Spain also addressed this matter, and made the following important point:

⁶ On such questions, see the recent article by Professor McRae: D. McRae, “The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission”, 111 (2013) *Journal of International Law and Diplomacy (Kokusaiho Gaiko Zasshi)*, pp. 75-94.

⁷ All citations are from the ‘PaperSmart portal’ of the Sixth Committee <http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda/>

“We also consider relevant the intention of distinguishing between *lex lata* and *lex ferenda*; it might not be relevant when drafting a project of treaty, but it does be relevant when the recipients are judges and lawyers.”

This reminds us of the point about how the Commission’s ongoing product may be viewed by national and international courts.

Some others, such as Iran, took a different position:

“... the subject should not be considered solely in terms of codification. Rather, it is both legally appropriate and practically convenient to formulate provisions *de lege ferenda* taking due account of the requirements of international relations of States.”

That brings me on to a related point. Some have suggested that the Commission should approach this particular topic through the lens of what they term variously ‘principles and values of the international community’ or ‘the system of values and principles of contemporary international law’ and similar expressions.⁸ Or as Portugal said in the Sixth Committee “The draft articles should properly reflect current trends in international law.” The Nordic States in 2013 suggested that immunity from domestic courts should somehow be influenced by developments in respect of international criminal courts and tribunals.

I do not find this a helpful way of looking at things. In my view, to seek to derive rules of immunity from such vague and subjective notions as ‘values’ of contemporary international law will lead us up a dead-end. It is to ask the Commission to engage in policy formulation at a most abstract and subjective level. There will be as many views as to what those values are as there are members of the Commission. Likewise, a search for ‘current trends’ is pretty meaningless. Such trends are very much in the eye of the beholder, not least in this field.⁹ People see trends where they want to see trends. In my view, the Commission should approach this topic in particular in a dispassionate way, “in a careful, sober and responsible manner” as the South African Representative said in the Sixth Committee, and in the

⁸ Special Rapporteur’s Preliminary Report (A/CN.4/654, 31 May 2012), paras. 60, 72.1 (1.2), 73; Special Rapporteur’s Second Report (A/CN.4/661, 4 April 2013), para. 7(c).

⁹ I.Wuerth, “Pinochet’s legacy reassessed”, 106 (2012) *American Journal of International Law* 731-768.

light of State practice including that of national courts. We need to start from what States and courts have actually done, not what we wish they had done.

This is particularly relevant when it comes to considering such exceptions as there might be to immunity. But I shall leave that for another occasion. I would, however, like to quote again the words of the South African representative:

“While the fight against impunity is inextricably linked to our common aspiration to guarantee fundamental human rights and ensuring that justice is served, particularly for grave international crimes, such as genocide, war crimes and crimes against humanity, **we should ensure that, when considering developing the rules that accord immunity to state officials, misuse of jurisdiction for political purposes is avoided.**” (emphasis added)

B. The ‘troika’ or ‘troika plus’ question

The ‘troika’ or ‘troika plus’ question illustrates rather well the risks inherent in the present topic. I tend to share the concern, expressed for example by Israel, that the draft articles may be “formulated in a manner that might inadvertently misrepresent or be interpreted as limiting, the scope of personal immunity as it currently stands under customary international law.”

On this point, and in relation to the topic more generally, the interaction between States and the Commission will be particularly important. In the Sixth Committee in 2013, there seemed to be no opposition to the inclusion of the troika (though the Czech Republic seemed to suggest we might possibly want to look at the matter again). Quite a few speakers, however, said we should reconsider the decision to limit the narrow circle of holders of high ranking office in the State who are entitled to immunity *ratione personae* to the troika (that is, Head of State, Head of Government, Minister for Foreign Affairs); some even said that the *lex lata* would require this. given the case law it is difficult to see how.

So where does the Commission’s work so far leave the law on this point? In my view, it leaves the law where it was. The Commission’s work so far, and in particular the reaction of States to that work, should not be seen to have had any effect on the existing law:

- It tends to confirm the view that the troika enjoy immunity *ratione personae*. But very few questioned that that was the law anyway, in light of the reception by States of the *Arrest Warrant* judgment.
- It leaves unchanged the question whether the narrow circle extended beyond the troika and if so how far. That is a matter on which there is differing State practice. The differences were reflected within the Commission, and within the Sixth Committee.

Special missions

At this point, I want to draw attention to the importance of the customary and conventional law on special missions.¹⁰ The immunity of persons who are not resident diplomatic agents, but who are present only on a temporary basis, is an increasingly important matter. The international law in this field is now clearer than it was a few years ago, in light of recent State practice and case-law. I am pleased to see that it is once again on the agenda of CAHDI.

I should mention some recent developments in two States, the Netherlands and the United Kingdom. In the Netherlands, the Dutch Advisory Committee on Issues of Public International Law (CAVV) issued an advisory report (No. 20) in May 2011 on the immunity of foreign State officials. The Dutch Government agreed with the main conclusions and recommendations in a first response of 19 October 2011,¹¹ and then set out its position in more detail in a letter of 26 April 2012.¹² The letter states that –

“The government agrees with the CAVV that under customary international law members of official missions enjoy immunity. This applies both to members of foreign official missions visiting the Netherlands and to members of Dutch official missions visiting other countries. Members of official missions can be regarded as ‘temporary diplomats’.”

¹⁰ M. Wood, “The Immunity of Official Visitors”, 16 *Max Planck Yearbook of United Nations Law* (2012).

¹¹ Letter of 19 October 2011; House of Representatives, 2011-2012 session, 33000 V, no. 9.

¹² Letter of 26 April 2012 from the Minister of Foreign Affairs and the State Secretary for Security and Justice to the Senate and the House of Representatives on the immunity of members of foreign official missions.

The letter of 26 April 2012 contains much of interest. It lists four conditions that must be met:

- a. The official mission must be temporary in nature (generally “a relatively short time, ranging from part of a day to a period of several weeks”);
- b. The mission must be ‘from one state to another’. But ‘this does not mean that all the members of an official mission must be government officials. They may include, for example, parliamentarians or representatives of the business community’.
- c. ‘An official mission must be a mission to the government of the receiving state.’
- d. ‘The receiving state must have consented to receive the mission in question.’

In the United Kingdom, following the *Khurts Bat* case in the High Court,¹³ the Government informed Parliament on 4 March 2013 of ‘a new pilot process by which the Government will be informed of inward visits which may qualify for special mission immunity status.’ In doing so it explained that -

“A special mission is a temporary mission, representing a State, which is sent by one State to another with the consent of the latter, in order to carry out official engagements on behalf of the sending State.”

And went on to say that -

“In the case of *Khurts Bat v. the Federal Court of Germany* [2011] EWHC 2029 (Admin) the High Court recognised that, under customary international law, members of a special mission enjoy immunities, including immunity from criminal proceedings and inviolability of the person, and that these immunities have effect in the United Kingdom by virtue of the common law. However, the Court made clear that not everyone representing a State on a visit of mutual interest is entitled to the immunities afforded to members of a special mission but only where a visit is consented to by as a special mission. In the case of inward missions to the United Kingdom, the Court

¹³ *Khurts Bat v. The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin); [2011] All ER (D) 293 (Jul); *ILR* 147 (2012), 633.

affirmed that it is a matter for Her Majesty's Government to decide whether to recognise a mission as a special mission."¹⁴

In a Note of the same date to diplomatic missions and international organizations in London, the FCO drew attention to this new procedure "of which missions may wish to avail themselves, in order to clarify where the United Kingdom consents to an official visit as a special mission." The Note stated that

"The FCO is mindful of the obligations incumbent upon the United Kingdom under customary international law in respect of special missions. Under customary international law, a special mission is a temporary mission, representing a State, which is sent by one State to another State with the consent of the latter, in order to carry out official business. In this context, "official business" will normally involve official contacts with the authorities of the United Kingdom, such as a meeting [with] officials of Her Majesty's Government, or attendance at a ceremonial occasion, for example a Royal Wedding."

If the 'narrow circle' of persons entitled to immunity *ratione personae* were eventually to be limited, say to the 'troika', this would surely be on the understanding that the customary and conventional law on special missions is adequate to ensure that high-level visits can continue to take place without the risk to international relations that threats of prosecution, often politically motivated, may bring.

Jones and Others v the United Kingdom

Before concluding I have also been asked to say a word about the recent *Jones and Others case* before the ECtHR. As I am sure you all know, this was a long-awaited judgment of the Fourth Section of the Court, given on 14 January 2014. By 6 votes to 1, the Chamber upheld the line of cases from *Ad-Adsani* onwards, and applied that decision not just to cases brought against a foreign State as such but to those brought against individual named government officials. Although the case concerned civil liability, the reasoning is obviously significant for the question of exceptions to immunities from criminal jurisdiction.

¹⁴ Written Ministerial Statement, House of Commons, 4 March 2013.

The ECtHR's judgment followed careful and detailed consideration of the law by the English courts. The speeches of the late Lord Bingham and Lord Hoffman in the House of Lords are particularly impressive. Their analysis had been stimulated by the reasoning of the Court of Appeal, which had reached a different conclusion as regards the cases brought against individual officials.

I see the ECtHR judgment – together with the *Germany v. Italy* case - as confirming (contrary to the position taken by the amicus interveners – Redress, Amnesty, Interights and Justice)) that there is not in fact a discernable trend in State practice, or in court decisions, towards greater exceptions to the rule of immunity in the domestic courts for cases of 'crimes under international law'.