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Editorial
Challenging the International Law of Immunities: New Trends on Established Principles?
An introduction to the special issue*

Lucas Carlos Lima**
Loris Marotti***
Paolo Palchetti****

In his Foreword to the second edition of Fox's The Law of State Immunity, Christopher Greenwood observed that the law of state immunity is "one of the fastest evolving areas of international law". This remark could be extended, more broadly, to the law of immunity, be that of states, of state's officials, or of international organizations. After the Second World War the evolution mainly related to the progressive abandonment of the principle of absolute immunity of state and state's officials. Nowadays, the core issue appears to be that of reconciling the recognition of immunity and the effective protection of fundamental values of the international community: Is a state official who is accused to be the author of international crimes entitled to immunity? Can a state or an international organization invoke immunity when reparation is sought for breach of a peremptory rule of international law and/or when no alternative remedies are available to the victims? These questions were at the center of a number of landmark decisions of international courts rendered in the last 20 years, including the judgments of the International Court of Justice in the Arrest Warrant and Jurisdictional Immunities cases, of the International Criminal Court in Al-Bashir, or of the European Court of Human Rights in Mothers of Srebrenica. Domestic courts - such as the District court of Seoul, the United States Supreme Court, and the Brazilian Supremo Tribunal Federal, to cite just the more recent decisions addressing these issues – continue to enrich an expanding case law. It is therefore not surprising that most of the papers presented by those who responded to our call for papers on the evolution of the law of state immunity focused on the impact of international crimes, peremptory rules, and the fundamental rights of individuals to have access to justice on the law governing the immunity of states, state's officials, and international organizations. It is a sign of the intense debate still surrounding the complex relationship between immunity, on the one side, and the protection of human rights of individuals and fundamental values of the international community, on the other.

The selection of papers included in this forum prompts a number of other considerations. In the first place, it strikes that almost all the papers deal with the contribution of judges – both domestic and international ones – to the identification and evolution of the law of immunity. Again, this is hardly surprising given the importance generally attached to the case law of international courts in the determination of rules of general international law and to the role of domestic courts in shaping state practice relevant for the formation of customary rules on immunity. Indeed, as recognized by the

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** Professor of International Law at Universidade Federal de Minas Gerais
E-mail: lclima@ufmg.br

*** Senior Researcher in International Law at Università degliStudi di Napoli Federico II
E-mail: lorismarotti@gmail.com

**** Professor of International Law at Université Paris I - Panthéon Sorbonne
E-mail: paolo.palchetti@univ-paris1.fr

International Court of Justice, "State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune". Yet, the risk here is to obscure the role played by other state powers in this field. In this respect, George Galindo's article is a refreshing reminder of the contribution of the Executive, and particularly of the legal advisers of Foreign affairs ministries. The examination of 75 years of opinions written by the conselheiros jurídicos do Itamaraty reveals not only significant bodies of practice and elements for ascertaining opinio juris, but also invites to the reflection on what is the proper balance of judicial and executive practice for the purposes of forming a customary rule.

Another point that emerges from several contributions is a more or less pronounced criticism directed to the current status of the law on immunity. Such criticism dominates the study of Héloïse Guichardaz, dealing with the question of immunity of the United Nations in case of breaches of human rights. While admitting that the current international practice does not support a human rights exception to immunity of states or international organizations, she pleads, in an activist mode, in favour of a change of the law and find – quite optimistically – that a "pattern of resistance" against the current situation has already emerged, as evidenced by the dissent expressed by a number of judges as well as by the recognition by the Inter-American Court of Human Rights of the peremptory status of the rule recognizing the individual right of access to courts. In the same vein, the piece of Vinícius da Silveira, Luiz Felipe Santana and Valesca Moschen address possible conflict between peremptory norms and the rules of State immunity from a theoretical point of view. They also argue that there is something moving either in the doctrinal debate and within the national judiciaries that would open space for the mitigation of the immunity rule.

Rita Guerreiro Teixeira and Hannes Verheyden, on the other hand, deal with the question of immunity of head of states before the International Criminal Court, by focusing on the 2019 ICC Appeals Chamber's judgment in the Al-Bashir saga. The ICC stated that, given the "fundamentally different nature" of international courts as opposed to domestic courts, it cannot be assumed that an exception to the customary international law rule on head of State immunity applicable in the relationship between States has to be established. Rather it has to be established that there is such a rule in relation to international courts, which is not the case lacking sufficient practice and opinio juris. While immunity has never been recognized as a bar to the jurisdiction of international criminal courts and tribunals, the authors critically appraise the Appeals Chamber's approach, claiming that more solid and consistent legal arguments should be employed to exclude that immunity of head of states applies before international courts.

A more nuanced analysis is contained in the articles of Pierfrancesco Rossi and Vinicius Fox Cançado Trindade. The former highlights a number of flaws in the case law of the European Court of Human Rights concerning the determination of the content of the rule on state immunity in relation to employment disputes; the latter addresses the evolution of the law governing the immunity of international organizations, criticizing the organizations' reluctance to waive their immunity, particularly in cases arising out of breaches of human rights. Interestingly, both authors place emphasis on the importance to be attached to the existence of alternative remedies when assessing the immunity of states or international organizations. Rossi points to the lack of coherence in the position of the European Court in considering the possible relevance of the absence of alternative remedies. Cançado Trindade underlines that it is in the organizations interest to introduce internal mechanism for providing remedies to victims, as this is the best way to avoid the risk of a progressive reduction of their immunities before domestic courts.

Finally, a number of contributions were devoted to an analysis of recent decisions rendered by domestic courts in South American states dealing with questions of immunity. This attests the increasing importance of the subject in the day-to-day practice of these states; that can be likewise verified in the recent works of the Inter-American Juridical Committee on the matter. In dealing with questions of immunity domestic courts appear to take different approaches. The case of Brazilian Supremo Tribunal Federal is particularly interesting in this respect. As showed by Bárbara Sollero in her crônica on the Cristiano Paes de Castro

decision, the Supremo Tribunal accorded to the United Nations a rather wide immunity, recognizing that only a waiver by the organization could justify the exercise of jurisdiction. By contrast, the same Supremo Tribunal Federal appears to be divided in relation to the rule of immunity of states in the pending Changri-lá case, which is addressed in a crônica written by Aziz Saliba and Lucas Lima. The authors tackle some of the arguments advanced by the forming majority of judges with the view of rebutting state immunity in cases of human rights violations, as well as of highlighting the risks that may ensue from the recognition of a broad exception to immunity. An acute critique to the approach adopted by national courts can be found in the study of Walter Arevalo-Ramirez and Ricardo Abello-Galvis on the Colombian case law regarding jurisdictional immunity of international organizations in labour disputes, described as "a complex case of reception and misinterpretation". In that instance, the pull towards flexibility of the immunity comes from the Colombian Constitutional Court which applies the same exceptions to the customary rules of diplomatic immunity to the law of international organization.

A year ago, when the call for papers was issued, our common purpose was to discuss new trends and emerging challenges to the international law of immunities. The selection of papers included in this special issue will hopefully provide the reader with food for reflection on the trends and novelties in such a fascinating topic. The law of immunities may still be safely regarded as "one of the fastest evolving areas of international law" and this special issue confirms this diagnosis.