



### Diplomatic Immunity from Foreign Criminal Jurisdiction

- Sana Kulkarni (III B.A.LL.B.)

Diplomatic immunity, a widespread practice in international relations, is a principle by which certain foreign government officials are recognized as having legal immunity from the jurisdiction of another country. It allows diplomats safe passage and freedom of travel in the host country and like any other convention-based immunity, constitutes a concession of part of the State's territorial jurisdiction to assist the performance of 'functions' recognised by the territorial State.

The International Law Commission's Draft (ILC) Article 7 on the Immunity of State Officials from foreign criminal jurisdiction lists the only crimes over which State officials may not enjoy immunity in foreign criminal proceedings: crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture, and enforced disappearance. This has been controversial due to the availability of immunity *ratione materiae* for crimes in international law. Immunity *ratione materiae* bars the host State from exercising its criminal jurisdiction over a serving

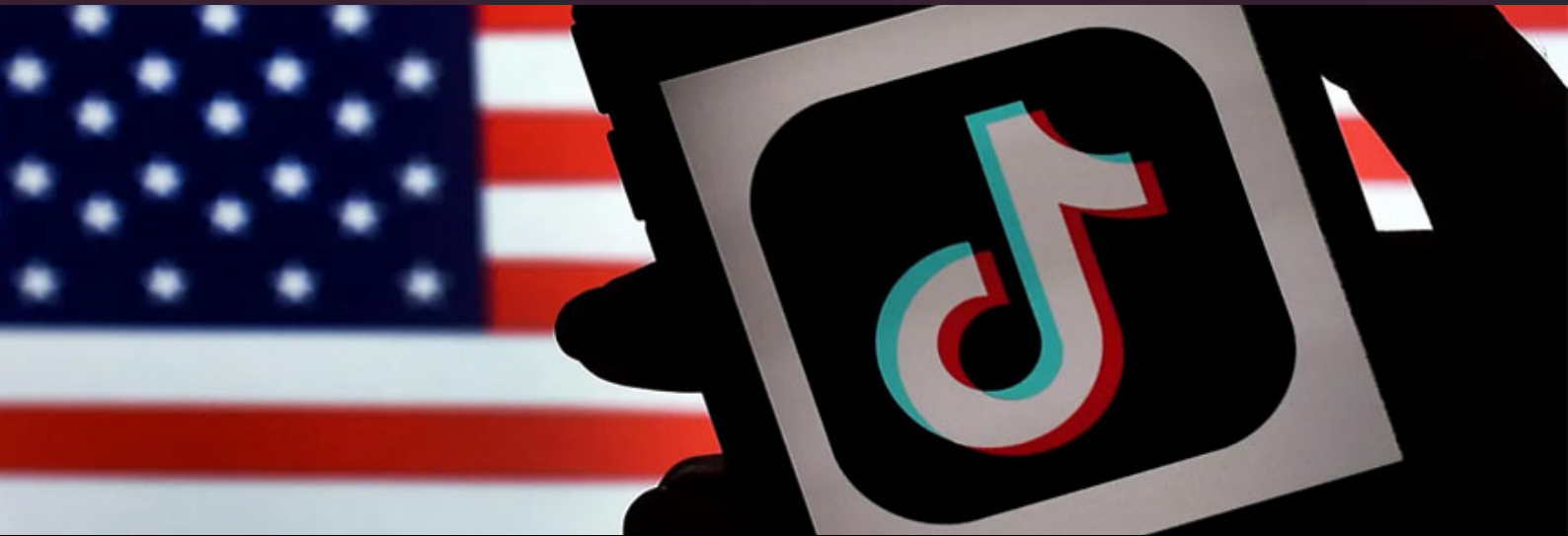
or former foreign State official in respect of acts performed by them in their capacity as State officials. It covers not only official acts in general but merely acts performed in the exercise of diplomatic functions. An essential issue relating to the scope of diplomatic immunity *ratione materiae* that distinguishes between diplomatic immunity *ratione materiae* and immunity *ratione materiae* in general international law, is the meaning of the 'functions' of a diplomatic agent.

Diplomatic immunity *ratione materiae* constitutes conceding part of the territorial State's jurisdiction which is made in order to facilitate the performance of functions recognised by the territorial State. Article 3(1) of the Vienna Convention on Diplomatic Relations VCDR lists the functions of a diplomatic agent: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in

### News at a Glance

The International Court of Justice issued an order on Thursday imposing additional emergency provisional measures Israel must follow in South Africa's genocide case against the country. The order comes after South Africa requested additional measures in light of the worsening humanitarian crisis in Gaza, a request that Israel asked the court to deny. For more information, see [here](#).

Ongoing gang violence in Haiti has killed more than 1,500 people this year and lynched dozens by so-called self-defence brigades, the UN Human Rights Office said on Thursday. The office's findings come after Prime Minister Ariel Henry announced his resignation on March 11. In the days after, Haiti experienced a surge of violence, including bombings at the national airport and police stations, carried out by heavily-armed adversaries. For more information, see [here](#).



The receiving State, and reporting thereon to the Government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Among the functions listed in the article, only the function of protection and the function of observation have a well-defined 'legal' element. However, in Abu Omar, the Court of Appeal of Milan rejected the diplomatic immunity *ratione materiae* of three US diplomats who had helped kidnap an Egyptian imam and later transferred him to Egypt, where he was allegedly tortured.

Even though the kidnapping was a part of the US government's policy of fighting international terrorism and could be considered a diplomatic function of protection under the VCDR, the phrase 'within the limits permitted by international law' excluded the application of immunity because the diplomats' acts violated international human rights law. This proves that diplomatic immunity *ratione materiae* does not aid diplomats who act beyond the bounds of international law

under the pretext of their functions as prescribed in the VCDR.

### TikTok and ByteDance: A Case Study in National Security and Foreign Investment

- Soumik Ghosh (III B.A.LL.B.)

On 14 March 2024, the US passed the Protecting Americans from Foreign Adversary Controlled Applications Act (H.R. 5721). This bill aims to address the national security concerns posed by ByteDance, a Chinese entity, to the confidential data of the American public by virtue of China being classified as a foreign adversary. Failure of ByteDance, the parent company of TikTok, to adhere to the divestment requirement u/s 2(6) of the act would lead to TikTok being banned from being hosted and distributed in the United States u/s 2(1A). This essentially means that platforms like Google's Play Store and Apple's App Store would not be able to dispense the mobile application or source code of any kind belonging to TikTok.

Ex-President Donald Trump tried to ban TikTok, which was blocked citing First Amendment issues i.e. the right to free speech. This legislation comes as a second

### News at a Glance

Saudi Arabia was elected chair of the Commission on the Status of Women (CSW) by "acclamation" on Wednesday after an unopposed bid for leadership with no dissent, despite outcry from human rights organizations ahead of the vote. Saudi Ambassador to the UN Abdulaziz Alwasil will assume the position. For more information, see [here](#).

The UN's International Labor Organization (ILO) stated in a report on Tuesday that forced labor in the private economy generates annual illegal profits of US\$236 billion per year. This has risen by US\$64 billion since 2014. Forced labor is a criminal offense and violation of fundamental human rights. It is defined in the Forced Labor Convention, 1930 (No. 29) as "all work or service that is exacted from any person under the menace of any penalty and for which said person has not offered himself voluntarily." For more information, see [here](#).



attempt with the same objective. The execution of this bill brings into question the duty of the United States to protect foreign investments under customary international law.

This action of forcing divestment can be construed as expropriation because H.R. 5721 intends to deprive the owner of control over their assets which, in this case, translates to equity ownership. This still comes under the classification of lawful expropriation as it is done for a public purpose i.e. safeguarding the national interests of citizens. However, it is a different question that the U.S. government has been accused of making arbitrary decisions in light of the absence of any enhanced wrongdoing on TikTok's data processing policies as compared to American technology companies themselves.

Conversely, lawful expropriations still require prompt compensation, and this is where things get complicated, as forced divestitures usually impact the stock prices of the parent company negatively, thus leading to a loss to ByteDance's as well as TikTok's valuation. Thus, the amount of compensation

warranted remains ambiguous. This proposed divestment has been protested in turn by the Chinese government, as it has classified TikTok's operations as technology exports. Thus any such action has to be approved by the Chinese government. Adding to the complication of this divestiture is another pressing issue: antitrust. TikTok is valued at a relatively large amount and very few companies like Meta, Google and Apple, will be able to acquire the equity stakes, creating major competition issues. This has also been reflected in the Congressional Report.

TikTok is an example of the rising importance of the digital landscape which is fueled by data and is transforming global power dynamics, reshaping international business relations, and challenging traditional notions of sovereignty and control over information. Given the magnitude of TikTok's influence on the American economy, coupled with its magnanimous valuation, the H.R. 5721 is bound to ruffle feathers in both countries.

In the short term, ByteDance may make use of judicial review u/s 3 of the H.R. 5721 to contest the validity of the bill.

### News at a Glance

The Thai House of Representatives approved Wednesday an equal marriage bill, with 400 favoring votes out of 415 members of the house. The bill still requires approval from the Senate and endorsement from the king. If the Senate and the king approve the legislation, Thailand will become the third Asian country/region that recognises same-sex marriage, after Taiwan and Nepal. For more information, see [here](#).

New Zealand's government expressed concerns Tuesday about China's alleged involvement in a cyberattack that targeted New Zealand's parliament. According to New Zealand's intelligence agency, the Government Communications Security Bureau (GCSB), the cyberattack dates back to August 2021 when the National Cyber Security Center (NCSC) discovered that the networks of both the Parliamentary Council Office and the Parliamentary Service were targeted by "malicious cyber activity." For more information, see [here](#).



However, China is unlikely to concede to the demands of the United States if such an application were to fail. In fact, other than tightening the export regulations, China has also threatened ByteDance with legal proceedings if divestment occurs, putting the company in a tough position and threatened by both governments. If this dispute does not resolve then it has a potential for massive escalation including retaliatory bans by the Chinese government on American apps.

### Do Preliminary Investigations Fall Under States' Continual Obligations?

- Arya Mitkari (II B.A.LL.B.)

In the past decade, several States, like the Philippines, Burundi, South Africa, Gambia, and even the African Union (AU) Bloc have expressed their disapproval of the ICC. These States have even gone on to say that the ICC is not about justice but rather politics disguised as international justice. The Philippines and Burundi formally withdrew from the ICC's Rome Statute in 2019 and 2017, respectively. The authorisation for a formal investigation in the Burundi case came only two days

before the withdrawal became effective, whereas the Philippines gave its notification just after the Office of the Prosecutor (OTP) opened a Preliminary Examination (PE).

State withdrawals from treaties must follow Article 42 (2) of the Vienna Convention on the Law of Treaties (VCLT), which states that the withdrawal of a party from the treaty may only take place as a result of the application of provisions. This means that Parties must follow the withdrawal procedure mentioned in the respective treaties. In the present cases, this procedure is given in Article 127 of the Rome Statute, which implements a one-year notification period. During the period of continual obligations, the States are obliged to cooperate with ongoing criminal investigations and proceedings that were commenced before their withdrawal becomes effective. Criminal investigations are a form of formal investigation, authorized directly by the Pre-Trial Chamber (PTC). Here, the term "investigation" may not include Preliminary Examination, which is done by the Office of the Prosecutor (OTP). This is because the PE precedes the criminal

### Upcoming Activities

Academy on Human Rights and Humanitarian Law of the American University Washington College of Law

The Academy on Human Rights and Humanitarian Law of the American University Washington College of Law, U.S.A is hosting its Program of Advanced Studies on Human Rights and Humanitarian Law from 27 May – 14 June 2024. Registration is now open with a deadline of 1 May 2024. For more information, see here.

BIICL Training Programme: Spring 2024

The British Institute of International and Comparative Law (BIICL) has launched its programme of short courses for spring 2024. The programme is now accepting bookings and will cover public international law, climate change law, international trade law and the context of the war in Ukraine. For more information, see here.



investigation.

Withdrawing from the Statute during an investigation against the State raises several questions about using this unethical method as a defence to prolong or even call off the investigation completely. The withdrawal from the Statute puts unnecessary pressure on the OTP to proceed with the preliminary investigation, conduct the investigation and then request and receive the court's authorisation for a formal investigation. If not for the withdrawal, the OTP can take sufficient time to look into the matter rather than hastily attempting to complete the PTC process in less than a year.

It is essential for the OTP to establish that a situation is a matter under consideration, as doing so will grant the court jurisdiction over the situation, even if the State is not a party to the statute after the withdrawal becomes effective. This has been observed in both the Burundi and the Philippines cases, where the States withdrew from the Statute but were bound to cooperate with the court owing to Article 43 of the VCLT.

The question of whether a PE amounts to being a matter under consideration is still quite ambiguous. The existence of a preliminary investigation being undertaken by the OTP should imply that this matter is under consideration by the court since the OTP is an organ of the ICC. However, a counter-argument arises, where the PE is merely a preliminary and an informal look into the situation which, at times, might not even amount to a formal investigation. The existence of continual obligations of the State to cooperate with the court is essential, so as to prevent withdrawal from the Statute as a growing defence to the crimes that have been committed. If the establishment of continual obligations is not followed, then States would get an easy pass of committing the crimes and immediately withdrawing, which is contrary to the spirit of the Rome Statute, and unfair to the victims as well as the international community. The ambiguity surrounding whether PE should be considered as a 'matter under consideration' by 'the court' needs to be eliminated, through an amendment to the Rome Statute, to prevent the misuse of Article 127.

### Upcoming Activities

**Call for Papers: Workshop on the Contribution of the United Nations War Crimes Commission to International Criminal Law**

The Research Centre in International Justice in Maynooth University is seeking abstracts to participate in a workshop on the contribution of the United Nations War Crimes Commission (UNWCC) to International Criminal Law. This event will take place on 12 July 2024 online and in person. The event brings UNWCC experts and new scholars together to explore the contribution of the work of the UNWCC to contemporary international criminal law. The deadline for submission of abstracts is 3 May. For more information, see [here](#).

#### Editors:

Shweta Shukla (V B.A.LL.B.)  
Shreya Basu (III B.A.LL.B.)

#### Assistant Editor:

Sana Kulkarni (III B.A.LL.B.)