Codifying Immunity or Fighting for Accountability? International Custom and the Battle Over Foreign Official Immunity in the United Nations

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Expert and political bodies in the United Nations are deeply enmeshed in debates over the relationship between immunity and accountability. In 2006, the International Law Commission (ILC or Commission) launched a work program to examine the immunity of state officials from foreign criminal jurisdiction. The ILC’s activities have generated acrimonious divisions between Commission members who seek to codify expansive immunity rules allegedly protected by customary international law, and others who favor the progressive development of exceptions to immunity for officials who violate peremptory human rights norms. Similarly contentious debates have occurred in the Sixth Committee of the General Assembly which, since 2009, has analyzed the scope and application of universal jurisdiction—an issue that directly implicates the immunity of foreign officials from domestic criminal prosecution.

These parallel inquiries pose complex questions concerning each U.N. body’s functions and the relationship between them. The inquiries also raise interesting issues concerning the sources and methodologies that each body applies to identify existing custom, discern emerging trends in state practice and opinio juris, and evaluate whether to codify or progressively develop the customary law of foreign official immunity in an ILC-drafted multilateral treaty.

We are primarily interested in the institutional and strategic issues raised by the simultaneous assessments of the same or similar legal issues in multiple U.N. venues. In this paper, we consider a related issue—the role that international custom, and specifically opinio juris, has played in the Commission and Sixth Committee debates over foreign official immunity. As we explain, the ILC and the Sixth Committee have implicitly emphasized opinio juris over state practice. While not ignoring state practice, the studies and debates in each body ultimately give pride of place to ICJ judgments and to assertions by state representatives to determine the scope of immunity that international law requires. This emphasis on legal obligation implicates three broader methodological questions—first, what are the relative values of domestically-focused acts—such as national court decisions—versus international acts in assessing custom; second, how to evaluate competing claims of opinio juris by state delegates and independent experts; and third, whether ICJ judgments, and more broadly the acts of international organizations whose members serve in an individual capacity as professional “experts,” are declarative of existing custom or merely persuasive evidence that ILC and Sixth Committee members may reject.

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I. THE CATALYSTS FOR ILC REVIEW OF FOREIGN OFFICIAL IMMUNITY

Beginning in the late 1990s, a series of events increased the legal and political salience of clarifying the immunity of foreign government officials from criminal investigations and prosecutions. The watershed event was the 1999 decision in the Pinochet case, in which the British House of Lords held that Chile’s former head of state could be extradited to Spain to stand trial for torture.1 In the ensuing decade, a number of national courts declined to grant immunity to former heads of state as well as current and former lower-level officials from such investigations and prosecutions, especially where international law provides a basis for exercising universal jurisdiction.2 Some countries responded to these trends by narrowing their universal jurisdiction laws to expressly recognize foreign official immunity or limit the circumstances in which courts consider criminal prosecutions of such officials.3 These events highlighted the need for a comprehensive analysis of state practice and opinio juris regarding the rapidly evolving relationship between accountability and immunity.

In 2006, the ILC decided to include in its work program a study of “Immunity of State officials from foreign criminal jurisdiction.” An ILC working group had identified this topic as suitable for ILC consideration based upon criteria previously identified by the Commission:

(a) The topic should reflect the needs of States in respect of progressive development and codification of international law; (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; (c) The topic is concrete [and] ... the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of international community.4

As the discussion below reveals, however, the ILC’s application of these criteria—and related issues such as the weight of different sources of international law, the methodologies used to analyze these sources—have proven to be highly contentious.

II. CONTROVERSIES IN THE ILC OVER EXCEPTIONS TO FOREIGN OFFICIAL IMMUNITY

The ILC’s work began in earnest with the appointment of Roman Kolodkin of Russia as the Special Rapporteur. During his tenure as Special Rapporteur, Kolodkin wrote three reports on the immunity of state officials: a Preliminary Report in 2008,5 a Second Report in 2010,6 and a

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Third Report in 2011. The first two reports prompted lively debates within the ILC. The central bone of contention was the role of the ILC and the methodology it should employ. Was the ILC to execute a technical codification of existing custom? Or was the Commission to engage in a more policy-driven process of progressive development? Wrapped up in these larger questions were issues about the appropriate indicia of state practice and opinio juris, and the relationship between the ILC, tribunals like the ICJ, and political bodies like the Sixth Committee.

A. The Preliminary Report

An initial question in the Preliminary Report focused on which materials the ILC should consider in assessing customary international law, and whether the Committee should look principally to lex lata or lex ferenda. With respect to the issue of sources, an immediate rift opened among the members of the Commission with respect to the value of the Arrest Warrant case in assessing the customary law of immunity. While ILC members agreed that the Arrest Warrant case stands for the proposition that immunity is governed principally by customary international law, they divided sharply on the merits of the decision itself. Kolodkin’s Preliminary Report took the Arrest Warrant Case as an authoritative statement regarding the absolute nature of immunity. Alain Pellet of France and John Dugard of South Africa did not mince words in disagreeing. Pellet, for example, stated that he was:

unable to share the Special Rapporteur’s reverential respect for the stance of the [ICJ] in the Arrest Warrant case. While the Court generally applied existing law, it was quite prepared, when it felt that circumstances so required, to interfere in the process of elaboration of the law, by supplementing it, shifting its direction or, less felicitously, seeking to prevent or curb current trends.

Pellet continued that, while he “was willing to concede, albeit with deep regret” that the immunity for the so-called “troika” (heads of state, heads of government, and foreign ministers) could be argued to be absolute de lege lata, de lege ferenda the Court’s judgment was open to “severe criticism.” The trend towards restricting immunity, in Pellet’s view,

had been clearly discernible until the Court’s attempt to apply the brakes to it in 2002, and it would redound to the Commission’s credit if it were to reinforce the trend towards restricting, or even barring, procedural immunity for all State officials in the case of the most heinous international crimes.

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8 Preliminary Report, supra note __, at 10-11.
9 Id. at 8.
10 Id. at 8.
11 Id.
Dugard echoed Pellet’s criticism of the *Arrest Warrant* judgment, describing the decision as “disastrous.”  Dugard also called attention to state practice following the decision, noting that South Africa (his own country) “had enacted legislation that would authorize the courts to try foreign heads of state for international crimes without their being able to raise the plea of immunity.”  Listing several other states that had enacted jurisdictionally permissive statutes following the *Arrest Warrant* case, he called on the Special Rapporteur to consider the role of national legislation in assessing the current state of the customary law of immunity. Other ILC members focused on different sources. For example, Marie Jacobsson of Sweden emphasized the role of state practice and in particular its influence in Latin America on the Inter-American Court of Human Rights. Hanquin Xue of China noted the importance of domestic court decisions but cautioned that national court decisions should be examined to be sure they were consistent with general state practice and *opinio juris*. Bernd Niehaus of Costa Rica echoed this point, while suggesting that the emphasis should remain on international sources.

The *Preliminary Report* said little about exceptions to immunity, the issue that was to become the fulcrum around which debate pivoted. Some delegates sharply criticized this omission and the link to the sources to determine custom. The *Preliminary Report* also sparked a debate on the relationship between jurisdiction, including universal jurisdiction, and immunity. Kenya’s Amos Wako emphasized that impunity did not exist when a defendant’s national courts or international tribunals exercised jurisdiction. Moreover, he cited to a decision of the African Union condemning the abuse of universal jurisdiction, arguing that such abuse required clarifying and developing the law in this area. Despite the arguments of Wako and others, Kolodkin responded that the ILC did not need to take a substantive position on jurisdiction.

**B. The Second Report**

The *Second Report* picked up the issue left unaddressed in the *Preliminary Report*: exceptions to immunity. However, the discussion of the *Second Report* mostly continued the debates begun in response to the *Preliminary Report*. First, was the Commission engaged in codification of established custom, or should it engage in progressive development? The issue was important because the Commission was largely able to reach consensus that exceptions to immunity were rare, if they existed at all, under existing law. But many Commission members felt that the ILC should be engaged in progressive development, and that there was ample evidence to support the emergence of exceptions to immunity. A second issue concerned the relationship of the Commission to other international entities, with Commission members

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13 Id. at 11.


15 Id.


17 Id.

18 Id. at 10.
expressing concerns about the ILC’s mandate from the Sixth Committee and its distinct function in contrast to the ICJ. We discuss each of these issues in turn.

In introducing the report to the ILC for debate, Kolodkin expressed the view that *de lege lata* “the personal or functional immunity of State officials from foreign criminal jurisdiction was a rule of general international law requiring no proof, whereas it was necessary to prove that there were exceptions to that immunity.” 19 Elaborating, Kolodkin stated that “[t]he prevailing view was that the personal immunity of [sitting heads of state, heads of government, and ministers of foreign affairs] was absolute and subject to no exceptions.” 20 In his report, he considered and rejected a number of possible rationales for exceptions to immunity: *jus cogens* norms, universal criminal jurisdiction, and the emergence of a rule of customary international law establishing an exception to immunity. 21

Despite his view on existing custom, Kolodkin allowed that exceptions to immunity “had to be accepted in consequence of [international law’s] progressive development.” Nevertheless, he “was not entirely convinced that such development might be a sign of progress.” He expressed concern for the way in which the related expansion of exceptions to immunity and universal jurisdiction had affected the relations between “certain developed and developing states.” 22

Concluding, Kolodkin stated that:

> The Commission’s primary task was to codify international law on the topic. . . . The Commission could contribute to the uniform application by various national courts of international legal standards relating to the officials’ immunity. That would enable it to abandon attempts to devise what were sometimes rather dubious foundations for the immunity of State officials, or the absence thereof. 23

The debate on the Second Report was, to put it mildly, contentious. Dugard immediately rejected as “nonsense” the notion that exceptions to immunity were a point of contestation between developed and developing states. Moreover, he “resented such a very patronizing attitude” that led Kolodkin to suggest that officials should be immune from prosecution for the gravest crimes “simply because they came from a developing country.” 24

With regard to the ILC’s role, Dugard rejected Kolodkin’s premise that the Commission should engage in the technical exercise of codification. The Commission, in his view, faced a choice between accountability and impunity: “In either case, it would be engaging in progressive development, for it could not hide behind the fig leaf of codification as an excuse for retaining the old law which had existed before the International Criminal Court, before the human rights movement and before current demands for accountability.” 25

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20 Id. at 5.
21 Id.
22 Id.
23 Id. at 7.
24 Id. at 9.
25 Id. at 10.
As for the ILC’s approach to progressive development, Dugard framed the methodological choice as one between two opposing cultures: “the culture of seeing legal issues through the spectacles of State interest, and the culture of practicing and academic lawyers and of non-governmental organizations, who were not blinded by the interests of States.” He opined that “members of the Commission were first and foremost lawyers and not State officials,” whereas Kolodkin “was placing himself in the camp of State officials rather than in that of lawyers.” Pellet echoed many of Dugard’s sharp criticisms. In particular, he distinguished between the ICJ’s role, which must make decisions based on lex lata, and the Commission, whose “first duty was the progressive development of international law.” Dugard’s and Pellet’s trenchant remarks prompted only light pushback from other ICL members.

Donald McRae of Canada concluded the debate with some reflections on this choice. McRae began by characterizing the two opposite poles of the debate: Kolodkin’s view as one based on existing customary international law and supported by the majority of state practice and opinio juris, against Dugard’s call to “take a stand on a matter of fundamental principle.” The debate between these positions—between codification and progressive development—“was about policy, but he was not sure that the essential policy question could be answered by saying that one approach was right as a matter of law and one was wrong. Neither could the problem be solved by trying to achieve consensus on what the law was . . . .”

C. A New Special Rapporteur

In 2012 the ILC appointed a new Special Rapporteur, Concepcion Escobar Hernandez. This appointment came at the beginning of a new ILC quinquennium. Elections to the Commission were held in 2011 and Russia appointed Kolodkin as ambassador to the Netherlands.

Hernandez began by issuing a single preliminary report (the Hernandez Preliminary Report). The Report, although brief, signaled a clear break from the approach taken by Kolodkin, particularly with respect to methodology. Hernandez candidly explained that her reports would address codification and progressive development. She also stressed the need to base the Commission’s work on “the current values of the international community.” To do otherwise, she contended, would render the Commission’s work “pointless and unproductive, since it would fail to take into account new legal principles, values and realities . . . .”

If Kolodkin’s reports provoked a pushback by those in favor of progressive development, Hernandez’s report galvanized the opposite methodological concerns. Georg Nolte of Germany expressed concern about the lack of empirical evidence, in the form of domestic cases and

26 Id. at 13.
27 Id.
29 Id. at 19-20.
30 Id. at 20.
31 Id. at 20.
legislation, in support of a trend towards restricting immunity.\textsuperscript{35} He worried that the report sought to “pursue an abstract and systematic method that entailed deducing conclusions from certain conceptual distinctions” in the civil law tradition, when an inductive approach based on practice was more appropriate.\textsuperscript{36} Relatedly, he underscored the importance of maintaining analytical clarity between analysis based on \textit{lex lata} and analysis based on \textit{lex ferenda}.\textsuperscript{37} Debates in the Sixth Committee demonstrated a desire by states for greater clarity as to the distinctions between codification and progressive development.\textsuperscript{38} Finally, Nolte questioned whether there was in fact a trend towards restricting immunity in national courts, as Hernandez’s report claimed, citing the ICJ’s 2012 judgment in \textit{Germany v. Italy} and Ingrid Wuerth’s study in questioning whether national courts were in fact restricting immunity.\textsuperscript{39} Similar concerns were echoed by Huang Huikang of China and Shinya Murase of Japan.\textsuperscript{40}

Hernandez’s second report (\textit{Hernandez Second Report}) was released in April 2013.\textsuperscript{41} The Commission is set to debate the report during the Summer of 2013, and so little can be said at this point about reactions to the report. The report proposes draft articles on basic issues, such as the scope of a possible treaty, defining the concepts of jurisdiction and the different kinds of immunity, and developing the scope of immunity \textit{ratione personae}.

In terms of methodology, the \textit{Hernandez Second Report} is notable for continuing an approach favored by Kolodkin: accepting (at least sometimes) decisions of international courts as indicative of customary international law. For example, in discussing who should benefit from immunity \textit{ratione personae}, the \textit{Hernandez Second Report} defends including ministers of foreign affairs on the grounds that a contrary view is “difficult to reconcile with the judgment of the [ICJ in the \textit{Arrest Warrant} case], which can be assumed to reflect the applicable customary international law at the time of its issuance.”\textsuperscript{42}

Notwithstanding the emphasis on progressive development in the \textit{Hernandez Preliminary Report}, the \textit{Hernandez Second Report} hews closely to codification. The \textit{Report} takes the position that officials beyond the so-called \textit{troika} are not afforded immunity \textit{ratione personae} under current customary international law and that any decision to extend immunity beyond the \textit{troika} would constitute progressive development.\textsuperscript{43} Interestingly, the Report’s primary evidence that existing custom does not support the extension of immunity is drawn from remarks made by state representatives in response to a query from the ILC.\textsuperscript{44} The Report does not analyze state practice on this issue in any depth, instead noting only that such practice is

\begin{footnotesize}
\begin{enumerate}
\item Id. at 7.
\item Id.
\item Id. at 9-10.
\item Id.
\item Id. at 8.
\item Id. at 10, 12.
\item Id. at para. 58.
\item Id. at paras. 67-68.
\item Id. at n. 41 & n. 42.
\end{enumerate}
\end{footnotesize}
“not widespread, nor is it coherent or consistent.” Similarly, the Report dismisses as “special regimes that fall outside the scope of this topic” international agreements such as the Vienna Conventions on Diplomatic and Consular Relations that extend immunity _ratione personae_ beyond the _troika_. From a methodological standpoint, then, the Report relies most heavily on state’s expressed views as to _opinio juris_ to the exclusion of other sources.

### III. THE SIXTH COMMITTEE’S PARALLEL INVESTIGATION OF UNIVERSAL JURISDICTION

In July 2009, the Republic of Tanzania, acting on behalf of the African Group, submitted a request to include “the subject and scope of universal jurisdiction” on the agenda of the General Assembly. The African Group acted at the request of the African Union, which had adopted a resolution calling for “exhaustive[]” discussions at the U.N. in response to the “blatant abuse” of the principle of universal jurisdiction by non-African (especially E.U.) nations. The Tanzanian request noted similar concerns, including the “ad hoc and arbitrary application [of the principle], particularly towards African leaders.”

The General Assembly assigned the matter to the Sixth Committee, which discussed the matter in 2009 and 2010. State representatives expressed widely divergent views on the propriety and scope of universal jurisdiction. Delegates from China, Ethiopia, Iran, Libya, Sudan, Swaziland, and Tunisía, among others, emphasized that foreign official immunity and the principle of state sovereignty bar the application of universal jurisdiction. In contrast, delegates from countries including Australia, Costa Rica, El Salvador, Germany, Guatemala, Kenya, Norway, Slovenia, and Switzerland generally praised universal jurisdiction as a back-stop to other national prosecutions and as a key tool to prevent impunity for international crimes. Some of these countries recognized, however, that courts should exercise universal jurisdiction “in good faith and in a manner consistent with established principles” of international law.

In part in response to this controversy, in October 2011 the Sixth Committee established a Working Group to review the scope and application of universal jurisdiction. The Working Group has held informal consultations that have prompted additional discussions in the Sixth Committee.

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45 _Id._ at para. 63.
46 _Id._ at para. 65.
49 Press Release, U.N. GAOR, Sixth Committee, Legal Committee Delegates See Principle of Universal Law as Safeguard Against Impunity for Major Crimes; Some Caution on Risk of Abuse, GA/L/3371 (Oct. 20, 2009) [2009 Sixth Committee Meeting].
51 2009 Sixth Committee Meeting, _supra_ note 48 (Andrew Rose (Australia)). Other countries—including Austria, the Democratic Republic of the Congo, Lebanon, Peru, South Africa, and Thailand—expressed cautious support for the Sixth Committee to consider various aspects of the topic. _Id._
Committee. These debates have made little substantive headway. Delegates have mostly reiterated platitudes, recognizing the validity of universal jurisdiction and of immunity in the abstract and calling for “a delicate balance” between the two legal principles.

Debates have also focused on the appropriate division of labor between the Sixth Committee and the ILC. Several delegates called for referring the agenda item to the ILC for further study, stressing “the fundamentally juridical and technical nature of the subject.” Others opined that “[b]ecause the Committee was a political body and the [ILC] an expert one, it was more appropriate for the Commission to study the topic further.” In contrast, the representative from Russia countered that “the possibilities for reconciling positions had not been exhausted,” and argued in favor of further discussions in the Working Group.

These statements reveal that the Sixth Committee’s review of universal jurisdiction has proven to be contentious not only because of the substantive legal issues involved, but also due to the uncertain relationship to the ILC’s discussions on immunity. Seizing on this ambiguity, state representatives have discussed the specific questions, methodologies, sources, and outcomes that should guide the ILC’s work. For example, several delegates urged the Commission to focus on “reviewing and summarizing relevant practices and rules” of immunity instead of establishing new immunity rules. Thus, even as the Sixth Committee debates whether the ILC should take the lead in developing legal texts for both universal jurisdiction and immunity, it remains deeply invested in the form and substance the ILC’s work.

IV. CONCLUSION

The debates in the Sixth Committee and the ILC highlight three points about where these institutions look for evidence of customary international law in general and opinio juris in particular. First, while participants frequently reference state practice (even if only abstractly) the debates contain very few explicit references to opinio juris. This disparity reflects, in all likelihood, the simple problem that acts are easier to identify than beliefs. Having said that, however, much of the state practice on immunity flows from national court decisions and, to a lesser extent, national legislation and executive branch positions taken in domestic litigation. The domestic focus of these sources has led some representatives to caution that their value as evidence of custom may be limited. This cautionary approach, although sometimes expressed as a concern about state practice, might also be reframed as a concern that domestically-focused acts lack sufficient indicia of opinio juris.

54 Id.
56 Id.
The debates and reports also place great emphasis on the declarative acts of state representatives in international organizations and the decisions and acts of “expert” international bodies. The Hernandez Second Report, for example, relies heavily on declarative statements by states in the Sixth Committee rather than domestic sources. While technically the declarations of states in international organizations are state practice, their declarative content gives them their greatest effect as *opinio juris*. Thus, our second observation is that when it comes to time to write draft articles, as the Hernandez Second Report suggests the ILC will do, representatives may be inclined to privilege *opinio juris* over state practice.

Third, and closely related, the debates raise the complicated issue of what weight to give the declarative acts of international bodies – such as the ICJ and the ILC – comprised of “experts” that serve in their individual capacity and that are charged with making a determination as to what customary law is. The acts of these bodies are neither state practice nor *opinio juris* as traditionally understood. Thus, their value as evidence of custom should be contingent either on the correctness of their analysis or on subsequent state practice and *opinio juris* that endorses that analysis. Yet with some notable exceptions, participants in the ILC debates do not probe deeply the underlying evidentiary basis of, or the subsequent reactions to, these declarative acts. Rather, as the Second Hernandez Report states with regard to the Arrest Warrant case, these acts are often “assumed” to reflect customary international law. This assumption, difficult to justify with reference to custom’s traditional methodology, has the effect of giving expert international bodies an independent ability to affect the formation of customary law.

These acts and decisions may be understood as a form of delegated *opinio juris* – statements about what states collectively believe custom requires. Using expert bodies, rather than political bodies such as the General Assembly, to make these statements may be useful for states. Expert bodies, while not entirely depoliticized, are also not free to reach results unconstrained by prior precedent, broadly construed to include both traditional evidence of custom and the acts of other international organizations. Thus, delegating the formulation of *opinio juris* to expert bodies like the ICJ and the ILC may allow states to pursue their agendas in fora that are partly constrained by professional norms and methodologies, but relatively less constrained by the diplomatic and procedural limitations of political bodies. The increased importance of expert international bodies in the formation of customary rules regarding the immunity of foreign officials has also prompted the creation of other expert bodies, such as the African Commission on International Law and the AU-EU ad hoc Expert Group on the Principle of Universal Jurisdiction. The rise of these competing expert bodies may lead to a distinctive type of forum shopping among methodologically-constrained international bodies, each of which can plausibly claim to generate authoritative declarative acts.