

Concept Note

Seminar on States' obligations under public international law in relation to immunity of State officials

Bucharest, 21 September 2022

I. Background

The international law confers two types of immunity to certain state officials:

- immunity *ratione personae* or "personal immunity" attaching to their office or status and
- immunity *ratione materiae* or "functional immunity" attaching to acts performed in their official capacity.

The immunities granted to officials who represent the State at the international level are essential to ensure the smooth conduct of international relations and maintain a system of cooperation among States. Therefore, the granting of immunity can be considered a necessary exception to the rule of criminal jurisdiction. Any analysis of this topical subject should consider the fact that immunities have not been conceived to remove responsibility for international law violations or to affect the objective of combatting impunity for the most serious crimes; they merely embody a procedural mechanism meant to ensure stability in international relations.

Under customary international law, acting Heads of State, Heads of Government and Ministers of Foreign Affairs, as well as diplomatic agents possess personal immunity from the jurisdiction of foreign States.

The immunity *ratione personae* absolutely prohibits the exercise of criminal jurisdiction by States which means that it applies irrespective if the act in question was done at a time when the official was in office or before entry to office. Moreover, it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts. However, since this type of immunity is granted to avoid unwarranted hindrances into the exercise by the official of his/her international functions and thus to secure respect for good relations between States, this immunity exists for only as long as these persons are in office. After such persons have left office, they possess only functional immunity; that is, their immunity relates solely to acts performed in their official capacity.

The immunity *ratione materiae* may be relied by those who have acted on behalf of the State with respect to their official acts, namely serving State officials or former State officials in respect of official acts performed while in office. This type of immunity is built on the understanding that the individual officials are not to be held legally responsible for acts that are not attributed to them personally but to the State on whose behalf they acted.

While State officials will normally enjoy personal or functional immunity from criminal jurisdiction when this is prescribed by international law, there is an ongoing discussion as to the extent these immunities are applicable to State officials accused of committing international

crimes (the crime of genocide, crimes against humanity, war crimes, crime of aggression). By weighing in the interests of fostering stable international relations with those served by combating impunity for *jus cogens* violations, there is a noticeable trend favoring prosecution for atrocity crimes over functional immunity. There have already been a significant number of national prosecutions of foreign State officials for international crimes based on the rationale that the official position of an individual does not exempt him/her from personal responsibility for international crimes. The principle of universal jurisdiction is also increasingly asserted in national legislation and judicial decisions although its application can be challenged in cases where the alleged perpetrator possesses immunity *ratione personae* under customary international law.

The above-mentioned trend is linked to the recent development of norms of international criminal law and international human rights that require adequate mechanisms and procedure for enforcement. While international law imposes obligations on States to prosecute those who have committed international crimes within their territory, the latter are often perpetrated by State agents/officials as part of State policy and therefore not prosecuted by those respective Governments. Consequently, the enforcement of such norms can take place either in international courts, such as international criminal tribunals dealing with criminal responsibility of individuals, and the domestic courts of other States. Hence, one issue to be determined in this context is whether the State/ its official is/are immune before these fora.

Several cases on the docket of the International Criminal Court (ICC) have brought into the light the complex issue of the concurrent obligations of States under the Rome Statute (RS), specifically the duty of cooperation in the case of arrest warrants for persons who benefit of immunities, and the obligations to respect these immunities under customary international law or under a specific conventional regime (including Headquarters agreements). The challenges are even greater in the case of arrest warrants issued in respect of State officials of third States (that is States not parties to the RS). The impact of the immunity of state officials of third States on the Court's exercise of jurisdiction is subject of debate.

The topic of the immunity of State officials from foreign criminal jurisdiction also appears on the agenda of the International Law Commission, with a focus on the immunity from criminal jurisdiction of a State. The sensitive nature of discussions among Member States is mirrored by their great care in striking the adequate balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to ensure that the immunity of its officials is respected.

II. Some questions for discussion

- Officials entitled to immunity *ratione personae* (beyond the Troika);
- Limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction;
- The relationship between immunity *ratione materiae* and individual criminal responsibility;
- The exercise of universal/extra-territorial jurisdiction in relation to international crimes;

- The consequence of the jurisprudence of the International Criminal Court (ICC) for States in case the ICC issues an arrest warrant for officials of third States who benefit from immunity under customary international law, and if this official finds him/herself on the territory of a State Party;
- The removal of immunity before the ICC as a consequence of the participation of a State Party to the Rome Statute and of the third State (whose officials are under arrest warrants issued by the ICC) in an international treaty related to crimes under the jurisdiction of the ICC.

III. Participants

Host: Ms. Alina Orosan, Chair of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), Director General for Legal Affairs, Ministry of Foreign Affairs of Romania

Target audience: Members of CAHDI/ legal advisers of the Member States of the Council of Europe

IV. Objectives

The event is meant to offer an academic and expert perspective over the complex topic of States' obligations in relation to immunity of State officials in view of current and emerging practice as a means to informing and supporting States' own evaluations over the articulation between the relevant jurisprudence of the international courts and the customary immunities of State officials, as well as to facilitating a general exchange of views on the matter.