

THE IMMUNITY OF STATE OFFICIALS FROM FOREIGN PENAL JURISDICTION IN LIGHT OF THE INTERNATIONAL LAW COMMISSION'S DRAFT

BENSALAH RACHIDA¹

¹Faculty of Law, University of Algiers 1, Benyoucef Benkhedda
Legal Research, Laboratory on Artificial Intelligence and Society (Algeria).

The E-mail Author: r.bensalah@univ-alger.dz

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Abstract:

The issue of immunity of state officials from foreign penal jurisdiction is of great importance due to its impact on the principle of sovereign equality and international stability. Interest in the topic grew after widespread serious human rights violations and efforts to hold perpetrators accountable regardless of official position. Several states began exercising criminal jurisdiction over foreign officials, which risks destabilizing international relations. In response, the International Law Commission added the topic to its agenda in 2007. This led to the adoption of draft articles on the matter by the Commission in 2022.


Keywords: *Immunity of State Officials, Jurisdiction, International Law Commission, Principle of Equality in Sovereignty.*

INTRODUCTION:

Apart from the aggravation of human rights felonies, the world has seen the widespread emergence and growth of crime in its many forms, both international and transnational organized crime, including corruption, money laundering, and others. Consequently, the main goal of the world has been to fight these crimes and felonies, therefore guaranteeing that offenders cannot avoid punishment no matter their official standing inside the state's machinery. But this work ran into another problem: the equality of states in sovereignty, the stability of international relations between states, and the preservation of these relationships. In this setting, the idea of the Immunity of state officials from foreign penal jurisdiction (FPJ) drew international attention.

Interest in this topic grew particularly following the case of former Chilean President General Augusto Pinochet in the United Kingdom, which led to roughly 20 attempts between 1998 and 2001 to initiate Penal proceedings in national courts against high-ranking officials of foreign states in power or had formerly held office.¹ Accusing state officials of major human rights felonies and felonies of International Humanitarian law raises much debate about their immunity. This is especially true when some countries prosecute current or former officials of foreign states under their domestic laws in an attempt to fight human rights felonies and prevent impunity.

The officials of states that have committed crimes, especially those concerning human rights felonies, must be held accountable for their actions, especially Penal responsibility. But without compromising or weakening the current relationships between states founded on the principle of equality of sovereignty and the creation of stable international relations, especially since the officials acting on behalf of their states are independent in their interactions with other states, it is also vital that the state under whose authority such crimes are committed is able to exercise its Penal Jurisdiction over those who have committed these crimes. Thus, it is vital to differentiate between the rules governing the authority of national courts and those governing immunity from Jurisdiction. Submitting to Jurisdiction does not equal lack of immunity; conversely, lack of immunity does not automatically imply submission to Jurisdiction.



The decision of the International Court of Justice in the case of the arrest warrant issued by Belgium against the Minister of Foreign Affairs of the Democratic Republic of the Congo had a major effect on this matter since it offered a helpful evaluation of international law on the exemption of state officials from foreign Penal Jurisdiction (FPJ). The work of the International Law Commission (ILC) on this topic clearly shows this impact, especially in terms of which state officials have immunity. Though not separately, the UN ILC has addressed the topic of immunity several times; the International Law Institute first brought it up in 1891 and again in 2001.

After obtaining support from countries during debates in the Sixth Committee of the UN General Assembly, the ILC resolved in 2006 to put the issue of state officials' immunity from foreign penal jurisdiction (FPJ) on its current agenda, as suggested by the planning team. As the Special Rapporteur on this topic, Mr. Roman Anatolievich Kolodkin produced three reports in 2008, 2010, and 2011, respectively. Ms. Concepción Escobar Hernández was named new Special Rapporteur in his stead following his term on the ILC. She submitted eight reports on the subject between 2012 and 2021 together with draft articles addressing the matter. The draft articles on the Immunity of state officials from FPJ were adopted by the ILC in its first reading during its seventy-third session in 2022 following debates and comments.

Apart from procedural provisions regarding immunity, the draft articles tackle various topics including the scope of the application of the articles, people covered by immunity from FPJ, kinds of immunity, and the criteria for their application. In this respect, one could wonder about the kind of immunity state officials from the Penal Jurisdiction of a foreign country enjoy as well as how these officials are decided. Immunity raises another issue: is it total or limited by exceptions and restrictions? The first part of this paper discusses personal immunity and functional immunity for state officials as well as defining these officials in order to address these issues. The second part addresses immunity's exceptions and restrictions.

Section I: State Officials Between Personal Immunity and Functional Immunity

It is first necessary to clarify the idea of state officials before talking about Immunity and the kinds that might pertain to state officials from FPJ.

A) Definition of a State Official:

Given the kind of immunity they could enjoy, whether personal or functional, the meaning of state officials has generated considerable controversy. The General Secretariat's memorandum on the Immunity of state officials from FPJ² has examined this topic alongside the first report by special rapporteur Mr. Kolodkin³ and the third report by second special rapporteur Ms. Hernandez. Though the phrase "state official" or "official" has surfaced in some international instruments International law has not defined state officials. The issue then is: who qualifies as a "state official" who has Immunity from FPJ? Does this apply only to heads of state or are there other types that could fall under this definition?

1- Definition of State Officials in the Draft of the ILC:

Mr. Kolodkin, the first Special Rapporteur, suggested using the word "official" rather than "organ" when discussing the meaning of state officials, which generated debate among ILC members. Others said words like "agent" or "representative" could fit. In the end, it was decided to keep the word "official" with the option of altering it should the Commission deemed appropriate. Conversely, Mrs. Hernandez, the second Special Rapporteur, underlined that when the Commission defines state officials, it must consider people who enjoy immunity from FPJ, whether it is personal or functional immunity, and also consider the distinctions between these categories.

The draft of the ILC has a section called "Definitions" that characterizes state officials as "anyone who represents the state or carries out state duties." The paper goes on to say that "state officials include both current and former officials."⁴

Framed in broad terms, this definition seeks to apply to anyone who enjoys Immunity from FPJ, whether the Immunity is functional or personal. Conversely, the Commission's use of the word "individual" in the definition makes it obvious that the draft on Immunity for state officials only applies to natural people.⁵

The general sense of the word "officials" is another interesting feature of this definition. The Commission meant for the study to cover exemption for state officials more broadly; thus, it was not accidental that it was not confined to Immunity for heads of state, heads of government, and secretary of states from FPJ.⁶

The ILC indicated that this definition is self-contained for the purpose of applying it to the provisions of the Commission's draft on the immunity of state officials from FPJ. It specifically pertains to the individual who enjoys this immunity, without presuming or referring to any judgment that would limit the actions to which immunity could apply.

Thus, for any official to benefit from this Immunity under the draft, a connection between the individual and the state must exist, namely, that the individual "represents the state" in the broadest sense, or that the individual performs state functions. The latter includes all activities related to the state, such as executive, legislative, and judicial functions.

2- States' Comments on the ILC's Definition of State Officials:

Several states have commented on and observed this definition. Others have contended that other words mentioned in the draft's provisions, including foreign authority and immunity, need more definitions. The special rapporteur, though, said that the ILC⁷ did not feel defining Immunity and Penal authority in this draft was required since these concerns had already been handled in prior practices in other initiatives.

Another issue brought up was the state official's nationality, especially if the official hails from another nation. The special rapporteur, however, thinks that the individual's satisfaction of two criteria—being a state official and acting in an official capacity—determines whether they enjoy immunity from FPJ. So, immunity pertains to the state in which the official operates.

Some states have also requested that a list of state officials—especially those with functional immunity—be included. On this matter, the Special Rapporteur said that, with respect to personal immunity, it is provided for under the draft committee's recommendation for three positions: Chief executive, Ceremonial leader, and Minister of Foreign Affairs. Regarding functional immunity, the article lacks a list of state officials; yet, a non-exhaustive list has been included via the Article 2 of the draft immunity, which is open to additions.

Thus, a state official is a person who represents the state or performs state functions, regardless of whether they are current or retired authorities. The state is granted an exception; each case is evaluated individually to determine a person's eligibility as a state official. On the other hand, this official's job must be in an official capacity, therefore there must be a direct link between the action and the exercise of state authority. The action thus has to be ascribed to the state immunity from FPJ does not cover private acts that benefit only the individual and cannot be ascribed to the state.

B) Personal immunity from FPJ:

This is the immunity granted to people in particular positions, such as Chief executive, Ceremonial leader, and Minister of Foreign Affairs, depending on the official's role within the government. It covers the acts taken by this official both before and during their time in office, whether in their official or private capacity. Because it is tied to the official's job,⁸ this immunity is only valid for a limited time and expires when they leave their position.

Two items addressing personal immunity were included in the ILC's first reading of its draft on state officials' immunity from FPJ. The requirements that must be met in order for state officials to be eligible for this Immunity are described in these articles. The draft's Article 3 discusses the range of

individuals protected by this immunity, while Article 4 concentrates on its substantive and temporal scope.

1- Individuals Covered by Personal Immunity:

Personal immunity from FPJ only applies to certain people covered by this immunity. In this respect, the draft of the ILC's Article 3 says that "personal immunity is enjoyed by the chief executive, Ceremonial leader, and secretary of state." It therefore restricts this immunity to just these three officials, therefore excluding other high-ranking state authorities.

Because they represent their countries in international relations under international law, personal immunity from FPJ includes the chief executive, Ceremonial leader, and secretary of state.⁹ Moreover, this immunity lets them perform their designated tasks free of obstacles, which is not for their personal gain.¹⁰

It is interesting to highlight that when this problem was addressed, some ILC and Sixth Committee of the United Nations General Assembly members engaged in debate. Some members contended that the list of people covered by personal immunity from FPJ should not be limited to the previously mentioned trio but should also include other high-ranking state officials.

They argue that certain high-ranking officials, apart from the heads of state, government, and foreign ministry, have become more involved in international forums as international relations have changed. These officials represent their states in fields like defense or international commerce and travel outside their country's borders, including the Minister of Defense and the Minister of Global Trade. They base this on the ruling of the International Court of Justice in the case of Belgium's arrest warrant issued on April 11, 2000, against Mr. Yerodia Abdoulaye Ndongbasi, the Minister of Foreign Affairs of the Democratic Republic of the Congo. The Court noted that "Senior state officials, including the chief executive, Ceremonial leader, and secretary of state, are similarly immune from other states' authority in civil and Penal cases, as is well-established and consistent with international law."¹¹

And these members contended that the phrase should be interpreted widely since the word "such as" suggests the Court did not restrict immunity to only the three people named. Given the Court's use of the term "such as" in relation to a particular conflict—specifically, the degree of immunity held by the secretary of state of the Democratic Republic of the Congo—others, however, argued that personal immunity should only apply to the chief executive, the Ceremonial leader, and the secretary of state.

The phrase's literal meaning does not automatically suggest that the International Court of Justice plans to create an open list of people covered by personal immunity from FPJ. Furthermore, in the case involving specific mutual assistance in Penal matters (*Djibouti v. France*), when the Court had the chance to increase the list of people entitled to personal immunity, it found that this type of immunity only applied to the chief executive. Because they did not have the diplomatic status outlined in the 1961 Vienna Convention on Diplomatic Relations and were not protected by the 1969 Special Missions Convention, the Court determined that the prosecutor and head of national security of Djibouti were not entitled to personal immunity.

In the end, the Commission concluded that only the secretary of state, chief executive, and Ceremonial leader¹² should have personal immunity from FPJ. Two arguments supported this conclusion: the first was representative, since they represent their states without a mandate, and the second was functional, since it allows them to carry out their responsibilities without hindrance. As confirmed by the International Court of Justice's decision in the 2000 arrest warrant case, the Commission explained that the personal immunity of heads of state was uncontested and that the Ceremonial leader and the secretary of state were included because of their representative roles, which are comparable to those of the chief executive.¹³



2- Temporal and Subjective Scope of Personal Immunity:

1.1- Temporal Scope of Personal Immunity:

This pertains to the period during which a state official likes personal immunity from FPJ, especially during the term of the chief executive, Ceremonial leader, or secretary of state in these roles. Beginning when the official takes office and ending when they leave it, it is a transient immunity.

In this respect, the International Court of Justice decided in the previously cited arrest warrant case that the secretary of state loses the personal immunity given by international law as soon as they leave office. The chief executive and Ceremonial leader both equally benefit from this concept. Any state may therefore prosecute this official for acts done before or after their term, whether these acts were done in an official or personal capacity, so long as the state has authority under international law.

This decision had an impact on the ILC's report on the duration of personal immunity because it stated in its draft provisions on immunity from FPJ that immunity is only granted for the duration that the chief executive, Ceremonial leader, or secretary of state is in office. The Commission's use of the word "only" in the draft of Article 4 reflects this.¹⁴

1.2- The Substantive Scope of Personal Immunity:

The substantive range of personal immunity is the actions to which it applies. Unlike the subjective scope, which concerns the people covered by this immunity, no objections have been voiced about the actions taken by the Chief executive, Ceremonial leader, and Minister of Foreign Affairs, whether these actions are carried out in an official or personal capacity. The ILC's approach to personal immunity for particular categories, including the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions, has been in line with that of current international instruments. It also fits the approach taken by national and international courts, especially the international Court of Justice, in awarding personal immunity to the above-mentioned trio for their acts, whether official or personal.

This immunity is total, or absolute... and comparable words the Commission once used. In her second report of 2013, Special Rapporteur Ms. Fernandez chose "full immunity" over "absolute immunity," arguing that the latter term might suggest other connotations, particularly in view of recent changes concerning immunity in international law.

Conversely, with regard to actions done officially during their tenure, both the Chief executive, the Ceremonial leader, and the Minister of Foreign Affairs can retain functional immunity from FPJ even after leaving their posts. But, this is not a personal immunity extension.¹⁵

C) Functional immunity from FPJ:

The immunity that state officials enjoy based on the official acts they carry out while in office is known as functional immunity from FPJ.

A person must fulfill specific requirements, such as being a state official and acting in an official capacity, in order to be eligible for this immunity.

1- Scope of Functional Immunity:

Functional exemption from FPJ applies to state officials in the context of carrying out official responsibilities during their time in office, irrespective of the rank they hold inside the state. This is why some call this kind of immunity "functional immunity." It covers only actions done by state officials in their official capacity; it does not apply to personal activities done outside of official obligations. For actions done in an official capacity during their term, state officials retain functional immunity even after leaving office.

From the above, we can infer the required criteria for enjoying functional exemption, which can be classified into personal scope, material scope, and temporal scope.



1.1- Personal Scope of Functional Immunity:

This refers to the people included under this immunity. A state official, according to the draft of the ILC on immunity for state officials from FPJ, is someone who represents the state or uses its powers and acts in that role. Whether executive, legislative, or judicial, both nationally and globally, the individual must be linked to the state shown by their representation and participation in different state activities. Thus, the state operates via its representatives carrying out their official responsibilities.

Found in Article 5 of the draft of the Commission, the term "acting in that capacity" underlines the official character of the state officials' actions, therefore stressing the functional aspect of functional immunity, which sets it apart from personal immunity. Discussions on this article revealed differing views among ILC members. Some thought it was pointless to name the people covered by this immunity since its foundation is in the character of the acts done—i.e., official—rather than the person immunity them. Most of the members contended, though, that it is crucial to first define these people given that immunity is given to particular people.

In contrast to personal immunity, a list of state officials covered by functional immunity¹⁶ was not included in the ILC's Draft, especially in the article on the personal scope of this immunity. Rather, the Commission believed that these officials should be identified on an individual basis.

1.2- The Material Scope of Functional Immunity:

This pertains to the activities undertaken by state officials covered by functional immunity; these activities are only those officially conducted by state officials.¹⁷ Key questions are defining the idea of an action done officially and understanding its features.

The Draft of the ILC defines an action as officially performed if it is "any action undertaken by a state official in the context of exercising state authority."¹⁸ Thus, the person carrying out this action has to be a state official and it has to be done in the exercise of state authority, thus there has to be a clear link between the action and the execution of state duties and powers.

The Commission's draft makes clear from its use of the term "in the exercise of state authority" that it stresses the need of a connection between the action and the state. This connection supports the acknowledgment of immunity to maintain the concept of sovereign equality between countries. Moreover, this term is used broadly to cover all activities state officials might do in the state's interest under their responsibilities.

Another feature of an officially conducted action is its state attribution. The action can also be ascribed to the person who performed it, therefore the state is not solely responsible for the action. Actions done by state officials for their own personal gain, even if they seem to be done officially, cannot be deemed officially executed since in such situations there is no obvious state interest and hence no justification for immunity, which is given to maintain the sovereign equality between states.

Conversely, functional immunity cannot be denied for illegal acts done officially. Unlike personal immunity, which covers both official and personal acts, functional immunity does not cover acts done by state officials in a personal capacity.

Many ILC members have engaged in lively discussion on the link between the idea of "state official" and the idea of "acts done officially". Several members contended that the definition of "state official" in Article 2 of the draft under consideration already addresses the personal and material extent of immunity from FPJ,¹⁹ therefore obviating the need to discuss both separately. Though, even if the two ideas are related, it is obvious that each has a different meaning and should be examined and handled separately.

Regarding the individuals covered by substantive immunity, some states offered feedback on Article 5 of the ILC's draft as well as Paragraph 1 of Article 6, which addresses the substantive scope of this immunity and relates to officially performed acts. In order to prevent duplication, these states

recommended merging the two articles. But the special rapporteur thought it would be better to keep these two articles apart.²⁰

1.3- Temporal Scope of Substantive Immunity:

Among members of the ILC, the temporal range of substantive immunity did not present problems comparable to those regarding personal exemption from FPJ. Permanence defines substantive immunity; it stays relevant to acts done by state officials in their official capacity even after they depart their roles. Substantive immunity is founded on the character of the acts done by these officials, which do not vary depending on the position held. Whether or not the state official remains in office, the official character of these actions does not vanish.

This is not the same as personal immunity, which is transient. The chief executive, Ceremonial leader, and secretary of state's personal immunity finishes immediately upon departure from office. Though, even after that time has passed, these people, who are also state officials, retain substantial immunity from FPJ for actions done officially during their time in office.²¹

Section II: Exceptions to Immunity from Foreign Penal Jurisdiction

Under terms and criteria already stated, state officials enjoy immunity from the Penal Jurisdiction of a foreign state. But the issue is whether this immunity is total or qualified. Discussions reaching the Sixth Committee of the United Nations General Assembly have fueled significant controversy among ILC members and even outside that body. The discussions emphasized several significant issues: the kind of immunity that is exceptionable, the justifications for the existence of these exceptions, and the clarification of the situations in which they apply—especially the international crimes that could be affected by these exceptions.


A) Scope of Exceptions to Immunity for State Officials from Foreign Penal Jurisdiction:

The fifth report submitted by the Special Rapporteur tackled the topic of restrictions and exceptions to exemption from FPJ. Among the members, views differed on the use of the words "limitations" and "exceptions" as well as the difference between the two. Every one of these words has a unique meaning, thus it is crucial to emphasize. Whether personal or functional, the normative aspects particular to each kind of immunity are related to limitations; exceptions are external influences on parts of the international legal system.

Several members of the ILC believe that the distinction between limitations and exceptions is helpful and ought to be upheld because it makes it easier to distinguish between situations in which immunity is excluded due to extraordinary circumstances and those in which immunity is not in question because the behavior in question cannot be regarded as an official act or carried out by the individual in their official capacity.

Ms. Hernandez, the Special Rapporteur, thought it scientifically unimportant, however, given the theoretical and normative significance of differentiating between limitations and exceptions in evaluating the general immunity system, both ideas produce the same outcome: the inapplicability of the legal immunity system for state officials from FPJ in particular situations. Thus, the term "immunity does not apply"²² was used to convey both limitations and exceptions. With modifications as required, this strategy fits the Commission's methodology in earlier drafts, especially in the draft United Nations Convention on the Immunity of States and Their Property from Authority. In that framework, the phrase "claims to which states cannot invoke immunity" was employed in a comparable context. The Commission, on the other hand, in this instance, chose to avoid the phrase "cannot...invoke" to sidestep the procedural component of the aforementioned phrase and instead used the neutral phrase "does not apply." Based on practice, this wording lets one avoid conflicts resulting from the difference between the words "limitations" and "exceptions."

The ILC began with the premise that, under customary international law, state officials' immunity from FPJ is self-evident. The Commission, whose mandate is to codify and progressively develop



International law, sought to determine whether a customary international rule on exceptions to this immunity existed so that it could be codified. The Commission drew on present practices in certain national laws, national court rulings International Penal tribunals, and some academic opinions, including the 2009 decision of the Institute of International Law. Ms. Hernandez, the special rapporteur on this issue, presented the fifth report previously mentioned, which resulted in the suggestion of Article 7 of the Commission's draft. Among the Commission members, this suggestion generated notable controversy and division.

Notably, the ILC has usually approved proposed draft texts by consensus; yet, in this instance, for the first time, this rule was violated. With 21 members voting in favor, 8 against, and one abstaining, Article 7, headed "International Crimes to Which Functional Immunity Does Not Apply," was temporarily adopted in 2017 by roll-call vote. The opposing members offered justifications for their opinions and a summary of their objections.

The Commission found in its studies that neither a customary rule nor a trend favoring immunity to personal immunity from FPJ exists. A small number of state officials have personal immunity from FPJ; this immunity is total during their time in office. These people are restricted to the secretary of state, Ceremonial leader, and chief executive. But, since these people are state officials as well, they have functional immunity for actions done in official capacity that persists even after they leave office.²³

Therefore, the Commission is trying to create a customary rule for functional immunity, which would exempt state officials from certain immunities. The Commission draws on its work on customary law to offer summaries of particular judicial rulings, national laws, preparatory work for international agreements, and decisions of International Penal tribunals. Using both deductive and inductive approaches, the Commission shows a trend in practice favoring the existence of exceptions to functional immunity by means of the explanations in Article 7, therefore justifying its decision by citing its mandate to promote the codification and progressive development of international law. Among ILC members and via state comments and observations, opinions on the fifth report—which deals with exceptions and limitations to functional immunity as well as the draft of Article 7—varied; some supported it while others opposed it.

1- The Supportive View for Limiting Functional Immunity:

For those who advocate the concept of exceptions and restrictions on functional immunity, they think the Commission was right to add Article 7, which says functional immunity does not apply to particular grave international crimes. Although this immunity is required and crucial for managing international relations and guaranteeing the independence and freedom of state officials acting officially, it cannot excuse the commission of international crimes or hinder the prosecution of those accountable. These offenses cannot be classified as part of the state's official duties and hence cannot be seen as officially carried out.

The immunity system should not hinder the safeguarding of international community interests. Furthermore, the fight against impunity and the safeguarding of human rights are not less important than state sovereignty; rather, they must complement it.²⁴

They also contend that the draft of Article 7 shows the progressive evolution of international law and rightly reflects, in principle, the general rules of law and state practice. Their argument is that national laws back this strategy; while these laws usually emphasize state immunity, they at least show a trend toward restricting immunity. Treaty practices have also changed to put state officials' exemption under restrictions and exceptions, as the Commission on individual Penal responsibility has noted.

Moreover, International instruments including the principles of international law acknowledged in the Nuremberg Charter and the draft code of crimes endangering the peace and security of individuality reject immunity for international crimes. Furthermore, in the prosecution of those committing

international crimes, Article 27 of the Rome Statute of the International Criminal Court clearly ignores official capacity. Some international agreements' "prosecution or surrender" clause inclusion influences state officials' immunity as well.²⁵

Proponents of exceptions contend that some courts and International judicial bodies are increasingly deciding not to apply immunity, either because they believe the actions violated peremptory norms of international law or because these actions cannot be considered as having been carried out officially. The national level application of the Rome Statute has also directly affected immunity before national courts. For serious international crimes that harm state interests, national courts are essential in guaranteeing responsibility. This then guarantees that they do not evade punishment, prosecutes the offenders, and stops the perpetration of such crimes. Especially in situations where the International Criminal Court has no authority, national authority is quite important. Thus, one recognizes a clear trend toward the non-applicability of substantive immunity for international crimes at the national level.²⁶

2- The Opposing View for Limiting Functional immunity:

The second perspective denies state officials' immunity from FPJ exceptions and restrictions. Proponents of this perspective underline the need of enhancing responsibility for the most grave international crimes and backing efforts meant to stop impunity. But they contend that Article 7 does not correspond with customary international law. They justify this by citing the fifth report discussed before, which offers a thorough analysis of practice; however, the link between this practice and the restrictions and immunity noted in Article 7 is ambiguous. It lacks enough proof to back the suggested restrictions and exceptions. Furthermore, many of the examples discussed in the report relate to state exemption or exemption in civil cases, not exemption in the context of penal trials. Selected cases supporting the application of limits and exceptions on immunity were also covered; evidence against these actions was overlooked.

This contrary perspective also emphasizes that the report's illustrations originate from various settings and eras, thus there is no demonstrated evolution toward applying limitations and exceptions on the substantive immunity of state officials. Conversely, just a handful of national laws have limitations and exceptions. Legal systems using the Rome Statute, for example, often do not handle immunity in extradition-related issues. Furthermore, the handful of nations with such legislative exceptions have lately changed their laws to restrict the extent of these exceptions about the immunity of state officials from FPJ, including Belgium.

Among the reasons against this viewpoint is the assertion that treaty practices do not show a trend toward restricting functional immunity. A handful of international treaties specify restrictions and exceptions; these treaties only bind their parties, therefore they cannot be seen proof of a customary rule. Regarding national courts, many of the cases listed in the report, albeit few in number, were either reversed by the courts or did not involve state officials' immunity from foreign authority but rather state immunity or immunity in civil lawsuits. Conversely, some Commission members who disagreed with this perspective underlined the distinction between national and international courts and claimed that the lack of immunity before international Penal courts does not automatically mean the non-application of immunity in national courts.

Having considered the many viewpoints, we can finally say that the draft Article 7 does not represent customary international law since it is not backed by consistent state practice and belief in its compulsory character. With just a few instances from other areas, most of the ILC's fifth report or Draft Article 7 explanations' cited instances come from European countries. State practice is also restricted and the Commission cites few judicial precedents. The fact that Draft Article 7 was adopted by vote in 2017 rather than by consensus indicates that this article does not codify current rules. The different opinions among countries in the Sixth Committee of the United Nations General Assembly supports this even more.

B- International Crimes Exempted from the Application of Immunity immunity for State Officials from Foreign Penal Jurisdiction

According to Article 7 of the ILC's draft, state officials from FPJ are not immune from functional immunity for a number of International crimes. These offenses are regarded as the biggest dangers to the international community's interests. In order to identify the situations in which functional immunity does not apply, the Commission used the term "international crimes" in Article 7 to make it clear that, regardless of whether these crimes are classified as crimes under national laws, reference to international law is required to characterize them as Penal and that prevention and punishment of these crimes are directly based on International law. It is important to note that the Commission has already used this phrase in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind and when defining the Nuremberg Principles in 1945.

Article 7's draft lists international crimes to which functional immunity does not apply. Among these offenses are genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance. Especially absent from this list is the crime of aggression as well as some others suggested by special rapporteur Ms. Hernandez, including corruption crimes and regional exception crimes.

Describing war crimes, crimes against humanity,, and genocide as crimes with notable effects on the international community as a whole,²⁷ the Commission defended their inclusion in the draft of Article 7. Though the crime of aggression would logically be at the top of this list according to this reasoning, the ILC did not use the same logic to this crime. Though its mention in the Rome Statute in Article 5, the primary reasons for its exclusion from the 2017 draft of Article 7 were the nature of the crime of aggression, which requires national courts to determine whether a foreign state has committed an act of aggression, the political nature of the crime due to its designation as a crime of leadership, and the fact that the Assembly of States Parties to the Rome Statute had not decided to activate the Court's authority over this felony.²⁸

Though the Commission revised its rationale on the third argument in 2022, excluding it from the justifications because the international Penal Court's authority over the crime of aggression was activated in 2018, it kept the other two arguments.

Concerning the Commission's second argument for excluding the crime of aggression, which holds that national courts must decide whether a foreign state's aggressive act exists, this might also be true for other international crimes. For instance, in situations of crimes against humanity,, a national court could be obligated to decide if the state had a policy to start a systematic or widespread assault on civilian populations. The political factors cited in the justifications of Article 7 with respect to the crime of aggression could also completely apply to the international crimes enumerated in this article. The charge against a state official of committing genocide or crimes against humanity, has no less political relevance than the charge of aggression; current or past practices involving conflicts between states suggest that genocide, war crimes, and crimes against humanity, all have notable political implications.

Examining the Commission's draft also reveals it admits the creation of safeguards and procedural rules to stop the possibility of FPJ being exercised against state officials in a political or arbitrary way.²⁹

It might be argued that the ILC did not adequately explain why the crime of violence was left out of its whole text, particularly Article 7. Moreover, its placement in this article's list of offenses aligns with the Commission's earlier research. Therefore, if the Commission chooses to continue to exclude the crime of aggression, which is considered to be one of these crimes, it would be departing from its stance that immunities do not apply to crimes committed worldwide.

Corruption crimes and territorial exception crimes were left out of the draft of Article 7 since, while they are acts committed by a state official for personal gain, they cannot be deemed acts done

officially. Although the person's official status may help a corruption crime to be committed, it does not alter the character of the act, which the Commission sees as one done for personal gain even if the official employs state resources to carry it out.

Concerning territorial exception crimes, the Commission chose not to include them in the draft of Article 7 because of inadequate supporting practices and other factors not cited by the Commission. It thought that some of these offenses, including espionage, sabotage, and kidnapping, fall under the concept of territorial sovereignty and do not create substantive immunity. Conversely, Paragraph 24 of the explanatory notes to Article 7 on corruption crimes and territorial exception crimes is ambiguous and lacking more information and explanation.³⁰

CONCLUSION

The question of immunity of state officials from FPJ is very significant since it affects the promotion of the idea of equality in sovereignty among states and the preservation of international relations. This immunity is based on international law, especially customary international law, not just on standards of international courtesy. Thus, the decision of the ILC to tackle this issue and carry out a study on it is not only consistent with its goal to codify and advance international law but also based on a normative basis. Though the ILC has addressed this matter many times, as noted before, it has never looked at it in isolation.

What stands out in the draft being considered is the Commission's emphasis on a few important factors:

- First, the draft is restricted to immunity from FPJ.
- Second, it is limited to FPJ and has no bearing on the system used by international penal courts.
- Third: It Applies to All State Officials, Regardless of the Positions They Hold in the State Apparatus or the Functions They Perform, Except for State Officials Covered by Special Systems

Through this draft, the ILC sought to evaluate the need of guaranteeing one of the most fundamental principles of international law, specifically the principle of equality of sovereignty among states, which underlies the immunity of state officials from FPJ. Emphasizing in the 2002 decision of the international Court of Justice in the case of the arrest warrant, international law grants state officials this immunity to allow them to represent their countries or fulfill their responsibilities rather than for personal gain. The Commission underlined this idea again by means of its work on the topic and the related clarifications in the draft.

The draft differentiates between two types of immunity state officials can enjoy in the face of FPJ: personal immunity and functional immunity (or official immunity). It also has particular standards for every kind. The draft also specifies state officials covered by immunity and explains their extent, particularly given positive international law has not yet defined the term "state official." Many of the clauses also reflect common state practice and belief in their mandatory character, therefore codifying customary international law, especially in most of the draft provisions in Part II, which deals with personal immunity, and Part III, which deals with functional immunity, with the exception of Article 7.

The ILC typically operates by consensus on the initiatives it adopts. But, with regard to this draft, Article 7 was not adopted provisionally in 2017 under consensus given the significant concerns raised, especially regarding functional immunity's limitations and exceptions for particular international crimes and not others, without a strong legal foundation. Rather, a roll-call vote approved it. Furthermore, the major debates and conflicts this problem generated among ILC members and inside the Sixth Committee of the United Nations General Assembly show that reaching agreement on unresolved vital issues is not only essential for improving the advantage of the project to states but is also vital for preventing instability in international relations.

Though the ILC has spent much time on this topic, the draft still raises several issues, especially with regard to the exceptions and limitations to functional immunity, which call for more research and analysis. Article 7 calls for more legal basis study on any functional immunity exceptions. Given the many unresolved sensitive concerns, it is therefore crucial not to rush in finishing the study and to set aside enough time to keep intensifying the work on the draft articles. Rushing to finish the work on this topic will prevent consensus adoption of the draft. Therefore, the Commission has to strive to address these problems during the second reading in a careful, consensus-driven way.

Ultimately, especially by means of the development of draft articles, which have set a strong basis although needing changes and improvement, the ILC has made significant progress on this subject. The Commission, though, has not yet decided in the general explanation accompanying the draft whether the draft should serve as a foundation for negotiations toward adopting an international agreement on the immunity of state officials from FPJ. This issue will be decided later, pending second reading approval of the draft; it will also rely on the results of that process.

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