



**General Assembly**

Distr.  
LIMITED

A/CN.4/L.737/Add.1  
4 August 2008

Original: ENGLISH

INTERNATIONAL LAW COMMISSION  
Sixtieth session  
Geneva, 5 May-6 June and 7 July-8 August 2008

**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS SIXTIETH SESSION**

**Rapporteur: Ms. Paula ESCARAMEIA**

**CHAPTER X**

**IMMUNITY OF STATE OFFICIALS FROM  
FOREIGN CRIMINAL JURISDICTION**

**Addendum**

**CONTENTS**

	<i>Paragraphs</i>	<i>Page</i>
B. Consideration of the topic at the present session ( <i>continued</i> ).....	1 - 32	
2. Summary of the debate .....	1 - 7	
(a) General comments .....	1 - 3	
(b) Sources .....	4	
(c) Basic concepts .....	5 - 9	
(d) Persons covered .....	10 - 15	
(e) The question of possible exceptions to immunity .....	16 - 20	
3. Special Rapporteur's concluding remarks .....	21 - 32	

## **B. Consideration of the topic at the present session (*continued*)**

### **2. Summary of the debate**

#### **(a) General comments**

1. The Special Rapporteur was commended for the thoroughness of his preliminary report, which constituted an excellent basis for a discussion on the topic. Members also expressed their appreciation to the Secretariat for its high-quality and detailed memorandum.
2. There was support to the proposition by the Special Rapporteur that the Commission should not consider, within this topic, the questions of immunity before international criminal tribunals and before the courts of the State of nationality of the official.
3. Some members emphasized that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations had already been codified and need not be addressed in the context of this topic.

#### **(b) Sources**

4. Members agreed with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law, and not simply on international comity. It followed that the work of the Commission on the topic could be founded on a solid normative basis and would truly constitute a task of codification of existing rules. In this connection, some members pointed out that the Commission should examine relevant judicial decisions of national tribunals. At the same time, it was noted that the Commission should be cautious in assessing the value of those decisions for the purposes of determining the state of international law on the subject.

#### **(c) Basic concepts**

5. Members commented on the basic concepts examined in the preliminary report. As regards the notion of “jurisdiction”, some members rallied to the Special Rapporteur’s view that the said notion covers the entire spectrum of procedural actions, and support was expressed for the idea of giving special attention to the pretrial phase. It was also noted that, as explained in the

preliminary report and in conformity with the opinion of the International Court of Justice,<sup>1</sup> jurisdiction logically preceded immunity, in the sense that any question of immunities only arises once the tribunal has established its jurisdiction to hear the case. Some members suggested that the Commission consider the implications on immunity of the principle of universal jurisdiction.

6. With respect to the notion of “immunity” itself, some members supported the idea that the Commission should attempt to define this notion. It was observed, in this regard, that immunity was procedural in nature and did not absolve the State official from its duty to abide by national law and from his or her criminal responsibility in case of breach. Support was expressed for the Special Rapporteur’s analysis that immunity was a legal relationship which implied a right for the State official not to be subjected to foreign criminal jurisdiction and a corresponding obligation incumbent upon the foreign State concerned.

7. Some members were of the view that, contrary to what had been suggested in the preliminary report, the Commission should not refrain from dealing with the question of immunity from interim measures of protection or measures of execution; some other members, however, endorsed the suggestion contained in the report. While some members supported the Special Rapporteur’s intention to consider existing practice in relation to immunities of State officials and of the State itself from foreign civil jurisdiction, on account of their common features with the present topic, some other members maintained that those immunities were too different in nature from immunity from criminal jurisdiction for the relevant practice to be relied upon in this context.

8. Some members rallied to the opinion that, in its rationale, immunity had both a functional and a representative component, and that it was justified by the principles of sovereign equality and non-interference in internal affairs, and by the need to ensure stable relations among States. While some members emphasized the emerging role of the functional component of immunity in

---

<sup>1</sup> *Arrest Warrant, op. cit.*, p. 20, para. 46.

recent practice, some other members recalled that the representative component continued to be relevant since certain officials were granted immunity because they were considered to embody the State itself.

9. It was generally agreed that a distinction could be drawn between two types of immunity of State officials: immunity *ratione personae* and immunity *ratione materiae*. Some members underlined the importance of these concepts to differentiate the status of high-ranking and other State officials, and that of incumbent and former officials. According to one view, it was preferable to set aside this typology and consider the concepts of “official” and “private” acts and the time dimension of immunity (e.g., with respect to acts carried out before office or by former officials while in charge). It was also pointed out that immunity *ratione materiae* of officials should not be confused with the immunity of the State itself; according to another view, however, all immunities of officials derive from the immunity of the State.

**(d) Persons covered**

10. With respect to the terminology to be employed to refer to the persons covered by immunity, some members supported the Special Rapporteur’s proposal to continue to use, at this stage, the expression “State officials”. Some other members suggested, however, that the terms “agents” or “representatives” could be preferred. It was noted that, in any event, the precise persons covered by those terms should be determined. A view was expressed that the scope of persons covered could be narrowed down to those who exercise the specific powers of the State (a criterion which would make it possible to exclude from the scope of the topic certain categories of officials, such as teachers, medical workers, etc.); reference was made in this regard to the notion of “public service” used by the Court of Justice of the European Communities.

11. Support was expressed for the Special Rapporteur’s view that all State officials should be covered by the topic, given that they enjoy immunity *ratione materiae*. However, some members were of the opinion that only the question of immunity of Heads of State, Heads of Government and ministers for foreign affairs should be considered by the Commission. The Special

Rapporteur was encouraged to study further the status of former officials, notably in light of the *Pinochet* case<sup>2</sup> and paragraph 61 of the Judgment of the International Court of Justice in the *Arrest Warrant* case.<sup>3</sup>

12. Some members supported the view that Heads of State, Heads of Government and ministers for foreign affairs (the so-called “troika”) enjoyed immunity *ratione personae*. It was argued by some members, however, that the International Court of Justice’s contention, in the *Arrest Warrant* case, that such immunity was enjoyed by ministers for foreign affairs did not find grounds on customary international law. The question was also raised in the debates whether personal immunity extended to other categories of high-ranking officials. Some members excluded this possibility, pointing to the particular representative role in international relations of the three categories of officials mentioned above, to the insufficient practice to support any extension of immunity, and to policy considerations. Some other members believed that certain senior officials (which could include, in addition to those mentioned by the Special Rapporteur, vice-presidents, cabinet ministers, heads of parliament, presidents of the highest national courts, heads of component entities of federal States, etc.) were also to be granted such immunity; they called for the Commission to determine criteria, such as the representative nature or the importance of the functions performed, for the identification of those officials. The Judgment of the Court in the *Arrest Warrant* case<sup>4</sup> was invoked in support of the latter argument, although certain members remarked that the Court appeared to have adopted a more restrictive approach in its more recent decision in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.<sup>5</sup> Some other members, while acknowledging that other senior officials besides the Head of State, Head of Government and minister for foreign affairs could enjoy immunity *ratione personae*, were of the view that the Commission should limit its examination to the latter

---

<sup>2</sup> See, in particular, United Kingdom, House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 24 March 1999, reproduced in *International Legal Materials*, vol. 38, 1999, pp. 581-663.

<sup>3</sup> *Arrest Warrant*, *op. cit.*, p. 26, para. 61.

<sup>4</sup> *Ibid.*, pp. 21-22, para. 51.

<sup>5</sup> Judgment of 4 June 2008, *op. cit.*, notably at para. 194.

three and leave the question open as to whether immunity might also be granted to other officials. It was emphasized that, in any event, no official would continue to enjoy personal immunity after the end of his or her functions.

13. The suggestion was made that the Commission should devote more careful analysis to the question of immunity of military personnel deployed abroad in times of peace, which was often covered under multilateral or bilateral agreements, but also raised issues of general international law (including that of the rights and obligations of third States).

14. On the role of recognition in the context of immunity, a view was expressed that this issue was central to the present topic and should be examined by the Commission. Some members, however, supported the Special Rapporteur's view that the question of recognition was not part of the Commission's mandate on this topic and that, at most, a "without prejudice clause" could be adopted on the matter. It was indicated by some members that, if a State was in existence, immunity should be granted to its officials independently from recognition. The view was also expressed, however, that immunity should not be extended to officials of those self-proclaimed States which had not received the general recognition of the international community. Some members finally believed that the Commission should examine the consequences of the non-recognition of an entity as a State on the immunity of that entity's officials.

15. Some members considered that the immunity of the family members of State officials was mainly based on international comity and remained outside the scope of the topic. Some other members, however, suggested that this subject should be dealt with by the Commission.

**(e) The question of possible exceptions to immunity**

16. Some members insisted that the Special Rapporteur, in examining the scope of immunity in his subsequent report, should devote special attention to the central question of whether State officials enjoy immunity in the case of crimes under international law.

17. In this regard, some members expressed the view that there was sufficient basis both in State practice and in the previous work of the Commission (notably in its 1996 draft Code of Crimes against the Peace and Security of Mankind) to affirm that there exists an exception to immunity when a State official is accused of such crimes. It was argued by some members that

the fact that immunity was excluded in the statutes and case law of international criminal tribunals could not be ignored when dealing with immunity from foreign criminal jurisdiction. Some members further contended that the position of the International Court of Justice in the *Arrest Warrant* case<sup>6</sup> ran against the general trend towards the condemnation of certain crimes by the international community as a whole (as exemplified by the position of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Blaškić* case<sup>7</sup>), and that the Commission should not hesitate to depart from that precedent, if necessary as a matter of progressive development. According to some members, the Commission should further determine whether international law had changed since the said Judgment, notably in light of national legislation passed in the meantime for the implementation of the Rome Statute of the International Criminal Court.

18. Several possible explanations to the exceptions to immunity were mentioned, including the non-official character of crimes under international law, the *jus cogens* nature of the norm prohibiting such crimes, or the condemnation of those crimes by the international community as a whole. The Special Rapporteur was called to examine these possible explanations in his subsequent report to determine, in particular, whether these exceptions applied to all, or only some, crimes under international law and whether, and to what extent, it was applicable to immunity *ratione materiae* or also to immunity *ratione personae*. Some members pointed out that these questions put into play a balancing of the interest of stopping impunity for such crimes and that of ensuring freedom of action for States at the international level. It was suggested that consideration be also given to the ways in which this exception to immunity could be structured to strengthen international criminal tribunals, taking into account the complementary jurisdiction of the International Criminal Court: for example, it could be envisaged that, while officials from States having accepted the jurisdiction of the Court would have complete immunity from foreign criminal jurisdiction, officials from States that have not done so would not enjoy immunity in the case of crimes under international law.

---

<sup>6</sup> *Arrest Warrant*, *op. cit.*, p. 3.

<sup>7</sup> *Prosecutor v. Blaškić* (IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the review of the decision of Trial Chamber II of 18 July 1997, para. 41.

19. Some members emphasized that the Commission should also consider other possible exceptions to the immunity of State officials, namely in the case of official acts carried out in the territory of a foreign State without the authorization of that State, such as sabotage, kidnapping, murder committed by a foreign secret service agent, aerial intrusion or espionage.

20. Some other members maintained, on the contrary, that the *Arrest Warrant* Judgment did reflect the state of international law. Due regard should be given, in this context, to considerations of stability of international relations, sovereignty and equality of treatment of States. It was pointed out that the precedents of statutes and case law of international criminal tribunals which excluded immunity for crimes under international law were different in nature with the topic under consideration. It was considered that the Commission should not make proposals *de lege ferenda* in this topic and establish exceptions to immunity.

### **3. Special Rapporteur's concluding remarks**

21. In summarizing the main trends of the debate, the Special Rapporteur observed that there was general agreement that the basic source of the immunity of State officials from foreign criminal jurisdiction was to be found in international law, particularly customary international law. He noted that some members had highlighted the importance of national practice and judicial decisions in this regard.

22. With respect to the notion of “immunity”, general support had been expressed for the idea that it implied a legal relationship involving rights and corresponding obligations, and that it was procedural in nature (although one member had argued for its substantive character). It was also widely accepted that immunity of State officials from foreign criminal jurisdiction covered both executive and judicial jurisdiction and that it was particularly relevant in the pretrial phase. There were divergent views on the question whether the Commission should study the issue of jurisdiction: the Special Rapporteur explained that his intention was to consider analytically this issue in his future work, without however proposing draft articles on the subject.

23. As to the rationale of immunity, some members had acknowledged the existence of its mixed functional and representative components and that the different grounds of immunity were interrelated. The view had been expressed, however, that the immunity of different officials had



different rationales. It had been argued, for example, that the immunity of the Head of State was to be justified by his or her status as personification of the State itself and that this ground would not be applicable to justify the immunity of other officials.

24. Members had also recognized that the distinction between immunity *ratione personae* and immunity *ratione materiae* was useful for methodological purposes, although, as the Special Rapporteur noted, it was seldom used in normative instruments.

25. The debates had also clarified the scope of the topic as understood by the Commission. The general perception was that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations were outside of the topic. The majority of members were also of the view that the question of immunity from international criminal jurisdiction was also to be excluded from the topic, although the Special Rapporteur indicated that, as suggested by some members and without prejudice to his future findings, he intended to take into account the practice in that field when dealing with possible exceptions to immunity.

26. In light of the different opinions articulated on the issue of recognition, the Special Rapporteur suggested that the Commission could examine the possible effects of *non-recognition* of an entity as a State on whether immunity is granted to its officials.

27. On the scope of the topic with respect to the persons covered, the majority of members had favoured consideration of the status of all “State officials” and had supported the use of such term, which was to be defined in the future work of the Commission.

28. As to immunity *ratione personae*, there was broad agreement that it was enjoyed by Heads of State, Heads of Government and ministers for foreign affairs (the so-called “troika”), but divergent views had been expressed as to its extension to other high-ranking officials. According to some members, personal immunity was limited to the three categories of officials mentioned above. Some other members confirmed the possibility that other State officials could enjoy personal immunity, but expressed concerns with respect to the idea of expanding such immunity beyond the “troika”. Some other members favoured the idea of an extension of immunity, but pointed to the necessity of being very cautious in this regard: they recommended

the identification of criteria, rather than an enumerative approach, to establish those other State officials to whom personal immunity might also be granted. The Special Rapporteur noted that further consideration should be given, in this regard, *inter alia* to the Judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.

29. Opinions seemed to be equally divided as to whether it was desirable for the Commission to look into the issue of immunity of family members of State officials. So far, at least, the debates had not persuaded the Special Rapporteur to reconsider his view according to which it was not feasible to deal with this issue under the present topic, but he would consider the issue further.

30. The Special Rapporteur also noted that it had been proposed that the Commission also consider the question of immunity of military personnel stationed abroad in times of peace.

31. The Special Rapporteur then turned to the prospective contents of his subsequent report. He reiterated his intention to study therein the scope and limits of the immunity of State officials from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*), including the question of possible exceptions to immunity in the case of crimes under international law and official acts unlawfully carried out in the territory of a foreign State. He would consider, in particular: the relationship of immunity with peremptory norms of general international law (*jus cogens*) and with State responsibility; the effects on immunity of the implementation of universal jurisdiction for core crimes under international law; and the practice relating to other crimes, such as corruption or money-laundering. He would also examine the distinction between “official” and “private” acts for the purposes of immunity *ratione materiae*, notably the question whether the nature or gravity of an unlawful act could affect its qualification as an act carried out in an official capacity. The Special Rapporteur emphasized that the important question was whether there were exceptions to immunity under general international law, because the possibility to establish exceptions to immunity by concluding treaties was beyond any doubt. He would further analyse the immunities enjoyed by incumbent and former State officials. His subsequent report would finally look into the procedural aspects of immunity, notably the waiver of immunity and some questions raised by the recent Judgment in the case concerning *Certain*

*Questions of Mutual Assistance in Criminal Matters* (such as whether the State which seeks to claim immunity for one of its officials should notify the authorities of the foreign State concerned or whether it should claim and prove that the relevant act was carried out in an official capacity).

32. The Special Rapporteur concluded with some comments on his methodology and approach to the topic. In his view, the 2002 Judgment of the International Court of Justice in the *Arrest Warrant* case was a totally correct and landmark decision. It had been adopted by a large majority and contained a clear and accurate depiction of the current state of international law in this field. He emphasized that his reports would be based, first of all, on a careful study of State practice, international and national judicial decisions and the legal literature. With regard to judicial practice, he noted that the relevant decisions rendered by various tribunals should be examined taking into account their chronological sequence. As to domestic judicial decisions, they were relevant both *per se* and because they were based on materials by which States expressed their position on the subject matter. The Special Rapporteur also continued to think that decisions relating to immunity from civil jurisdiction could be significant for this topic. Lastly, he emphasized that his ultimate goal was not to formulate abstract proposals as to what international law might be, but to work on the basis of evidence of the existing international law in the field.

-----