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Change in International Law through Informal Means

The rise of exceptions to state official immunity for international crimes

Pedro Martinez Esponda

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Change in international law through informal means: the rise of exceptions to state official immunity for international crimes[1]

Pedro Martínez Esponda

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1. Introduction

The question of foreign state official immunity for crimes not committed in the territory of the prosecuting state is, in historical terms, a rather recent one. Before the last decade of the twentieth century, legal debates on immunities focused on issues of general state immunity and, less controversially, on diplomatic immunities. Non-diplomatic state official immunity seems to have been a non-issue.[2] It was out of question that any state was barred by the international rules on jurisdiction and immunities from prosecuting a foreign state official for crimes that had not taken place in its territory nor involved its nationals regardless of the nature or seriousness of the crime

[1] This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 740634). This work forms part of a broader research endeavour being conducted at the Global Governance Center of the Graduate Institute of International and Development Studies in Geneva. The project focuses on selected case studies of successful and failed normative change among different issue-areas of international law – one of which is the law of immunities – with the purpose of better understanding dynamism in international law. It does so by building and testing hypotheses, such as the one used in this work, about how normative change takes place through different paths depending on different contextual factors. Ultimately, the project seeks to contribute to the debate on change in international law by providing a balanced theoretical account that incorporates both normative and social insights into it, something that has so far been seldom done. See: https://paths-of-international-law.org/

[2] See, for instance, how three leading international law textbooks such as Brownlie, Nguyen and Shaw, do not mention non-diplomatic state official immunities whatsoever in their pre-2000 editions, while all of them do in their post-2000 editions. See: I. Brownlie, *Principles of Public International Law* (5th ed, 1998), at 361; Nguyen Quoc Dinh, A. Pellet and P. Daillier, *Droit International Public* (5e éd, 1994), at 434; M. N. Shaw, *International Law* (4th ed, 1997), at 514–515.

committed. The immunity of foreign state officials in this regard was simply perceived as absolute.[3] The few instances of actual prosecution of state officials by jurisdictions with no necessary territorial or nationality links to the crimes or the individuals prosecuted had been undertaken by courts of international nature, such as the post-World War II international military tribunals. In these instances, however, no real questions about immunity arose, given that the international nature of the jurisdictions excluded questions of domestic immunities. Thus, the question of foreign non-diplomatic state official immunity before domestic courts seems to have been uncharted waters for most of the history of international law.

This has been changing since the last years of the twentieth century. Today, whether or not foreign state official immunity applies in proceedings before domestic courts is an inescapable component of any discussion about immunities, whether academic or institutional. Moreover, there are good reasons to claim that in present times the majoritarian view among international lawyers is that international law provides an exception to state official immunity in cases involving the prosecution of international crimes – at least when the officials concerned are not covered by immunity *ratione personae*. The strongest indication of this tendency is perhaps the recent adoption by a clear majority vote of a draft article establishing precisely such exception at the International Law Commission (ILC), in the context of the works on the topic of Immunity of State officials from foreign criminal jurisdiction.[4] It is thus plausible to argue that an exception to state official immunity has developed for international crimes.

What seems less clear, however, is how this change transpired. At least from the perspective of the doctrine of sources, claims that international customary law has developed in this direction are, to say the least, methodologically weak. The scattered and contradicting *opinion juris* and state practice on the matter make it a very complicated argument to put forward. Majoritarian narratives therefore seem to run counter to formal arguments: what most international lawyers believe to be the law on state official immunity is not convincingly explainable through article 38 of the Statute of the International Court of Justice (ICJ).

This article seeks to explore this paradox and provide a non-formalistic, discursive account of change in international law. The main claim here will be that, as shown by the case of the law of state official immunities, discourse in international law often moves faster than any of the formal sources, leading to states of discursive *faits accomplis* that the traditional methodology struggles to account for. The idea is to look at the main factors that explain how this phenomenon happens – *i.e.* the factors that foster normative change in discourse and the factors that simultaneously block it from transiting through the formal sources. This is done by focusing on the specific case of the

[3] See, for example, how the immunity of foreign state officials was simply described as being absolute in : J. Bénezet, *Etude Théorique Sur Les Immunités Diplomatiques* (1901), at 23; R. J. Dupuy, *Le Droit International* (1966), at 31; D. A. Retortillo y Tornos, D. M. Colón y Cardany and P. P. Gómez, *Vocabulario de Derecho Internacional Público* (1910), at 121; Reynaud, 'Les Relations et Immunités Diplomatiques', 36 *Revue de Droit International de Sciences Diplomatiques et Politiques* (1958) , at 425.
[4] See: http://legal.un.org/ilc/sessions/69/

development of an exception to state official immunity *ratione materiae* based on international crimes. The working hypothesis is that change in international law is achievable through informal means even in settings where states are inactive or opposed – blocking treaty-making and international custom – provided that there exist: a) other actors that are persistent and resilient enough to stand the opposition of states; b) discursive preconditions that make a change attempt legally and socially plausible; and c) minimal institutional channels that allow some type of authoritative endorsement of the change attempt.

This hypothesis rests on an assumption that needs to be spelt out from the outset. International law and thus change in its rules, however pluralistic the international legal order might have become in the last fifty years, still rests to a large extent on what states do, think, and want. The doctrine of sources – which places states as the origin of validity in international law – continues to be the most used and most highly regarded yardstick of argument in international law. Thus, when states make treaties to create or modify conventional regimes, or when they follow homogeneous patterns of behaviour, a change in a rule of international law is significantly clearer and less controversial than when treaty-making efforts fail or when states follow contradicting patterns of behaviour. Now, to say this about the international legal system is not to say that change is not feasible when states oppose it. It just means that the system has a clear preference for states' will and conduct as source of validity. What it takes to counter this systemic preference is the object of study here. The account of change in international law proposed in this paper is therefore one that moves in scales of formality, whereby the higher state support for a given normative change is, the more likely it is to transit through formal means of normative change. Likewise, the lower the support of states is with regard to a change attempt, the less formal these means will be, and the bigger the role played by informal elements.

The case of the international crimes exception to state official immunity *ratione materiae* provides an interesting window to explore this theoretical approach because it moves rather towards the lower end of the scale of formality, while combining different elements of support by different actors. The structure of this article seeks to reflect these different aspects. First, the article introduces the evolution of the debates on state official immunity through a historical overview. Then, it focuses in three separate sections on each of the conditions set out in the hypothesis – actors, legal and social preconditions that catalyse change, and institutional availability. Finally, it reflects on the state of the debate on state official immunity *ratione materia* nowadays to draw insights on the extent to which it can be said that change has happened in the field of immunities. A brief conclusion sums up the different elements analysed, and discusses the systemic implications of the account provided in the article.

2. Historical overview

The debate on exceptions to state official immunity emerged abruptly towards the end of the last century. No one seems to have seriously thought of possible exceptions to state official immunity until two key cases came to public attention in 1998 and then in 2002: *Pinochet* before the UK House of Lords, and *Arrest Warrant* before the ICJ.[5] In *Pinochet,* the extradition of Augusto Pinochet – the former dictator of Chile – from the UK, was being requested by Spain to prosecute him for torture, and he sought to prevent that by resorting to British courts. In *Arrest Warrant*, Belgium had issued an arrest warrant against the incumbent minister of foreign affairs of the Democratic Republic of Congo (DRC) for war crimes and crimes against humanity, and DRC initiated proceedings before the ICJ under the argument that such action violated the international immunities owed to such high officials. Independently of their outcome,[6] these two cases had the double effect of, first, calling the attention of the general public, academia, and the media over the topic of the immunities of state officials before domestic courts, and second, of setting the substantive parameters on which the discussion on the matter would then unfold.

The House of Lords and the ICJ both transposed the rationales of the law of state and diplomatic immunities to the issue of state official immunity and placed at the core of the debate the distinction between acts undertaken in an official and in a private capacity. In other words, they framed state official immunity as depending on this dichotomy. Simultaneously, both discussed the issue of the normative hierarchy of international crimes. However, *Pinochet* and *Arrest Warrant* in themselves did little to settle the two fundamental questions that follow naturally from framing the issue in this was. First, whether to consider international crimes as acts undertaken by their perpetrators in an official or private capacity was not decisively ruled upon neither by the House of Lords nor by the ICJ. And second, both courts eschewed having to decide on whether, for reasons of normative hierarchy, international crimes would displace immunity *ratione materiae*.[7]

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[5] It must be said, however, that the related issue of exceptions to state immunity for violations of human rights had been touched upon in several cases in the United states concerning the application of the Foreign Sovereign Immunities Act, such as *Von Dardel I, Von Dardel II, Amerada Hess, Nelson,* and *Siderman de Blake.* The outcome of these cases was, in general, adverse to the removal of state immunity, even in cases of violations to human rights. See: Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights', in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997) , at 420–429.

[6] On the substantive issue of immunities, the *Pinochet* decision was of limited relevance because the House of Lords addressed head-of-state immunities not as a matter of general international law, but as a question within the specific regime of the Torture Convention, interpreted by the Lords as implying a tacit waiver to immunity. As concerns the *Arrest Warrant* case, the Court ruled that an incumbent minister of foreign affairs enjoys full immunity *ratione personae* during the time of his or her appointment. However, its highly influential *dictum* in paragraph 61 of the judgement, the ICJ explained that once the officer has ceased official functions, he or she could be tried "in respect of acts committed during [the period in office] in a private capacity". See: UK House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17*, 1999; ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment)*, 2002.

[7] Although it must be said that the ICJ did determine that the specific nature of international crimes would not displace immunity *ratione personae*, a point that has largely remained undisputed thereafter.

These questions remained open during the years following *Pinochet* and *Arrest Warrant* and arguably until around 2007. While some factors evidence a broader acceptance of the notion of exceptions to immunity *ratione materiae* based on international crimes during this period, there were significant setbacks, too. On the side of acceptance, one can note the fact that the *Institut de Droit international* (IDI), after dealing exclusively with the issue of state immunity for over a century,[8] adopted in its session of Vancouver in 2001 a resolution expressly establishing that former heads of state "may be prosecuted and tried when the acts alleged constitute a crime under international law".[9] Moreover, in its session of Naples in 2009, it adopted yet another resolution establishing that "no immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".[10] These resolutions, approved unanimously, hint an enlargement of the degree of acceptance of these exceptions. Yet, on the side of the setbacks, it is noteworthy that the two universal jurisdiction criminal laws that enabled *Pinochet* and *Arrest Warrant* to happen in the first place were repealed by Spain and Belgium, respectively, after facing heavy international pressure by the United States and China – as will be discussed below. In the academic world, the issue remained highly controversial as well, and something similar can be said about its evolution within national jurisdictions.[11]

A defining moment then came in 2007, when the ILC took it upon herself to clarify these questions and end the controversies. At the recommendation of its Planning Group, and with the endorsement of the Sixth Committee of the General Assembly, the ILC included that year the topic of "immunity of state officials from foreign criminal jurisdiction" in its programme of work. Roman Anatolevich Kolodkin was appointed as the first special rapporteur on the matter, and under his tenure three reports were issued. Overall, his view on the matter of the nature of international crimes was that they could not under any circumstance be understood to be acts of private character not amenable to immunity, given that "the very possibility of performing illegal acts on a large scale arises for

[8] In a remarkably early pronouncement on the matter, the IDI framed the rules of state immunity in its session of Hamburg in 1891 as only allowing civil claims for matters where the state acted in a private capacity, and not for actes de souveraineté, adding in article 6 that the same goes for sovereigns and foreign *chefs d'Etat*. Then, in its only resolutions on immunities during the entire twentieth century – those of Aix-en-Provence of 1954 and Basel in 1991 – the IDI confirmed this relative approach to state immunity, without any reference to heads of state or state officials.

[9] Institut de droit international, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver Session), 26 August 2001, article 13.

[10] Institut de droit international, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (Naples Session), 2009, article III.

[11] An overview of this inconsistency is provided by Escobar Hernández' Fifth Report, in which she cites ten cases in which immunities have been set aside, against five cases in which they have not. Those discarding immunities are *Pinochet* (both before the House of Lords and before Belgian courts), *Hussein* (Higher Regional Court of Cologne), *Bouterse* (Court of Appeal of Amsterdam), *Ariel Sharon and Amos Yaron*, (Court of Cassation, Belgium), *Fujimori* (Chilean Supreme Court, judge of first instance, judgment of 11 July 2007), *H. v. Public Prosecutor* (Supreme Court of the Netherlands), *Lozano v. Italy* (Court of Cassation, Italy), A. v. Office of the Public Prosecutor of the Confederation (Switss Federal Criminal Court), *Prince Nasser* (High Court of Justice, UK). Those upholding immunities are *Marcos and Marcos v. Federal Office of Police* (Federal Tribunal, Switzerland), *Prosecutor v. Hissène Habré*, (Court of Appeal of Dakar, Senegal), *Jiang Zemin* (decision of the Federal Prosecutor General of Germany), *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (House of Lords, UK). See ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2016). Footnotes 230, 239

State officials only by virtue of the fact that they are backed by the State".[12] On the issue of normative hierarchy, Kolodkin similarly upheld immunity for international crimes under the argument that "since the norm concerning immunity on the one hand and the norms criminalizing certain conduct or establishing liability for it on the other regulate different matters and lie in different areas of law (procedural and substantive, respectively), they can scarcely conflict with one another".[13] Thus, Kolodkin's answer to the two questions left open by the House of Lords and the ICJ in *Pinochet* and *Arrest Warrant* was negative: international law provides no exception to immunity because, first, international crimes are official acts subject to immunity *ratione materiae*, and, second, because the normative status of international crimes does not by itself displace any procedural rule, including immunity. These views proved nevertheless highly divisive among the different members and the report never translated into draft articles to be voted upon.[14]

The end of Kolodkin's tenure in 2012 gave way for a stark rupture with these views. The second special rapporteur, Concpeción Escobar Hernández, defended the position that state practice tends to exclude the official character of international crimes, and that in any case the *jus cogens* nature of their prohibition makes way for an exception to the rules on immunity.[15] Escobar Hernández' first proposal even intended to go further, establishing that immunity did not apply, not only to international crimes, but also to corruption-related crimes and serious territorial torts. This proposal was, however, strongly rejected. The draft had to be revised by the drafting committee, and a final text with the following wording was agreed upon as draft article 7: "1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in relation to the following crimes: a) genocide; b) crimes against humanity; c) war crimes; d) the crime of apartheid; e) torture; f) enforced disappearances".[16] This draft text was then adopted in 2018 by a majority of 21 votes in favour, 8 votes against and 1 abstention. Needless to say, though, this wording raised considerable opposition within the ILC members, the Sixth Committee of the General Assembly, and scholars.[17]

Today, there is no single, unambiguous indicator determining where the law stands. The debate is still ongoing. Yet, it appears that the position upholding the exception to immunity *ratione materiae* has advanced among the epistemic community of international lawyers. Perhaps – as reflected by the voting pattern of the ILC – to a majoritarian extent. Recent developments seem to confirm this.

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[12] ILC, *Second Report on Immunity of State Offcials from Foreign Criminal Jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, A/CN.4/631 (2010), at 61.
[13] *Ibid.*, at 64.
[14] See the different positions held in the 3086, 3087 and 3088 meetings of the ILC. See: ILC, Summary Record of the 3086th Meeting (A/CN.4/3086), 10 May 2011; Summary Record of the 3087th Meeting (A/CN.4/3087), 12 May 2011; Summary Record of the 3088th Meeting (A/CN.4/3088), 13 May 2011.
[15] ILC, *supra* note 11, at 179, 191, 192, 219.
[16] ILC, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2018), Draft Article 7.
[17] Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. D. Evans (ed.), *International Law* 5th ed (2018) , at 376; d'Argent, 'Immunity of State Officials and the Obligation to Prosecute', in A. Peters (ed.), *Immunities in the Age of Global Constitutionalism* (2015) , at 252; Franey, 'Immunity from the Criminal Jurisdiction of National Courts', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015) , at 242.

As will be seen later in this paper, several states – mostly European – have launched in the last years prosecution attempts against state officials involved in the commission of international crimes in domestic contexts such as the conflicts in Syria, Myanmar, and Yemen.[18]

3. Drivers and opponents of change: the actors and the interests involved

Agency is an essential element of change in international law. A norm change attempt, whether formal or informal, requires a norm entrepreneur. Someone, be it a state, an international institution, a non-governmental organization (NGO), or an individual, has to have an interest in achieving a certain legal outcome and the tools to set the machinery of argumentation in motion. This does not mean that the actor has to be aware that its actions imply change or will lead to change – in fact this is seldom the case. What it means is that an actor or actors have to have the motivation to bear the costs – political, reputational, economic, etc. – of pushing that argumentative attempt.

According to the traditional understanding of international law, this agency normally resides in states. In this perspective, change in international law would be explained by motivations that are intrinsic to state behaviour, such as geopolitics, domestic politics, ideological orientation, and so on and so forth.[19] But while these motivations undeniably play a prominent role in explaining contemporary international relations, there is much more going on than what inter-state relations can account for. Cases of normative change where the interests of a majority of states align are nowadays rare. More common are cases of coalitions of actors – international organizations or institutions, courts, businesses, scholars, expert bodies, civil society actors – who have an interest in shaping international rules in one way or another, and mobilize their resources to do so. The way they articulate among or against each other and states determines to a high extent how international law fluctuates.

In the case of state official immunity, as was shown in the historical overview, some states played a crucial role in setting change in motion. Yet, these efforts provoked a major backlash on the side of certain powerful states, to the extent of extinguishing any type of state initiative in pursuing the establishment of an exception to immunity *ratione materiae.* In the face of this blockage, it was the persistency of another type of actors – NGOs and scholars – that eventually opened a crack in the law of immunities, thanks largely to the possibility of using the ILC as a venue to launch the attempt. This section offers an overview of the different actors involved in this processes and on the motivations that led them to act as they did.

[18] See, for example, the General Assembly's resolution establishing a mechanism to assist states in the prosecution of international criminals acting in the context of the civil war: UN General Assembly, Resolution 71/248 - International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 11 January 2017.

[19] K. N. Waltz, *Theory of International Politics* (1979). See Chapter 6.

The origin of the international crimes exception to state official immunity lies in Spain's and Belgium's strong push for universal jurisdiction in the last decades of the twentieth century. In the case of Spain, in 1985 the Spanish Parliament passed a provision – article 23(4) of the *Ley Orgánica del Poder Judicial* – which established universal jurisdiction for international crimes. It did not include a specific consideration on immunity, but in the prosecutions on international crimes that followed, the Spanish courts did not consider state official immunity to be a bar when dealing with former state officials. This led to the request of extradition that gave rise to the *Pinochet* case in the UK.[20] In the case of Belgium, Parliament first passed unanimously legislation to prosecute grave breaches of the 1949 Conventions and its Additional Protocols in 1993. Then, in 1999, it passed the *Loi relative à la répression des violations graves de droit international humanitaire*, which extended universal jurisdiction to genocide and to crimes against humanity, and included an express provision – article 5 – barring any immunity defense. This law eventually led to the arrest warrant that was contested by DRC before the ICJ in 2000.

Máximo Langer explains the impetus for prosecuting international crimes by Spain and Belgium as the product of an effort by the political branches of these states to capitalize the sympathy of domestic constituencies for human rights violations abroad.[21] This might well be the case, considering the general anti-impunity narrative that the genocides in Bosnia and Rwanda triggered during the nineties, particularly in European societies. However, as Langer points out, "the prosecuting states must be willing to pay the international relations costs that the defendant's state of nationality would impose if a prosecution and trial take place".[22] Indeed, when the prosecution attempts under the laws of Spain and Belgium started to extend to officers of bigger powers, both countries faced a strong reaction that led them to repeal their laws. Clearly, powers with a high level of engagement in armed conflict abroad or with a questionable human rights record at home saw in these developments a big threat, and neither Spain nor Belgium had an interest on the topic that outweighed the political costs they were willing to bare.

With regard to Belgium, the US exerted great pressure to get it to abrogate its law on universal jurisdiction and restrict its exceptions on immunities after legal action was brought seeking to target high-ranking American officers for war crimes committed in Iraq in March 2003. The initial admission of these cases apparently even led Defence Secretary Donald Rumsfeld to threaten with moving NATO's headquarters away from Brussels, and indeed succeeded in getting the Belgian parliament to amend substantially its 1999 law.[23] In the case of Spain, several cases around 2006 equally prompted pressure by different states to modify its law on universal jurisdiction. In particular, several cases against Chinese officials for alleged genocide in Tibet sparked a strong reaction on the side of the Chinese government, which denounced the proceedings as interference

[20] Roht Arriaza, 'Universal Jurisdiction: Steps Forward, Steps Back', *Leiden Journal of International Law* (2004) 375, at 378.
[21] Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011) 1 , at 2.
[22] *Ibid.*
[23] Roht Arriaza, *supra* note 20, at 387.

in its internal affairs, claimed that its officers were exclusively subject to the jurisdiction of China, and demanded the Spanish government to take immediate action to have the cases dismissed in order "to avoid possible obstacles and damages to the bilateral relations between China and Spain".[24] Israel and the US similarly contested Spain's law and prosecutorial policies in the strongest terms, ultimately leading the *Congreso de los Diputados* to overhaul its legislation by an overwhelming majority vote.[25]

This led the issue of universal jurisdiction and the related topic of state official immunity to be largely dropped by states for many years, basically blocking any convincing development of homogenous state practices on the matter. And it was at this point that other actors had to step in, each of them performing a function that was key to foster change in the law of state official immunity.

The first of these was a network of NGOs that was and still is steadily active in pushing for change since the early 1990s. They have done so by filing cases before national authorities and, perhaps more importantly, by giving these cases visibility before public opinion and by exposing prosecutors, judges and politicians to the political costs of upholding immunities. This activism has been one of the key drivers of discursive shift in the field. To mention some of the most important examples, Amnesty International and an association of victims of the Chilean dictatorship were behind the original complaints in Spain against Augusto Pinochet and were responsible for pulling the strings to get Spain to request his extradition when he visited London in 1998. TRIAL International has also been a key actor, both by issuing publications on the more theoretical aspects of the matter and by taking cases to court in Switzerland and elsewhere.[26] More recently, organizations such as Fédération Internationale des Droits de l'Homme in France, Guernica 37 in Spain, and the European Center for Constitutional and Human Rights in Germany, have been active in bringing cases of alleged international criminals before domestic courts and litigating for limiting state official immunities. Without them, domestic courts would never have started processing cases, and without their communication strategies, the ethical implications of immunities would very likely never have become the object of public scrutiny in the way they were.

This goes to the heart of the unique contribution that different networks of NGOs have made to the shift in the law of state official immunity. As explained by Keck and Sikkink, activist networks are set up "not only to influence policy outcomes, but to transform the terms and nature of the debate". They do so by "mobilizing information strategically to help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and

[24] Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011) 1 , at 37, 38. See also: 'China Pide 'Medidas Efectivas' Para Que La Audiencia Abandone El Caso Sobre Tíbet', *El País* (2009) , available at https://elpais.com/elpais/2009/05/07/actualidad/1241684227_850215.html.
[25] Langer, *supra* note 21, at 40.
[26] B. Bertossa and P. Grant, *La lutte contre l'impunité en droit suisse* (2003).

governments".[27] This is precisely the role played by these networks in the case under study. NGOs were in a privileged position to influence the direction of public debates on immunity because of the appeal of their specific value-based motivation and because of their institutional autonomy. They succeeded in doing so by bringing immunity cases to the centre of public attention and to the core of the ethical debates about impunity and justice in the international community. Therefore, it is fair to say that the influence exercised by NGOs on the general public, on judges, and other decision makers was crucial in bypassing state inaction in debates about state official immunity.

The second group of actors that played a crucial role in the present case were scholars and individual experts. Academic work, in its vastness and its capacity of critique, provided the permanent outlet through which many international lawyers committed to the strengthening of international criminal law consistently advocated for the dismissal of immunity *ratione materiae*. Among these authors one can mention as precursors Pierre-Marie Dupuy, Andrea Bianchi and Antonio Cassese, although many more have followed suit.[28] Their underlying argument has been that international human rights law (IHRL) and international criminal law (ICL) have developed to such an extent and acquired such a normative prominence in international law that they have, as Cassese put it, "shattered the shield that traditionally protected state agents acting in their official capacity". In other words, the recurring account seems to have been that the deepening of the embeddedness of IHRL and ICL on general international law, for hierarchical reasons, limited the scope of the rules on immunities.[29]

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[27] M. Keck and K. Sikkink, *Activists Beyond Borders : Advocacy Networks in International Politics* (1998), at 2.

[28] Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian Journal of Public and International Law* (1994); Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* (1999); Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002) 853; Dupuy, 'Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes', *Revue générale de droit international public* (1999) 289.

[29] Along these lines – to mention some of the authors that have supported this view – Joanne Foakes explained the change as a reflex of international law to accommodate the needs and demands of actors other than states, through the development of human rights and international criminal law. Sam Lyes did it by contending that the emergence of rules protecting "fundamental values of the international community" – jus cogens rules – relegates the rules of immunity in terms of normative hierarchy. Andrew Clapham argued that the change is guided by the evolution of international law towards the fight against impunity for the most serious crimes. Olasolo, Martínez and Rodríguez said that at the heart of the change in the rules of immunity lies a process of humanization of international law whereby its centre of gravity slowly shifted from state interest to the protection of individuals. Brigitte Stern, finally, held a more nuanced position linking the evolution in the rules on immunity to the development of universal jurisdiction in international law. This is of course not to say that this line of argument has not been widely contested, but rather that there has been a persistent line of argument among scholars since the times of Pinochet and Arrest Warrant pushing for an exception to immunity ratione materiae. See: Clapham, 'Préface', in A. Bellal (ed.), *Immunités et Violations Graves Des Droits Humains: Vers Une Évolution Structurelle de l'ordre Juridique International?* (2011) , at 237; J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014), at 2; S. Lyes, *Crimes Internationaux et Immunité de l'acte de Fonction Des Anciens Dirigeants Étatiques* (2015), at 7; Olasolo Alonso, Martínez Vargas and Rodríguez Polanía, 'La Inmunidad de Jurisdicción Penal Por Crímenes Internacionales de Los Jefes de Estado, Los Jefes de Gobierno y Los Ministros de Asuntos Exteriores', 43 *Revista Chilena de Derecho* (2016) 251 , at 253; Stern, 'Immunities for Heads of State: Where Do We Stand?', in M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (2006) , at 95.

Now, the specific contribution of academics to the topic of exceptions to state official immunity has been twofold. On the one hand, academics in favour of the arguments mentioned above have been resilient and persistent throughout the instable trajectory of the topic. The judicial setbacks and the backlash against laws on universal jurisdiction by big powers never led them to reconsider their positions. This has enabled their voice to be consistently present, not allowing the topic to disappear from the debates during the lower points in the short history of the issue, and allowing other actors to take up on their claims during more favourable periods. Of course, this is due to the scholarly nature of their work, which is simply not exposed to the same kind of pressure that national parliaments or courts are. In other words, academics have not revisited their views in face of backlash for the simple reason that they have had little to lose for not doing so. This has provided the change attempt with a solid basis on which to rely on. On the other hand, in its purported scientific neutrality, academia has nurtured the debate and complimented the advocacy of NGOs by providing views of international rules that pretended to be not ideological but technical in nature. This has opened a ready-made source of authority for any actor wishing to endorse exceptions to immunity *ratione materiae*, from national prosecutors to judges or diplomats. When making arguments against immunity, usually they refer to academic authorities at some point.

In conclusion, while state initiative was blocked at an early stage by powerful states, other actors have provided the needed impetus for the topic of exceptions to state official immunities not to die-off in critical times, and to emerge when conditions have been ripe. These other actors – namely NGOs and academics – have performed the necessary function of framing the legal, epistemic, and moral dimensions of the debate, placing the issue in the focus of public attention and vesting it with technical and legal authority, thereby enabling other actors to take on the issue building on that authority.

4. The catalysts of change: legal plausibility and social legitimacy

The next factor that is crucial in explaining legal change in contexts where states are adverse to it, is the legal and moral backdrop from which change is attempted and rendered both legally plausible and socially legitimate before the international legal epistemic community and before the general public. For the purpose of this work, legal plausibility is understood as the embeddedness of an argument within widely shared ways of understanding or interpreting the law, whereas social legitimacy is the correspondence of a claim or an assertion with the dominant ethical preferences in a given community or society at a given point in time.

Two large-scale developments in international law throughout the twentieth century are key for explaining the legal plausibility of the attempt to introduce exceptions to state official immunity based on international crimes. The first development was the evolution of the general issue of immunities under international law up until the 1990s, with regard to domestic jurisdiction over foreign states and with regard to diplomatic law. On state immunities, international legal thought

and practice transited throughout the twentieth century from the paradigm of absolute immunity to the nearly general acceptance of relative immunity.[30] Under the former, foreign states cannot be brought before the domestic courts of other countries for any matter whatsoever, while under the later foreign states are generally understood to enjoy immunity before foreign domestic courts, except with regard to acts of a private law character. *Acta jure imperii* – or acts undertaken under public power – are, according to the notion of relative immunity, covered by state immunity, whereas *acta jure gestionis* – commercial transactions, contracts of employment and, more controversially, tort involving personal injuries or damage to property – are prone to civil suit.[31] This approach gained the upper hand when the ILC endorsed it at the time of the inclusion of the topic of state immunity in its agenda in 1977, and ended up as one of the structuring rationales of the UN Convention on Jurisdictional Immunities of States and Their Property – opened to signature in 2004, but still not in force. Similarly, with regard to diplomatic immunities, the Vienna Convention on Diplomatic Relations codified the customary rules of absolute immunity *ratione personae* and relative immunity *ratione materiae* as early as 1961. According to these, a diplomatic agent enjoys complete penal immunity from the jurisdiction of the receiving country during the time of her appointment, but ceases to be immune when having left the post – being liable to prosecution in respect of acts undertaken in a private capacity during her tenure. Hence, on issues of immunities, international law articulated around the functionalist dichotomy of official and private acts, setting the limits of immunities where the exercise of public power ended.

The second development that provided an avenue of legal plausibility to the attempt of having exceptions to state official immunity concerns the emergence of the notion of international crimes. Here, several elements aligned throughout the twentieth century. The first element was the revisiting in the 1990s of the idea of establishing international criminal jurisdictions to prosecute crimes that were deemed so heinous as to acquire an international dimension – *i.e.* international crimes. Two *ad hoc* international tribunals – the ICTY and the ICTR – were created by the UN Security Council, their statutes being based on the legal premise that all individuals were bound by international custom not to engage in the commission of particularly outrageous conduct such as war crimes, crimes against humanity, and genocide – following the example of their Nuremberg and Tokyo predecessors. These tribunals drew significant international attention to what was at the time labelled as the "fight against impunity", creating momentum for the expansion of international criminal law, to the extent of unleashing the negotiation and eventual creation of the International Criminal Court (ICC) in 1998. Similarly, the emergence of the notion of international crime was driven by the gradual consolidation of the idea of normative hierarchy in international law, and the recognition that international crimes belong to a category of norms – *erga omnes* or *jus cogens* – that cannot be derogated from and that legally concern the international community as a whole.[32]

[30] E. C. Okeke, *Jurisdictional Immunities of States and International Organizations* (2018), at 24.
[31] I. Brownlie, *Principles of Public International Law* (7th ed, 2008), at 332–335.
[32] Key to this were the adoption of the Vienna Convention on the Law of Treaties (VCLT) with its controversial article 53 on *jus cogens*, and the ICJ's famous *dictum* in paragraph 33 of *Barcelona Traction* on *erga omnes* norms – although the idea of normative hierarchy had been around before that. See: N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (2000), at 86A; Remiro Brotons (ed.), *Derecho Internacional* (2007], at 67.

Finally, another key element – as evidenced in the historical overview above – was the development of universal jurisdiction in national and international law.[33] In a nutshell, this was fostered by the previous adoption of international treaties creating different versions of such jurisdiction for certain international crimes, namely war crimes in the Geneva Conventions of 1949 and torture in the Torture Convention of 1984. These elements provided a basis for the notion of international crimes to acquire clear content, a purportedly elevated normative status, an expansive jurisdictional dimension and, perhaps more importantly, an undeniable discursive prominence both within the international law community and for the general public.

Thus, the normative evolution of the law of immunities and of the notion of international crimes paved the argumentative road through which the attempts to introduce exceptions to state official immunity *ratione materiae* were to transit towards the end of the twentieth century.[34] In the absence of any meaningful norm entrepreneurship by states after that of Spain and Belgium – and thus the absence of a formal, sources-based pathway for legal change to transit – the push for exceptions was rendered legally plausible by arguing that international crimes were private acts not covered by immunities, and/or that legal hierarchy outweighed any procedural rule on immunity. While both arguments might have had considerable weak points, the fact that the law of immunities had been articulated along the public/private dichotomy, and the fact that international crimes had been widely acknowledged as *jus cogens*, provided a solid argumentative basis capable of speaking to any audience within and without international law. Thus, when the first attempts to argue for exceptions to state official immunity took place, these background understandings rendered them legally plausible.

As does for the second catalyst of change, social legitimacy, it seems of crucial relevance to note that there was a high degree of public attention over atrocities committed in the context of armed conflicts in several parts of the world at the time of the push for the first national prosecutions of international criminals. This was triggered in part by the visibility of the calamities that had taken place in Rwanda and the Balkans, and the outrage they provoked in the international community. Almost any document touching upon the issue of international crimes at the time made a strong argument about the importance of holding accountable those responsible for the most serious international crimes.[35] This evidences a strong moral drive behind these efforts. As Michel Cosnard explained it, there was at the time a "rising culture of fight against impunity", which the efforts to limit state official immunities undoubtedly formed part of.[36]

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[33] Stern, *supra* note 29, at 75. 95.

[34] See, for example, the arguments used in the highly influential joint separate opinion on the *Arrest Warrant* case by judges Higgins, Kooijmans, and Buergenthal: ICJ, *Joint Separate Opinion by Judges Higgins, Kooijmans, and Buergenthal (Arrest Warrant Case)*, 2002, at 85.

[35] For example, in fifth paragraph of the preamble of the Rome Statute, the states parties claim to be "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

[36] Cosnard, 'Les immunités du chef d'état', in *Le chef d'Etat et le droit international : colloque de Clermont-Ferrand* (2002) , at 190.

The background of all of this was the post-Cold War social and political environment. Human rights, democratic values, and a liberal ethos centred on the individual seem to have been – at least up until the very recent rise of populism in many parts of the world – the dominant narrative about public morality.[37] Thus, when the question of upholding or removing state official immunity in face of international crimes first popped up before domestic courts, it did so in an axiological setting that was not neutral, but that had a clear preference for criminal accountability. The sensibilities and the scrutiny of the general public were particularly high when it came to events perceived as atrocities. In other words, removing immunity and prosecuting international crimes was, by and at large, the more ethically persuasive option. By the same token, upholding the immunity of an international criminal was and still is hard to justify morally. Doing it certainly takes a toll in terms of the legitimacy for any court at any level.[38]

An additional element worth considering is the internationalization of the concern for atrocities around the world. While before World War II it would simply not have been evident that the general opinion in one country would be invested in strictly domestic events in another country, the second half of the century saw a shift towards an internationalized awareness of national events. Particularly within Western societies, there seems to have been an increasing sense of concern and involvement with atrocities taking place elsewhere in the world. Accordingly, it is unsurprising that some legislators, prosecutors and judges in developed countries felt compelled to use whatever means available to act upon atrocities happening elsewhere. Judge Baltazar Garzón of Spain is a perfect example of this. In an interview done in 2002 he explained how, in the logic of subsidiarity, when "domestic prosecutions in the country where the acts occurred have either not been pursued or not pursued in an appropriate manner", the "intervention" of foreign judges is required.[39] While subsidiarity is a rather narrow legal concept, its logic reflects an element of internationalization that was present in the upbringing of the anti-impunity narrative.

These two elements – the prominence of accountability in public morality and its internationalization during the 1990s – provided the background of social legitimacy from which the attempt to introduce exceptions to state official immunity *ratione materiae* was launched. Together with the previous legal understandings of immunity and international crimes, it is easy to see how such efforts could be mainstreamed discursively even when states objected such a development as a matter of international law. In other words, the legal plausibility of the attempt, and its legitimacy before broader Western constituencies, provided the discursive avenues though

[37] S. Moyn, *The Last Utopia: Human Rights in History* (2010), at 7.
[38] See, for example, the media coverage of the final judgment of the ICJ on the *Arrest Warrant* case. Three days after the release of the judgment, *Le Monde*'s editorial read "*l'immunité des hommes d'Etat en exercice ne cède que devant des tribunaux internationaux*", a very critical opinion editorial on the ICJ's decision. Trean, 'L'immunité Des Hommes d'Etat En Exercice Ne Cède Que Devant Des Tribunaux Internationaux', (2002) , available at https://www.lemonde.fr/archives/article/2002/02/17/l-immunite-des-hommes-d-etat-en-exercice-ne-cede-que-devant-des-tribunaux-internationaux_4209957_1819218.html?xtmc=yerodia&xtcr=14.
[39] Rothenberg and Garzón, ''Let Justice Judge': An Interview with Judge Baltasar Garzon and Analysis of His Ideas', 24 *Human Rights Quarterly* (2002) , at 946.

which the change in question could transit. Without them, any change attempt would have been very likely impossible.

5. Institutional availability: the ILC as an authoritative outlet

Having seen who the actors that pushed for exceptions to state official immunity where, and how the previous legal and social understandings served as catalysers for transformation, attention is set now on the third element deemed crucial for explaining change in this field: institutional availability. Institutions are crucial in international law because they are a source of authority. They are seen by their different constituencies as righteous sources for attributing meaning to norms. Some fields of international law are particularly structured around certain institutions. In the law of the sea, the interpretation of the International Tribunal of the Law of the Sea (ITLOS) is particularly influential. The Appellate Body of the World Trade Organization (WTO) would be another clear example with regard to international trade law. But institutions need not be of a judicial nature to be authoritative. The World Health Organization (WHO) or the Special Rapporteurs of the Human Rights Council, to use different examples, are organs of very different nature whose interpretation of the law is regarded as highly authoritative within their respective fields.

The law of immunities is not a field that is articulated around any specific institution or sets of institutions. It is, however, an area that has successfully managed to get encroached in different institutional frameworks of general competence available in international law. An assessment of these would have to begin by noting how the area of immunities was profoundly destabilized by the *Pinochet* and *Arrest Warrant* cases, as noted above. This points to the primary venue available for the law of immunities: domestic courts. It is rather obvious that, because immunities concern the prosecution of international crimes by domestic jurisdictions, national courts are a forum where these issues get significant attention. Yet, domestic courts have played a rather reduced role in leading the evolution of state official immunity because they enjoy little authority before the different constituencies of international law. As reflected by *Pinochet,* it seems that it takes a highly reputed and visible domestic institution – such as the House of Lords at the time – as well as a case involving high stakes, for domestic courts to be seen as highly authoritative. In addition, more often than not the views of national courts are not seen as authoritative in themselves, but as components of state practice or *opinio juris.*

International courts might also seem to be an open venue for the field of immunities, and one enjoying a remarkably high degree of authoritativeness, judging from the *Arrest Warrant* case and other cases dealing with immunities before the ICJ, such as *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* of 2008, *Jurisdictional Immunities (Germany v. Italy)* of 2012 and the ongoing *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. However, the availability of the ICJ for the settlement of disputes concerning immunities is rather

low, given the jurisdictional hurdles that it takes for a case to reach its docket. *Arrest Warrant* was an exceptionally easy case to take before the Court because both of the states concerned had very open optional compulsory jurisdiction clauses under article 36(2) of the ICJ Statue that allowed for the proceedings to reach the merits phase. But most of the relevant states opposing the change or potentially having high stakes involved – the USA, China, Russia – have basically no optional clause and, in general, very carefully avoid treaty clauses that could make them prone to the jurisdiction of the ICJ. That makes the availability of the ICJ significantly low.

Other international courts are to a certain extent available in the field of immunities. Human rights courts are definitely open venues for issues of immunities, and have been an important one for state immunity – for instance the European Court of Human Rights (ECtHR). Yet matters of state official immunity rarely reach their dockets. In addition, their authority in general international law is uncertain, as they their field – human rights – is largely perceived as only having a relative impact on general international law.[40] As for other international courts, it appears that they are either not available because they deal with areas of international law that have no baring over immunities, or because they actively drive away potential domestic cases of immunities by making them international, thus rendering any discussion on domestic immunities void, as is the case with the ICC, the *ad hoc* international tribunals, or the mixed criminal tribunals. Therefore, it can be said that, overall, both national and international judicial institutions have not been critically relevant venues for the attempt of change in the law of state official immunity.

By contrast, the ILC, although reluctant to take up the issue for many years, proved to be a decisive available institution in this field once the topic of "immunity of state officials from foreign criminal jurisdiction" was included in its programme of work. As mentioned in the historical overview, this happened in 2007 at the recommendation of the ILC's Planning Group and with the endorsement of the General Assembly's Sixth Committee. The story of how the matter was dealt with by its special rapporteurs need not be repeated. Suffice it to say that the ILC provided a forum that so far had not existed, where the exceptions to state official immunity *ratione materiae* based on international crimes were framed, debated, and eventually endorsed. And while it is true that the IDI underwent a similar process several years before the ILC, the institutional authority of both entities can hardly be compared. The ILC is the organ expressly created by the UN General Assembly to fulfil its constitutional task of "encouraging the progressive development of international law and its codification", as determined by article 13 (1) (a) of the UN Charter. Thus, the end-products of the ILC carry with them the authority vested by this instrument and by the fact that its members are directly elected by the General Assembly.[41] Of course, the traditionally high authority enjoyed by the ILC in general international law was hindered in the case under analysis

[40] Lamour, 'Are Human Rights Law Rules "Special"? Study on Interactions Between Human Rights Law Rules and Other International Law Rules', in N. Weiß and J.-M. Thouvenin (eds.), *Influence of Human Rights on International Law* (2015), at 29.
[41] Pemmaraju Sreenivasa Rao, International Law Commission (ILC), Max Planck Encyclopedia of Public International Law, 2017, p. 42.

by the fact that the reports pushing for exceptions to immunity *ratione materiae* were contested both by members and states, and the relevant draft articles not adopted by consensus. But the work of Special Rapporteur Escobar Hernández, conducted under the institutional umbrella of the UN and endorsed by a majority of the ILC members, vested unprecedented authority on the attempt to change the law of state official immunity. These developments made these exceptions a discursive reality that both conservative ILC members and states in the Sixth Committee could not avoid dealing with.

6. State official immunity *ratione materiae* today

Have all of these factors allowed the norm-change attempt in question to circumvent the opposition by states and the blockage of the formal avenues of transformation in international law? Are the exceptions to state official immunity *ratione materiae* a discursive *fait accompli*, as suggested in the introduction? The issue remains highly controversial, no question. But there are clear indicators that the purported exceptions have managed to gain the upper hand in the debate, to the point of setting a high burden of argument on its opposers.

The first cluster of indicators consists of the views of the ILC members, both when discussing Roman Kolodkin's second report in 2011 and Escobar Hernández' fifth report in 2017. Kolodkin's second report, which fully rejected exceptions for international crimes, as mentioned above, was openly criticised by 14 members on this point, against only six supporters and with three uncommitted positions.[42] Of particular relevance were the arguments put forward by John Dugard, who supported exceptions on the basis that "immunity is continually evolving in accordance with the values of the international community as a whole", and claimed that the Commission had to "choose between accountability and impunity".[43] These views where largely echoed by many other members.[44] As for the scarce support for the report, most of it was based on the argument that the reasons for accepting exceptions were *de lege ferenda*, whereas the task of the ILC was to focus on *de lege lata.*[45] With regard to Escobar Hernández' fifth report and the draft articles that were put to a vote in 2017, again the clear majority of the ILC members held views favourable to introducing exceptions to immunities. 21 members voted in favour of draft article 7, which expressly excluded immunity *ratione materiae* in relation to several international crimes, as seen in the historical overview above, under arguments of hierarchy and non-official character of the

[42] ILC, *supra* note 14, *supra* note 14, *supra* note 14.
[43] ILC, *supra* note 14, at 31, 37.
[44] ILC, *supra* note 14. See the positions of Malescanu (Romania), Jacobsson (Sweden), Vargas Carreño (Chile), Pellet (France), Gaja (Italy), McRae (Canada), Caflisch (Switzerland), Valencia Ospina (Colombia), Wisnumurti (Indonesia), Ecobar Hernández (Spain), Hassouna (Egypt), Kamto (Cameroon), Hmoud (Jordan).
[45] *Ibid.*ILC, *supra* note 14, *supra* note 14. See arguments by Petric (Slovenia), Vasciannie (Jamaica), Wood (United Kingdom), Nolte (Germany), Singh (India) and Perera (Sria Lanka). The US and Chinese members were not present in the three sessions where the issue was discussed.

acts.[46] As for the opposition to it, 8 members voted against the draft articles, mainly claiming that the exceptions are not supported by clear state practice.[47] Worth noting is that none of the members that are nationals of states that are permanent members of the Security Council supported Escobar Hernández' report.

Another very revealing indicator are the opinions of states when discussing Escobar Hernández' fifth report at the Sixth Committee in 2018. The representatives of the countries that took the floor in these meetings were very careful to put forward a balanced approach to the issue, expressing their concern that the principle of sovereign equality and the "stability of international relations" could be endangered by accepting the prosecution of foreign state officials in domestic jurisdictions, but at the same time acknowledging the importance of fighting impunity for international crimes. Among others, such views were held by Poland, Peru, Sudan, Sweden, Singapore, Mexico, Ireland, Thailand, Azerbaijan, Russia, Israel, Germany and Iran, which are the majority of the states that took the floor to express positions.[48] Most of these countries ended up supporting the international crimes exception to immunity *ratione materiae*, in spite of their concerns.[49] Another good example of this attitude is a position paper issued in 2012 by the Asian–African Legal Consultative Organization (AALCO) – a low-profile inter-governmental board advising African and Asian states on matters of international law. In it, the AALCO takes a very uncommitted stance warning against attempts of progressive developments of the law at the ILC, but at the same time underlying the importance of "ending impunity for international crimes".[50] This reveals the degree to which the need to make exceptions to state official immunity *ratione materiae* has become a discursive reality that not even states can easily evade, despite the absence of clear state practice or any treaty-making efforts.

Furthermore, as in the time when Spain and Belgium found incentives to adopt laws on universal jurisdiction that had the effect of setting aside state official immunities, the past few years have seen the return of such efforts by a number of Western countries. This has happened mainly in the wake of the civil war in Syria and other protracted crises like the war in Yemen or the persecution

[46] See the positions of Galvão Teles (Portugal), Hassouna (Egypt), Valencia Ospina (Colombia), Vázquez Bermúdez (Ecuador), Letho (Finland), Jalloh (Sierra Leone), Gómez Robledo (Mexico), Murase (Japan), Peter (Tanzania), Oral (Turkey), Grossman Guilof (Chile), Ruda Santolaria (Peru), Argüello Gómez (Nicaragua), in: ILC, Summary Record of the 3361th Meeting (A/CN.4/SR.3361), 14 June 2017; Summary Record of the 3360th Meeting (A/CN.4/SR.3360), 19 June 2017; Summary Record of the 3362th Meeting (A/CN.4/SR.3362), 19 June 2017; Summary Record of the 3363th Meeting (A/CN.4/SR.3363), 19 June 2017; Summary Record of the 3364th Meeting (A/CN.4/SR.3364), 4 July 2017; Summary Record of the 3365th Meeting (A/CN.4/SR.3365), 13 July 2017.

[47] ILC, *supra* note 49. See the positions of Wood (United Kingdom), Kolodkin (Russia), Sean Murphy (USA), Sturma (Czech Republic), Rajput (India), Laraba (Algeria), Huang (China), Nolte (Germany)

[48] See: Sixth Committee, UN General Assembly, Summary Record of the 28th Meeting (A/C.6/73/SR.28), 10 December 2018; Summary Record of the 29th Meeting (A/C.6/73/SR.29), 10 December 2018; Summary Record of the 30th Meeting (A/C.6/73/SR.30), 6 December 2018.

[49] Sixth Committee, UN General Assembly, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Seventy-Third Session, Prepared by the Secretariat (A/CN.4/724*), 12 February 2019, para. 65.

[50] Asian–African Legal Consultative Organization, Immunity of State Officials From Foreign Criminal Jurisdiction, 2012, pp. 18, 20.

of the Rohingya people in Myanmar. Countries such as France, Germany and Sweden have been attempting to prosecute former or incumbent state officials for their engagement in international crimes since 2011. Germany, to take one of the clearest examples, has amended its *Völkerstrafgesetzbuch* (Code of Crimes against International Law) to expand the catalogue of crimes for which universal jurisdiction is provided for.[51] And while no express provision in the Code deals with immunities, so far German prosecutors have interpreted immunity *ratione materiae* not to apply. Tellingly enough, the position of Germany with regard to this specific point in the discussions at the Sixth Committee of the General Assembly has radically changed from 2011 to 2016. While in 2011 the German speaker held the view that "a violation of a jus cogens norm does not necessarily remove immunity [because that would be tantamount to confusing] rules of substantive law with rules of procedure",[52] five years later a different diplomat said in the same forum that "history had shown that there were crimes for which immunity could not be upheld, and Germany would always be a staunch supporter of exemptions from immunity".[53]

In sum, different elements seem to be aligning for some states to push for exceptions to state official immunity again. What is different from the push in the 1990s, however, is that such exceptions have now been widely discussed and endorsed by a large segment of the epistemic community of international law. The informal change of the rules in respect of state official immunity thus seems to have cemented in international legal discourse. Perhaps this is an indicator that the time is ripe for change through formal means to happen.

7. Conclusion

Whether or not international law provides exceptions to state official immunity *ratione materiae* in cases of international crimes is a matter of argument. In the absence of a treaty or a clear indication of the existence of a customary rule, the answer depends on who one asks. Yet, it seems that a majority of international lawyers, scholars, and diplomats nowadays considers these exceptions to be in place. Since this was not the case 20 years ago – and certainly not before that either – one can contend that international law has changed though informal means. Discourse has bypassed the formal sources.

This article has attempted to put forward an explanation for this phenomenon. It has been contended that three elements have been key in achieving the eventual acceptance of exceptions to state official immunity based on international crimes. First, in the absence of state support, the existence of other actors capable of mobilizing public opinion, setting the terms of the debate, and vesting

[51] Open Society Justice Initiative and Trial International, Briefing Paper: Universal Jurisdiction Law and Practice In Germany, 2019, p. 4.
[52] Sixth Committee, UN General Assembly, Summary Record of the 26th Meeting (A/C.6/66/SR.26), 7 December 2011, para. 86.
[53] Sixth Committee, UN General Assembly, Summary Record of the 29th Meeting (A/C.6/71/SR.29), 2 December 2016, para. 12.

technical authority, has allowed the issue to stay present in the debate despite setbacks, and to flourish when the political momentum has driven states to follow suit. In particular, these actors have been NGO networks and scholars, who have been persistent and active all along the way. Second, the legal and moral background understandings in the fields of immunities and international criminal law have catalysed change in the field by making the argument of exceptions legally plausible and socially legitimate, despite the blockage of the formal pathways of change. And lastly, the availability of the ILC as an authoritative institutional venue has played a fundamental role by providing an outlet for the change attempt to be discussed and endorsed. The reports by the ILC Special Rapporteurs on this issue have triggered heated debates among the different constituencies of international law and confronted states with the need to debate state official immunity at the Sixth Committee, where a majority of them has ultimately yielded to the existence of exceptions.

To what extent can these elements be abstracted and used to explain change in international law in general? That question obviously requires delving into other cases of norm-change in international law and testing different hypotheses. This is precisely the purpose of the PATHS project. Different case studies are being explored at the moment in different subfields, and the outcome should be an overarching theoretical approach to change in international law. However, it can already be said that change through informal means is common in international law. What is more, perhaps every change in international law transits at least to some extent through informal means. This calls for some closing remarks on the epistemic level of explanation of this article.

The relation between what has been labelled as "formal" and "informal" in this article is intricate, to say the least. The adjective "formal" has been used here to refer to the most accepted secondary rules of recognition or validity – to put it in Hartian terms – of international law; those mentioned in article 38 of the ICJ Statute. "Informal" has been employed to designate the material factors that have enabled a change in the understanding of the law: actor persistency and capability, background legal and moral understandings, and institutional availability. Now, in a classical positivistic approach to legal theory, these two categories are not mutually exclusive, but only epistemically directed to different objects of inquiry. One would explain legal validity, and the other one the sociological background of a legal norm. No relation of exclusivity would exist between the two. To the contrary, what is being called "informal" elements here would in fact be the material explanation of formal change in some cases, but not necessarily. The questions would remain distinct: validity simply as a procedural threshold, different from legitimacy, popularity, social endorsement or whatever else forms part of the history of a norm.

This narrow understanding would demolish the central hypothesis of this article. The explanation provided here, a critic could very well argue, conflates validity and discourse. It would explain how the exceptions to state official immunity became popular, but that would have no bearing on whether these exceptions are actually part of international law or not. For this, a conventional or customary rule, or a general principle of law would need to be in place. And that, the critic would

say, is a different question. But is it? This article does not contend that the informal means of change are a source of validity. Validity is indeed a procedural threshold: it depends on fitting a norm into the argumentative "boxes" of a particular legal field. Rather, the claim here is that these informal elements make a norm-change attempt more likely to be perceived as valid by the audiences concerned, even when it does not really fit the traditional argumentative "boxes" of international law. And in this scenario – *i.e.* when the formal pathways of change are constantly overlooked by the users of a legal order – one cannot but question whether these "boxes" of validity actually matter.

Well, they do, as a matter of fact. Validity and formalism are good ways of keeping the legal order stable, transparent, universally accessible, and legitimate. As such, they should be upheld.[54] But when widespread legal understandings – discursive *faits accomplis* – are not accountable for by formal means, new argumentative "boxes" are in order. The question is, then, how can the rules of recognition be readjusted in international law, so that they keep up with the expectations of their users? Clearly, there is not an easy answer for that question, although it might paradoxically have a lot to do with the informal means of change described in this work.

8. Bibliography

a) Articles and books

d'Argent, 'Immunity of State Officials and the Obligation to Prosecute', in A. Peters (ed.), *Immunities in the Age of Global Constitutionalism* (2015).

Bénezet J., *Etude Théorique Sur Les Immunités Diplomatiques* (1901).

Bertossa B. and Grant P., *La lutte contre l'impunité en droit suisse* (2003).

Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian Journal of Public and International Law* (1994).

Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* (1999).

Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights', in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997).

Brownlie I., *Principles of Public International Law* (5th ed, 1998).

Brownlie I., *Principles of Public International Law* (7th ed, 2008).

[54] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law-1870-1960* (2002), at 494–509.

Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002) 853.

Clapham, 'Préface', in A. Bellal (ed.), *Immunités et Violations Graves Des Droits Humains: Vers Une Évolution Structurelle de l'ordre Juridique International?* (2011).

Cosnard, 'Les immunités du chef d'état', in *Le chef d'Etat et le droit international : colloque de Clermont-Ferrand* (2002).

Dupuy, 'Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes', *Revue générale de droit international public* (1999) 289.

Dupuy R.J., *Le Droit International* (1966).

Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. D. Evans (ed.), *International Law* 5th ed (2018).

Foakes J., *The Position of Heads of State and Senior Officials in International Law* (2014).

Franey, 'Immunity from the Criminal Jurisdiction of National Courts', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015).

Jørgensen N.H.B., *The Responsibility of States for International Crimes* (2000), available at http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298618.001.0001/acprof-9780198298618-chapter-7 (last visited 21 January 2019].

Keck M. and Sikkink K., *Activists Beyond Borders : Advocacy Networks in International Politics* (1998].

Koskenniemi M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law-1870-1960* (2002].

Lamour, 'Are Human Rights Law Rules "Special"? Study on Interactions Between Human Rights Law Rules and Other International Law Rules', in N. Weiß and J.-M. Thouvenin (eds.), *Influence of Human Rights on International Law* (2015).

Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011] 1.

Lyes S., *Crimes Internationaux et Immunité de l'acte de Fonction Des Anciens Dirigeants Étatiques* (2015].

Moyn S., *The Last Utopia: Human Rights in History* (2010].

Nguyen Quoc Dinh, Pellet A. and Daillier P., *Droit International Public* (5e éd, 1994].

Okeke E.C., *Jurisdictional Immunities of States and International Organizations* (2018].

Olasolo Alonso, Martínez Vargas, and Rodríguez Polanía, 'La Inmunidad de Jurisdicción Penal Por Crímenes Internacionales de Los Jefes de Estado, Los Jefes de Gobierno y Los Ministros de Asuntos Exteriores', 43 *Revista Chilena de Derecho* (2016] 251.

Pemmaraju Sreenivasa Rao, International Law Commission (ILC), Max Planck Encyclopedia of Public International Law, 2017.

Remiro Brotons A. (ed.), *Derecho Internacional* (2007].

Retortillo y Tornos D.A., Colón y Cardany D.M. and Gómez P.P., *Vocabulario de Derecho Internacional Público* (1910].

Reynaud, 'Les Relations et Immunités Diplomatiques', 36 *Revue de Droit International de Sciences Diplomatiques et Politiques* (1958].

Roht Arriaza, 'Universal Jurisdiction: Steps Forward, Steps Back', *Leiden Journal of International Law* (2004] 375.

Rothenberg and Garzón, '"Let Justice Judge': An Interview with Judge Baltasar Garzon and Analysis of His Ideas', 24 *Human Rights Quarterly* (2002].

Shaw M.N., *International Law* (4th ed, 1997].

Stern, 'Immunities for Heads of State: Where Do We Stand?', in M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (2006).

Trean, 'L'immunité Des Hommes d'Etat En Exercice Ne Cède Que Devant Des Tribunaux Internationaux', (2002] , available at https://www.lemonde.fr/archives/article/2002/02/17/l-immunite-des-hommes-d-etat-en-exercice-ne-cede-que-devant-des-tribunaux-internationaux_4209957_1819218.html?xtmc=yerodia&xtcr=14.

Waltz K.N., *Theory of International Politics* (1979].

b) <u>UN and other documents</u>

Asian–African Legal Consultative Organization, Immunity of State Officials From Foreign Criminal Jurisdiction, 2012.

ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2016).

ILC, *Second Report on Immunity of State Offcials from Foreign Criminal Jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, A/CN.4/631 (2010).

ILC, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2018).

ILC, Summary Record of the 3086th Meeting (A/CN.4/3086), 10 May 2011.

ILC, Summary Record of the 3087th Meeting (A/CN.4/3087), 12 May 2011.

ILC, Summary Record of the 3088th Meeting (A/CN.4/3088), 13 May 2011.

ILC, Summary Record of the 3360th Meeting (A/CN.4/SR.3360), 19 June 2017.

ILC, Summary Record of the 3361th Meeting (A/CN.4/SR.3361), 14 June 2017.

ILC, Summary Record of the 3362th Meeting (A/CN.4/SR.3362), 19 June 2017.

ILC, Summary Record of the 3363th Meeting (A/CN.4/SR.3363), 19 June 2017.

ILC, Summary Record of the 3364th Meeting (A/CN.4/SR.3364), 4 July 2017.

ILC, Summary Record of the 3365th Meeting (A/CN.4/SR.3365), 13 July 2017.

Institut de droit international, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver Session), 26 August 2001.

Institut de droit international, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (Naples Session), 2009.

Open Society Justice Initiative and Trial International, Briefing Paper: Universal Jurisdiction Law and Practice In Germany, 2019.

Sixth Committee, UN General Assembly, Summary Record of the 26th Meeting (A/C.6/66/SR.26), 7 December 2011.

Sixth Committee, UN General Assembly, Summary Record of the 28th Meeting (A/C.6/71/SR.28), 7 December 2016.

Sixth Committee, UN General Assembly, Summary Record of the 29th Meeting (A/C.6/71/SR.29), 2 December 2016.

Sixth Committee, UN General Assembly, Summary Record of the 29th Meeting (A/C.6/73/SR.29), 10 December 2018.

Sixth Committee, UN General Assembly, Summary Record of the 30th Meeting (A/C.6/73/SR.30), 6 December 2018.

Sixth Committee, UN General Assembly, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Seventy-Third Session, Prepared by the Secretariat (A/CN.4/724*), 12 February 2019.

UN General Assembly, Resolution 71/248 - International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 11 January 2017.

ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment)*, 2002.

UK House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17*, 1999.