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Immunity of State officials from foreign criminal jurisdiction

Additional comments and observations received from Governments

Addendum

Contents

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I. Introduction

1. Two additional written replies, containing comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading by the International Law Commission at its seventy-third session (2022), were received from Sierra Leone (15 March 2024) and Spain (15 March 2024). The comments and observations are reproduced below, organized thematically as follows: general comments and observations; specific comments on the draft articles; and comments on the final form of the draft articles.

II. Comments and observations received from Governments

A. General comments and observations

Sierra Leone

[Original: English]

In accordance with paragraph 66 of the Report of the International Law Commission on the work of its seventy-third session (A/77/10, Report of the International Law Commission, 73rd Session), the Republic of Sierra Leone appreciates the opportunity to submit its comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, and accompanying commentaries, which were adopted on first reading.

Sierra Leone recalls that the Commission added this important topic to its program of work in 2007, making it the longest running topic on the current agenda. Sierra Leone was therefore pleased that, on 3 August 2022, the Commission successfully completed its first reading and "decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations."

Sierra Leone, which remains firmly committed to the fight against impunity, attaches great importance to the work of the Commission and values all its many contributions to the field of international criminal law. It also values the specific work on this critical albeit sometimes sensitive topic. It is for these reasons that Sierra Leone is grateful to all members of the Commission who have worked on this topic over the course of the past 16 years. Special appreciation must go to the two previous special rapporteurs on this topic, Ms. Concepción Escobar Hernández (who prepared eight reports on the topic) and Mr. Roman Koldokin (who prepared three reports), for their hard work and the results achieved.

Sierra Leone congratulates Mr. Claudio Grossman Guiloff on his appointment as Special Rapporteur for this topic in the summer of 2023. His involvement in the work on the topic, over the past few years, gives Sierra Leone great confidence that he and the Commission as a whole (in its new composition) will not change the direction of this topic at this late stage. To do so, at the final reading stage, would introduce grave uncertainty in an already challenging topic. Even worse, it could be detrimental to the clarity and consolidation of the law of immunity under international law.

Sierra Leone notes the importance for the Commission the views of the contemporary pluralistic international community and the need to ensure the views of countries in Africa, Asia and Latin America and the Caribbean are taken into account. It is States from these regions that together make up the vast majority of the membership of the United Nations, and at the same time, are often subjected to the political abuse and misuse of the rules of immunity and universal jurisdiction against

their officials. It is against this backdrop that Sierra Leone looks forward to the successful completion of the second reading, by the Commission, on this vital topic.

Sierra Leone would like to make two preliminary comments. First, Sierra Leone can support many of the Commission's 18 draft articles on this topic as adopted on first reading in August 2022. It considers that there are several draft articles that reflect extensive State practice and *opinio juris* thereby constituting codification of customary international law (for example, most of the draft articles in Parts Two (Immunity *ratione personae*) and Three (Immunity *ratione materiae*), especially draft articles 3 to 6).

Sierra Leone also considers that there are quite a few draft articles, especially some of the innovative ones contained in the procedural safeguards (in Part Four), that reflect proposals for the progressive development of international law rather than their codification. Nonetheless, Sierra Leone still finds the combination of texts of different normative value into a single set of draft articles consistent with the mandate of the Commission pursuant to articles 1 and 14 of its statute. Indeed, as was implied by paragraph (12) of the general commentary to the draft articles, they reflect the longstanding composite approach to codification developed by the Commission starting in the early 1950s.

Second, for the purposes of our observations, Sierra Leone will not attempt to be comprehensive. Rather, its comments will be selective as it is still studying the draft articles and their commentaries. For this reason, Sierra Leone focuses below on two draft articles of particular interest to it. Nonetheless, its decision not to comment on the remaining draft articles should not be taken as an indication of endorsement by Sierra Leone of their full contents or their commentary. Sierra Leone therefore reserves the right to make additional comments on the remaining draft articles on this important topic at a later stage.

The general commentaries: balancing principles of sovereignty against the fight against impunity

Sierra Leone would like to make two points on the general commentaries. First, it generally agrees with and thus welcomes the general commentary. It further agrees that the key challenge for the Commission and States in this topic is how best to strike a balance between the foundational principles of sovereign equality of States, which is the very basis of immunity of State officials from foreign criminal jurisdiction, on the one hand, and the fight against impunity, on the other. Sierra Leone agrees that, as both imperatives are equally important for States and the international community, it is critical to ensure that the immunity of State officials from foreign criminal jurisdiction does *not* result in impunity for the most serious crimes under international law. Impunity must be tackled by both national courts, which have the primary responsibility to investigate and prosecute such crimes, and international criminal tribunals where they possess jurisdiction. Sierra Leone, as a State party to the Rome Statute, has committed to the fight against impunity. It has also made its own contributions through the joint establishment with the United Nations of the innovative Special Court for Sierra Leone which today serves as one of the principal models of a hybrid court.

Second, bearing the above considerations in mind, Sierra Leone welcomes that as explained by paragraph (9) of the general commentaries, "***the Commission has also borne in mind that, under certain circumstances, the exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive, which in turn will create undesirable tension in the relations between the forum State and the State of the official***." [emphasis by Sierra Leone]. This abuse and misuse of international law is a reality that has been experienced by many African

and Global South States in respect of the treatment of their State officials in foreign criminal courts since the 1990s leading, inter alia, to the *Arrest Warrant Case* at the International Court of Justice.

Sierra Leone therefore strongly agrees with the Commission that the present draft articles must necessarily be matched with "a set of procedural provisions and safeguards aimed at promoting trust, mutual understanding and cooperation between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State." It underlines that the safeguards are critical not just for Sierra Leone, but also for all other African States, as manifested in numerous African Union decisions and their placing on the Sixth Committee agenda in 2009 the agenda item on "The scope and application of the principle of universal jurisdiction".

Spain

[Original: Spanish]

With regard to the request of the International Law Commission set out in paragraph 66 of its report to the General Assembly on the work of its seventy-third session,[1] Spain has the honour to transmit its written comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading by the Commission in 2022.[2] These comments follow the oral observations made on an ongoing basis by representatives of Spain before the Sixth Committee of the General Assembly from 2013 to 2022 and other partial written comments submitted previously.

First of all, the Kingdom of Spain wishes to express its satisfaction that the International Law Commission has carried out its work efficiently on a topic of great interest to States. It therefore wishes to express its gratitude to the Commission and all its members, in particular Special Rapporteur Professor Concepción Escobar Hernández for her dedication to the topic, her leadership and her outstanding contributions, which enabled the Commission to adopt the draft text on first reading after a long period of three decades. It also wishes to express appreciation to the first Special Rapporteur, Ambassador Roman A. Kolodkin, for his contributions, and welcomes the appointment of a new Special Rapporteur, Professor Claudio Grossman Guiloff, to lead the second reading of the draft articles.

Spain is aware that the immunity of State officials from foreign criminal jurisdiction is an institution rooted in the principle of sovereign equality of States that has a significant impact on the maintenance of peaceful and stable international relations and that must therefore be preserved, with the assurance that, as necessary, the exercise of foreign criminal jurisdiction over officials of another State is not abusive, carried out for improper purposes or politically motivated. At the same time, the Kingdom of Spain is convinced that the institution of immunity of State officials from foreign criminal jurisdiction must be applied in accordance with its original purpose, which is the protection of the sovereignty of the State of the official, avoiding any abuse of immunity that could result in protection of the official without consideration of the rights and interests of the State. In that context, the Kingdom of Spain believes that the safeguarding of immunity must be complemented by the protection of other values of the international community, in particular the fight against impunity for the most serious crimes under international law. Lastly, it wishes to note that immunity from foreign criminal jurisdiction cannot be properly regulated

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10).

[2] Ibid., paras. 68 and 69.

without taking due account of the interests of the State of the official and of the State seeking to exercise its criminal jurisdiction.

Bearing in mind those parameters, the Kingdom of Spain believes that the draft articles adopted by the International Law Commission on first reading constitute an outstanding contribution to the regulation of the immunity of State officials from foreign criminal jurisdiction for the following reasons: (i) they take a comprehensive and systematic approach to the institution of immunity, facilitating understanding thereof and offering useful guidelines to States, in particular the authorities competent to take decisions relating to immunity; (ii) they set forth and reflect current customary rules and at the same time offer positive elements of progressive development, including, in particular, many of the provisions in Part Four; (iii) they take into account the need to preserve the principle of international criminal responsibility for the commission of crimes under international law; and (iv) they represent an appropriate balance between the interests of the State of the official and those of the State seeking to exercise jurisdiction, and also set forth procedural safeguards so as to avoid any kind of abusive or politically motivated exercise of criminal jurisdiction in respect of an official of another State.

Spain therefore considers that the draft articles adopted on first reading constitute an excellent basis for the International Law Commission to complete its work on the topic. In that regard, Spain wishes to state its view that the substantive part of the draft articles, including draft article 7, constitutes a basic exercise in codification. However, Part Four contains procedural elements that are of great importance for the draft articles and that cannot always be considered to be among the customary rules directly applicable to the institution of immunity of State officials from foreign criminal jurisdiction. With this in mind, as well as the need to enhance legal certainty in the application of immunity, the Kingdom of Spain considers that the draft articles provide a good basis for the negotiation of an international treaty on the matter.

The foregoing general comments are followed by comments on specific provisions, set out below, which are dealt with according to the structure of the draft articles.

B. Specific comments on the draft articles

1. Draft article 1 – Scope of the present draft articles

Sierra Leone

[Original: English]

Sierra Leone appreciates draft article 1 – the provision on the scope of the draft articles, which consists of three paragraphs. The first paragraph addresses the scope of the draft articles, making clear that it concerns the immunity of "State officials" (as defined in draft article 2 (*a*) from the criminal jurisdiction of another State). The second paragraph underlines that the draft articles are "without prejudice" to the immunity from jurisdiction enjoyed under *special rules of international law* including those in respect of diplomatic and consular immunities. Sierra Leone supports this second paragraph. That said, Sierra Leone has some doubts about paragraph 3, which provides that "The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements". Its doubts stem from two main considerations.

First, Sierra Leone, as a State party to the Rome Statute, does not consider that the rights and obligations it has under the Rome Statute can be affected by the

Commission's draft articles in respect of the relationship between itself and other 122 States parties to the International Criminal Court. Those rights and obligations spelled out in the Rome Statute are not at all the subject of the Commission's draft articles, which as expressly noted in draft article 1 (a) concerns only the immunity of State officials from the *foreign criminal jurisdiction of another State* instead of the *immunity of State officials from the criminal jurisdiction of the International Criminal Court* – a separate international organization with its own distinct legal personality under international law (as confirmed by article 4 - Legal Status and Powers of the Court - of the Rome Statute). Indeed, as regards immunity before the International Criminal Court, all States Parties have accepted article 27 of the Rome Statute which establishes the irrelevance of immunities and special procedural rules of official persons under national and international law to prosecutions before the International Criminal Court.

Even assuming that the Commission's draft articles were transformed into a convention, and Sierra Leone became a State party to that convention, there would be no basis in international law for such a treaty to regulate let alone affect the rights and obligations between Sierra Leone and the other States parties to the Rome Statute – an entirely separate international agreement covering a different subject matter due to the *pacta tertiis rule* contained in article 34 of the 1969 Vienna Convention on the Law of Treaties and also reflective of customary international law.

Sierra Leone therefore calls on the Commission to reconsider this paragraph and either delete it in its entirety, or since the issue of scope of the draft articles is already well covered in relation to special rules of international law in paragraph 2 or draft article 1, to add such arrangements into the latter paragraph. The Commission might even just explain any remaining concerns it may have as to how the draft articles might relate to international criminal courts in the commentary to current paragraph 2.

Second, were the Commission to retain the text of paragraph 3, Sierra Leone supports the member of the Commission whose view is mentioned at paragraph (25) of the commentary concerning the imprecise nature of the phrase "international agreements establishing international criminal courts and tribunals". While the Commission notes, when reading the phrase together with "as between the parties to those agreements" the possibility that obligations may still be imposed on States by, for example the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, the Commission might wish to revisit that language to make it clearer.

For instance, the Commission might reformulate the provision to read that the "present draft articles do not affect the rights and obligations of States Parties under international ~~agreements~~ instruments establishing international criminal courts and tribunals as between the parties to those instruments ~~agreements~~." Instruments is a broader term than agreements. It could encompass treaties or other agreements as well as binding resolutions of international organizations such as those taken under Chapter VII of the Charter to establish the International Criminal Tribunals for the Former Yugoslavia in 1993 and Rwanda in 1994.

Spain

[Original: Spanish]

The Kingdom of Spain supports the International Law Commission's approach to the scope of the draft articles, as set out in draft article 1, and considers the definition of the scope appropriate in terms of the three concepts set out in the draft article, namely immunity, foreign criminal jurisdiction and State official. In particular, it considers it appropriate to limit the scope of the draft articles to criminal jurisdiction, given the special characteristics of that type of jurisdiction, which may

affect a State official in the exercise of his or her functions in a particular way and thus have an impact on State sovereignty. In addition, practice shows that it is before foreign criminal jurisdictions that the greatest number of practical questions connected with immunity requiring international regulation have arisen.

Similarly, Spain considers the "without prejudice" clause in draft article 1, paragraph 2, to be appropriate, since it is fully consistent with the ultimate purpose of the draft articles: to offer homogeneous regulation of the immunity of State officials from foreign criminal jurisdiction that will apply in general when there are no other special regimes applicable to certain categories of official. The use of the *lex specialis* technique is consistent with that purpose.

Spain welcomes the inclusion in the draft article of paragraph 3, which contains an express reference to international criminal courts and tribunals. If, as Spain is convinced, the fight against impunity for the most serious crimes under international law is an inescapable element of modern international law, the role that international criminal tribunals play in that context must be recognized in the draft articles. Although the scope of the draft articles is limited to foreign criminal jurisdiction, it is necessary to ensure that the new regime set out in the text does not affect the exercise of international criminal jurisdiction. The wording used in paragraph 3 is consistent with the foregoing and, in the view of Spain, cannot be interpreted as a mechanism that makes the regulation of immunity proposed in the draft articles subject to or conditional upon rules pertaining to international criminal courts and tribunals. On the other hand, Spain believes that the "without prejudice" clause set out in the paragraph properly preserves the separation between international criminal jurisdiction and national criminal courts. Nonetheless, the International Law Commission is encouraged to consider broader wording for the paragraph, stating expressly that the draft articles are to be understood without prejudice to the rules governing the functioning of international criminal courts and tribunals.

2. Draft article 2 – Definitions

Spain

[Original: Spanish]

The Kingdom of Spain has no specific comments on the definitions contained in draft article 2 ("State official" and "act performed in an official capacity"), and essentially supports their wording. In particular, it greatly appreciates the link established in both definitions between the concepts "official" and "official act" on the one hand and "the State" on the other, since immunity can be justified only by the existence of such a link and by the need to protect sovereignty.

It would be useful, however, for the Commission to reflect on the possibility of including or paying greater attention to other definitions, in particular definitions of the terms "criminal jurisdiction" and "immunity". Although the Commission has explained in the commentary to the draft article the reasons for not including definitions of these terms, it is clear when reading the draft articles as a whole that the absence of such definitions sometimes gives rise to doubts and difficulties. Spain believes that it would be preferable to include such definitions in the draft article, but they could also be included in the commentary, expanding or reinforcing what is already stated there in respect of the two terms. In any case, it should be noted that clarification of the concepts "immunity" and "criminal jurisdiction" is important for the draft articles as a whole, but in particular for Part Four. Therefore, the Commission is advised, when it considers how to deal with the two definitions, to do so both in the context of draft articles 1 and 2 and in the context of the relevant draft articles in Part Four, in particular draft articles 8, 9, 10, 11, 14, 15 and 16.

Part Two – Immunity *ratione personae*

Spain

[Original: Spanish]

As a general comment on Parts Two and Three, the Kingdom of Spain wishes to state that it appreciates the fact that the draft articles distinguish clearly between immunity *ratione personae* and immunity *ratione materiae*, since, even though both categories of immunity have the same purpose, the fact that each of them is enjoyed by different State officials means that each of them deserves separate treatment. Spain also welcomes the clear identification of the three basic normative elements that define those categories: subjective, material and temporal.

3. Draft article 3 – Persons enjoying immunity *ratione personae*

Spain

[Original: Spanish]

With regard to immunity *ratione personae*, Spain considers that the elements set out in draft articles 3 and 4 adequately reflect customary law. In particular, international practice supports the proposition that only the Head of State, the Head of Government and the Minister for Foreign Affairs enjoy this type of immunity. Other State officials may enjoy some form of immunity *ratione personae*, but this is possible only when some of the special regimes referred to in draft article 1, paragraph 2, apply. Given that the draft articles seek to establish a general legal regime, Spain does not believe that the list of State officials who enjoy immunity *ratione personae* set out in the draft articles can be expanded.

Lastly, Spain supports the system of transition from immunity *ratione personae* to immunity *ratione materiae* set forth by the Commission in draft article 4, paragraph 3, for former Heads of State, Heads of Government and Ministers for Foreign Affairs. This system is mentioned again, in similar terms, in draft article 6, paragraph 3, which could be viewed as duplication. Although it would be possible to delete one of the provisions and replace it with wording referring to the other provision, Spain considers it preferable to keep both paragraphs for reasons of clarity.

4. Draft article 4 – Scope of immunity *ratione personae*

Spain

[Original: Spanish]

[See comment under draft article 3.]

Part Three – Immunity *ratione materiae*

Spain

[Original: Spanish]

[See comment under Part Two.]

5. Draft article 5 – Persons enjoying immunity *ratione materiae*

Spain

[Original: Spanish]

With regard to the regulation of immunity *ratione materiae*, the Kingdom of Spain welcomes the fact that the International Law Commission has followed a model parallel to that used for the definition of immunity *ratione personae* in respect of the identification of the subjective, material and temporal elements of immunity (draft articles 5 and 6). This makes it possible to identify more clearly the elements that differentiate the two categories of immunity while also reflecting the common elements that they share.

With regard to the common elements, Spain considers it important to retain the link between the official and the State reflected in draft article 5 (State officials acting as such) and the types of acts covered by immunity that are also connected with State sovereignty, as reflected in draft article 6 (acts performed in an official capacity).

In addition, the Kingdom of Spain believes that paragraph 3 (transition) has particular relevance in draft article 6. As already mentioned above in the section on immunity *ratione personae*, the paragraph should be retained in the text of draft articles 4 and 6 for reasons of clarity. Furthermore, the retention of the provision acquires special significance in the context of immunity *ratione materiae*, in particular with regard to the application of draft article 7. The terms for the application of immunity *ratione materiae* to former Heads of State, Heads of Government and Ministers for Foreign Affairs, to whom the exception for the commission of the most serious crimes under international law also applies, are established in accordance with the transition set forth in draft article 6, paragraph 3.

Spain considers that, overall, draft articles 5 and 6 reflect the current state of customary law.

6. Draft article 6 – Scope of immunity *ratione materiae*

Spain

[Original: Spanish]

[See comments under draft articles 3 and 5.]

7. Draft article 7 – Crimes under international law in respect of which immunity *ratione materiae* shall not apply

Annex – List of treaties referred to in draft article 7, paragraph 2

Sierra Leone

[Original: English]

Draft Article 7 should be retained but be expanded to include slavery and slave trade crimes and the crime of aggression

Sierra Leone fully supports draft article 7 which concerns crimes under international law in respect of which immunity *ratione materiae* shall *not* apply. Sierra Leone concurs with the Commission that the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearances are among the most serious crimes of concern for which functional immunity are not applicable at the horizontal level.

On slavery and slave trade crimes, Sierra Leone notes that the Drafting Committee had previously received several suggestions for crimes to be included in

draft article 7, among them the international crime of slavery; yet, the Drafting Committee had decided not to incorporate the suggestions. When draft article 7 was adopted after a recorded vote, at least three members commented with dissatisfaction on the inconsistency of the exclusion of the prohibition of slavery from the list of draft article 7 (1), despite it being the subject of international conventions and its *jus cogens* status (A/CN.4/SR.3378).

Sierra Leone considers both the slave trade and slavery to be among the crimes of greatest concern to the international community. A broad international consensus exists as to their definitions, as well as on the obligations to prevent and punish them. As outlined above, the slave trade and slavery have been addressed in treaties and are also prohibited by customary international law (A/77/10, p. 238, para. (18)). The exclusion of the slave trade and slavery under draft article 7, paragraph 1, presents an inconsistent drafting oversight, which can be rectified by the proposed inclusion.

Sierra Leone, recognizing the paramount significance of inclusivity, respectfully proposes the inclusion of the international crimes of the slave trade and slavery under draft article 7, paragraph 1 (g), "Crimes under international law in respect of which immunity *ratione materiae* shall not apply." Draft article 7, paragraph 1, currently identifies six crimes under international law in respect of which immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply, namely the crime of genocide (a), crimes against humanity (b), war crimes (c), the crime of apartheid (d), torture (e), and enforced disappearance (f). It is imperative to underscore the discernible incongruity in their exclusion, prompting a call for rectification with utmost urgency.

The slave trade and slavery are distinct, stand-alone international crimes whose prohibition concerns peremptory norms of international law (*jus cogens*) with attendant *erga omnes* obligations of States. The status of slavery and the slave trade stands uncontested as treaty-based and customary-based international crimes and non-derogable human rights violations. The United Nations recognized the legal prominence of the prohibition of the slave trade and slavery early in its history. Its predecessor, the League of Nations, promulgated the 1926 Slavery Convention, uniformly condemning the slave trade and slavery. The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, drafted under the auspices of the United Nations, reiterated condemnation of slavery and the slave trade as international crimes.

On the crime of aggression, Sierra Leone notes that, despite the views of at least seven Commission members to the contrary expressed at the adoption of draft article 7 on 10 July 2017, the Commission failed to expressly include the crime of aggression in the list of crimes in respect of which immunity *ratione materiae* shall not apply under draft article 7. With all due respect, like the members of the Commission who opposed this, Sierra Leone does not find convincing the explanation provided for this glaring omission.[3] Worse, the Commission has since issued shifting explanations, between the 2017 and 2022 annual reports, without transparently explaining the reasons for omitting some of the arguments it had used to justify the exclusion after they were superseded by events (such as the eventual activation of the crime of aggression by the International Criminal Court). There are additional reasons for our doubts, so well expressed by the minority of members at the time, but it is sufficient to highlight three of them which also find additional support in the legal literature. [4]

[3] See the statements in explanation of vote by Mr. Tladi, Mr. Hmoud, Mr. Jalloh, Mr. Murase, Mr. Hassouna, Mr. Ouazzani Chahdi, Mr. Park, A/CN.4/SR.3378, Provisional summary record of the 3378th meeting, 20 July 2017.

[4] See Chile Eboe-Osuji, "Late effort at the International Law Commission to decriminalize the crime of aggression is wrong in law", 28 March 2023, Lawfare (lawfaremedia.org).

First, as a matter of principle, the Commission justified the inclusion of genocide, crimes against humanity and war crimes on the basis that they are mentioned in the Rome Statute as among the most serious crimes of concern to the international community. The crime of aggression is also included in the Rome Statute and by separating it from the other core crimes risks effectively downgrading its status.[5] So Sierra Leone does not find the argument compelling. Neither was the better argument based on gravity since the crime of aggression is arguably the gravest of the core crimes.

To Sierra Leone, as the Sierra Leonean member of the Commission explained, the crime of aggression should have been included as it has long been recognized to be among the most serious crimes of concern to the international community as a whole under international law. In fact, it is for that reason that the Nürnberg Tribunal Judgment of 1946 concluded that "to initiate a war of aggression, therefore, is not only an international crime; *it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole*." [emphasis by Sierra Leone]

Second, the Commission itself, in a long list of its own previous works that date back to its formulation of the Nürnberg Principles, has always included the crime of aggression as foremost among the crimes against the peace and security of mankind which are crimes under international law that are punishable as such. In this regard, as exemplified by the 1996 Draft Code of Crimes against the Peace and Security of Mankind, which was meant to apply at the *national level*, the crime of aggression, along with genocide, crimes against humanity, war crimes and other crimes, were condemned by the Commission as prosecutable. And irrespective of the official position of the individual who commits such a crime. Even if he acted as head of State or Government, that will neither relieve him of criminal responsibility nor will it mitigate his punishment.

Third, the Commission suggested that the crime of aggression is leadership crime that has political dimensions which warranted its exclusion from the list in draft article 7. Yet, it failed to complete the analysis in relation to the analogous core crimes which also implicate essentially the same leadership and political considerations that also give rise to genocide, crimes against humanity and war crimes. Indeed, all these crimes are committed more frequently or with graver implications when States and their officials go rogue – as was the case in Germany during the Second World War and 1994 Rwanda. Genocide committed in Rwanda in 1994 was a direct result of this intersection between leadership and political power. Crimes against humanity, as defined in article 7 of the Rome Statute, expressly incorporates a State or organizational policy requirement. In other words, those other core crimes are often also leadership crimes with political dimensions, similar to the crime of aggression.

For the above reasons, and others mentioned by the comments of other like-minded States and during the 2017 debate in the Commission, Sierra Leone calls on the Commission to correct this glaring omission of the crime of aggression from the list of crimes for which immunity shall not apply in draft article 7. The concrete textual proposal of Sierra Leone is for the Commission to list the crime of aggression as paragraph 1 (a) of draft article 7 with the consequential changes renumbering the crime of genocide to paragraph (b) and the rest of the crimes listed through to enforced disappearance as paragraph 1 (g).

With regard to the annex listing the treaties referred to in draft article 7, paragraph 2, which provides the definitions of the crimes, Sierra Leone would suggest

[5] See the statement of Mr. Jalloh, A/CN.4/SR.3378, Provisional summary record of the 3378th meeting, 20 July 2017.

a reference to article 8*bis* of the Rome Statute by linking it to the International Criminal Court definition of the crime of aggression as follows: Crime of aggression, Rome Statute of the International Criminal Court, 17 July 1998 (as amended by resolution RC/Res.6 of 11 June 2010), article 8 *bis*.

Spain

[Original: Spanish]

Spain fully supports the inclusion of draft article 7, which identifies the crimes in respect of which immunity from foreign criminal jurisdiction *ratione materiae* does not apply. As stated in the general commentary, in regulating immunity of State officials from foreign criminal jurisdiction, account must be taken of the strides made in international criminal law in recent decades, in particular in terms of consolidating the principle of individual criminal responsibility for the commission of the most serious crimes under international law, defining the principle of accountability and identifying the fight against impunity for such crimes as a goal of the international community.

It would be incomprehensible for the community of States to promote those principles and yet fail to take them into account when exercising their criminal jurisdiction in respect of the most serious crimes under international law, simply because the alleged perpetrators were identified as officials of another State. This reasoning was taken into account by the Spanish legislature in Organic Act No. 16/2015 of 27 October concerning the privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, which, in the context of regulating the immunity from criminal jurisdiction of former Heads of State, Heads of Government and Ministers for Foreign Affairs, precludes the application of immunity in respect of genocide, enforced disappearance, war crimes and crimes against humanity that those individuals might have committed while in office (art. 23, para. 1).

This example from Spanish law forms part of an increasingly significant body of State practice, with an increase in the number of judicial decisions of State courts in which the fact that the crimes committed were crimes under international law has served as a basis for not applying immunity from foreign criminal jurisdiction to the officials of another State. Spain believes that this practice is sufficient to conclude that, under international custom, immunity *ratione materiae* cannot be applied in respect of crimes under international law. It is not possible to reach the same conclusion in respect of immunity *ratione personae*; Spain is therefore in favour of draft article 7 applying only in respect of immunity *ratione materiae*. Nonetheless, this restriction must be understood within its proper limits, in particular bearing in mind that former Heads of State, Heads of Government and Ministers for Foreign Affairs will also be subject to the application of draft article 7 as an integral part of the immunity *ratione materiae* regime.

With regard to the crimes in respect of which immunity *ratione materiae* would not apply, Spain considers that all the crimes listed in draft article 7 fall within the category of the most serious crimes under international law, including torture, enforced disappearance and apartheid, understood as separate crimes. Bearing in mind the reasons for including these crimes and not others in the list in draft article 7, Spain wishes to draw attention to the need to clearly distinguish these crimes under international law from other crimes that are of international concern but that cannot strictly be characterized as crimes under international law. Nonetheless, with regard to the possible expansion of the list of crimes covered by draft article 7, it would be

worth including the crime of aggression in the list; the International Law Commission is therefore encouraged to consider this seriously.

Lastly, Spain also supports the decision not to include in the draft articles definitions of the crimes covered by draft article 7; the approach of listing in an annex the treaties that contain said definitions is preferable. However, for the list of treaties to be complete, it should include appropriate references to the articles of the four Geneva Conventions of 1949, which define the grave breaches that gave rise to the concept of war crimes.

Part Four – Procedural provisions and safeguards

Spain

[Original: Spanish]

The Kingdom of Spain attaches great importance to the inclusion of a procedural dimension in the regulation of immunity of State officials from foreign criminal jurisdiction. It therefore welcomes the inclusion in the draft articles of Part Four on procedural provisions and safeguards.

The procedural provisions and safeguards set out in the draft articles fulfil distinct functions that must be emphasized: they promote the building of trust between the States concerned; they guide the examination of the question of immunity in each specific case; they are instrumental in establishing a necessary balance between the interests of the individual States concerned; and they make it possible to address the legitimate concern about the risk of politicization that may be at the root of the decision whereby the immunity of State officials from foreign criminal jurisdiction is not applied by the internal organs and courts of the State, in particular as a consequence of the possible application of the exceptions to immunity set forth in draft article 7.

Spain therefore believes that Part Four is an essential component of the draft articles and significantly contributes to ensuring the balance between the different parts of the text. Draft article 8, which sets out the scope of application of Part Four, appropriately establishes the link between Parts Two and Three, on the one hand, and Part Four, on the other.

As a general comment, Spain notes that certain provisions in Part Four refer to coercive measures that may be taken in respect of a State official and to inviolability in relation to the exercise of criminal jurisdiction (draft articles 9 and 14). In that regard, Spain wishes to State that it does not consider the terms “immunity” and “inviolability” to be interchangeable and believes that inviolability does not automatically apply to all State officials. However, it is aware that, on occasion, jurisdictional acts that constitute coercive measures may have some impact on the inviolability of certain State officials. Therefore, it does not object to retaining the references to inviolability in the aforementioned draft articles, provided that the commentaries thereto explain sufficiently the reason for including said references to inviolability and the distinction between immunity and inviolability.

8. Draft article 8 – Application of Part Four

Spain

[Original: Spanish]

[See comment under Part Four.]

9. Draft article 9 – Examination of immunity by the forum State

Spain

[Original: Spanish]

With reference to the procedural provisions, Spain welcomes draft articles 9, 10 and 13, on the examination of immunity, notification of the intention to exercise jurisdiction, and exchange of information.

The affirmation that the authorities of the forum State must examine the question of immunity as soon as possible and always before exercising their jurisdiction or taking coercive measures against an official of another State represents an essential element that must guide the actions of said authorities and that constitutes a safeguard for the State of the official.

The same applies to the stipulation of a duty to notify the State of the official when the authorities of the forum State seek to exercise their criminal jurisdiction or take coercive measures. The duty to notify reinforces the safeguards for the State of the official and ensures that no measures are taken that could make it impossible to subsequently apply the immunity of State officials from criminal jurisdiction. However, it must be borne in mind that, on occasion, jurisdictional acts (for example, detention) must be carried out immediately for reasons of efficiency and that it may not be possible to give advance notice of a decision to carry out such acts. Therefore, it would be useful for the Commission to review this issue with a view to either revising the wording of the draft article or clarifying the issue in the commentaries.

Furthermore, the establishment of a system referring to mutual requests for information between the authorities of the two States concerned adequately rounds out this first block of procedural provisions, which facilitate the building of trust between the forum State and the State of the official.

Although the provisions in draft articles 9, 10 and 13 represent an innovation with regard to immunities and must therefore be understood as proposals for progressive development, that does not deprive them of value. On the contrary, they represent a good example of the Commission fulfilling its mandate in a comprehensive manner.

[See also comment under Part Four.]

10. Draft article 10 – Notification to the State of the official

Spain

[Original: Spanish]

[See comment under draft article 9.]

11. Draft article 11 – Invocation of immunity

Spain

[Original: Spanish]

Spain considers that both draft article 11 (Invocation of immunity) and draft article 12 (Waiver of immunity) sufficiently reflect international practice and are consistent with the current state of customary law. With regard to the question of the irrevocable nature of waiver of immunity, Spain wishes to express its support for the stipulation in draft article 12, paragraph 5, which is, moreover, consistent with the Spanish legal system, in particular article 28 of Organic Act No. 16/2015 concerning the privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain.

12. Draft article 12 – Waiver of immunity

Spain

[Original: Spanish]

[See comment under draft article 11.]

13. Draft article 13 – Requests for information

Spain

[Original: Spanish]

[See comment under draft article 9.]

14. Draft article 14 – Determination of immunity

Spain

[Original: Spanish]

Among the procedural provisions and safeguards, Spain attaches particular importance to draft article 14, on the determination of immunity. The draft article establishes clearly and systematically the elements and criteria that must be taken into account by the authorities of the forum State in order to determine in each specific case whether the circumstances required for the application of immunity are present. Paragraph 3 of the draft article warrants special consideration. Spain appreciates the fact that the International Law Commission has established additional safeguards that must be applied to the determination of immunity in cases in which the exceptions set out in draft article 7 may come into play. Given the sensitivity of the issue, paragraph 3 constitutes an enhanced safeguard against the possibility of abusive or politically motivated use of draft article 7.

Lastly, with regard to the determination of immunity, Spain wishes to state its opinion that, ultimately, it is in all likelihood a judicial body that will determine whether or not immunity applies, in particular if such determination is made at the time of initiation of criminal proceedings or if disputes arise with regard to the application of the criteria for the determination of immunity by other State authorities. Spain therefore welcomes paragraph 5 of draft article 14, which expressly provides for the possibility of filing an appeal before the courts of the forum State in respect of any determination on the application or non-application of immunity that has been made by the competent authorities of the forum State.

[See also comment under Part Four.]

15. Draft article 15 – Transfer of the criminal proceedings

Spain

[Original: Spanish]

Spain considers that the system for transfer of criminal proceedings set forth in draft article 15 could be a useful tool for achieving a balance between the rights and interests of the forum State and those of the State of the official. However, it should be noted that recourse to this system of international legal cooperation must be subject to requirements of effectiveness and must comply with the principles of international criminal responsibility and accountability. The International Law Commission is therefore invited to examine in greater detail the wording of paragraph 4, which, as it currently stands, does not sufficiently meet these requirements.

16. Draft article 16 – Fair treatment of the State official

Spain

[Original: Spanish]

Spain believes that procedural safeguards must also take account of the rights of the official, so as to prevent measures that may be abusive or politically motivated from being taken against him or her. From that perspective, it welcomes draft article 16, which provides for fair treatment of the official. Although some of the elements of the draft article reflect rights that must be granted to any person who is subject to jurisdictional acts carried out by any State authority, it is nonetheless particularly important to reiterate those rights in the case of an official of another State, since jurisdictional acts in respect of such an official may affect relations between the forum State and the State of the official. In addition, Spain attaches particular importance to paragraph 2, since it establishes rights that may be especially important when the official is not a national of the State that he or she represents or whose functions he or she exercises.

17. Draft article 17 – Consultations

Spain

[Original: Spanish]

[See comment under draft article 18.]

18. Draft article 18 – Settlement of disputes

Spain

[Original: Spanish]

Spain considers that draft articles 17 and 18 constitute safeguards that are closely linked with the prevention and settlement of disputes; it therefore welcomes their inclusion in the text.

Draft article 18 will assume more importance if the draft articles eventually serve as the basis for the negotiation of a treaty. In any case, Spain supports the wording of the draft article, which emphasizes that the International Court of Justice is the primary recourse if no other means of settlement has been agreed upon by the States concerned. This is consistent with the subject matter of the draft articles, which includes essential elements and principles of international law, including the principle of sovereign equality of States.

C. Comments on the final form of the draft articles

Sierra Leone

[Original: English]

At paragraph (13) of the general commentary to the draft articles, the Commission indicated that it had not "yet decided on the recommendation to be addressed to the General Assembly regarding the present draft articles, be it to commend them to the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic."

Sierra Leone notes that the preceding commentary foreshadows two main options that will likely be given serious consideration by the new Special Rapporteur and the Commission. First, the possibility of recommending the draft articles to States

generally. Second, the possibility of recommending that the draft articles be used as a basis for the negotiation of a treaty on the future.

We welcome the invitation of State comments on this issue and recognize that the decision will now be taken at the second reading stage. In the view of Sierra Leone, given the nature of this topic and the current state of international law, taking into account the possibility that the conditions may not be present for a consensus decision to be taken in the Sixth Committee based on its recent practice, the Commission should not recommend the draft articles generally. Such a recommendation will not necessarily be well received on such a sensitive topic when, by the admission of the Commission in its general commentary, the draft articles contain elements of both codification and recommendations for progressive development of the law of immunity. Sierra Leone appreciates both prongs of the Commission's mandate. We are however mindful that there are quite a few States that appear to prefer only codification for this topic. If that assessment is true, it would seem unlikely they would join such consensus.

Moreover, balanced against considerations of sovereignty and the role of the Sixth Committee comprised of State delegates vis-à-vis the Commission comprised of independent experts, we would encourage the Commission to consider recommending, in line with article 23 of its statute, that the General Assembly *take note* of the draft articles in a resolution and that it annexes the draft articles to the resolution and encourage their widest possible dissemination.

The Commission could further recommend that the General Assembly consider, at a later stage and in light of the importance of the topic and the evolution of State practice in the fight against impunity, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to adopting a convention on the topic. We note in passing that the above approach would be consistent with the Commission's own approach in other benchmark projects, including the 2001 articles on the responsibility of States for internationally wrongful acts.

[…]

In conclusion, Sierra Leone again wishes to pay tribute to the Commission, its special rapporteurs for this topic, and the entire membership for their outstanding work and dedication in the preparation of the present draft articles. Sierra Leone is hopeful that, as with the Commission's draft statute for a permanent international criminal court, this set of draft articles will in the future be viewed favourably by States and the General Assembly. We also hope that they will in the not-so-distant future come to join the pantheon of memorable Commission contributions to the progressive development of international criminal law and its codification.