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Immunity of State officials from foreign criminal jurisdiction

Comments and observations received from Governments

Contents

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I. Introduction

1. At its seventy-third session, in 2022, the International Law Commission adopted, on first reading, the draft articles on immunity of State officials from foreign criminal jurisdiction.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft principles, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.[2] The Secretary-General circulated a note dated 26 September 2022 to Governments transmitting the draft articles on immunity of State officials from foreign criminal jurisdiction, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission. By its resolution 77/103 of 7 December 2022, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles adopted on first reading by the Commission at its seventy-third session.

2. As of 30 January 2024, written comments and observations had been received from Australia (20 December 2023), Austria (1 December 2023), Brazil (1 December 2023), the Czech Republic (11 December 2023), Estonia (1 December 2023), France (28 December 2023), Germany (1 December 2023), Ireland (5 January 2024), the Islamic Republic of Iran (30 November 2023), Israel (1 December 2023), Japan (27 November 2023), the Kingdom of the Netherlands (1 December 2023), Latvia (4 December 2023), Liechtenstein (30 November 2023), Lithuania (5 December 2023), Luxembourg (30 November 2023), Malaysia (29 November 2023), Mexico (14 December 2023), Morocco (1 December 2023), Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (1 December 2023), Panama (20 November 2023), Poland (22 November 2023), Portugal (4 January 2024), Romania (29 November 2023), the Russian Federation (18 December 2023), Saudi Arabia (3 November 2023), Singapore (8 December 2023), Switzerland (29 November 2023), Ukraine (16 November 2023), the United Arab Emirates (1 December 2023), the United Kingdom of Great Britain and Northern Ireland (30 November 2023), and the United States of America (6 December 2023).

3. The comments and observations of Governments are reproduced in chapter II below.[3] The comments and observations are organized thematically as follows: general comments and observations and specific comments on the draft articles.[4]

[1] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), para. 64.

[2] *Ibid*., para. 66.

[3] Abbreviations (e.g., UN, ILC) have been spelled out where necessary for clarity, and quotations of the draft principles and commentaries thereto in the comments and observations as submitted have been omitted where appropriate. The comments and observations as submitted are available on the website of the Commission at https://legal.un.org/ilc/guide/4_2.shtml#govcoms.

[4] In each of the sections below, comments and observations received are arranged by States, which are listed in English alphabetical order.

II. Comments and observations received from Governments

A. General comments and observations

Australia

[Original: English]

Australia thanks the Commission for its extensive work on the draft articles since 2007, which has allowed the discussion of this important topic to progress to this point.

The observations of Australia focus on draft article 7 on the crimes under international law in respect of which functional immunity shall not apply, and draft articles 8 *ante* to 18 on procedural provisions and safeguards. However, as a broad comment, Australia considers it important that the commentaries to the draft articles clearly state those articles in which the Commission has sought to codify an existing rule of customary law and where it has engaged in progressive development.

[See also comment under draft article 7.]

Austria

[Original: English]

Austria appreciates the text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted, on first reading, by the International Law Commission and the significant progress on this topic achieved so far. In this context, Austria expresses its support for the balanced approach of the draft articles containing important procedural safeguards, which will make this endeavour more acceptable to the international community. Austria encourages the Special Rapporteur to pursue the finalization of the draft articles in this spirit.

Brazil

[Original: English]

Brazil commends the International Law Commission for the adoption of the draft articles on first reading and thanks the Special Rapporteur, Ms. Concepción Escobar Hernández, for her outstanding contribution to this work. Brazil also appreciates the contribution of the previous Special Rapporteur, Mr. Roman Kolodkin, for his work and commends Mr. Claudio Grossman Guiloff for his nomination as the new Special Rapporteur for the topic.

The immunity of State officials from foreign criminal jurisdiction is crucial to ensure the adequate performance of their functions, particularly when they are not protected by existing multilateral conventions. Such immunity is also essential to promote peaceful settlement of international disputes and friendly relations among states, including inasmuch as it allows State officials to participate in diplomatic conferences and missions in foreign countries.

It contributes to the stability of international relations, as it prevents the abusive, arbitrary and politically motivated exercise of criminal jurisdiction to be used against State officials.

Czech Republic

[Original: English]

The Czech Republic welcomes the opportunity to present its written comments on the set of draft articles, together with commentaries thereto, on immunity of State officials from foreign criminal jurisdiction, adopted on first reading by the International Law Commission at its seventy-third session (2022). The Czech Republic would like to express its gratitude and appreciation to the Commission and the Special Rapporteur, Ms. Concepción Escobar Hernández, for their work on the topic. The Czech Republic would like to make the comments below on the draft articles.

The Czech Republic commends the Special Rapporteur and the Commission for the clarification of the definition and scope of the immunity of State officials *ratione personae* and *ratione materiae* contained in draft articles 1 to 6. In its opinion, these provisions in principle reflect customary international law.

Estonia

[Original: English]

Estonia welcomes the adoption of the draft articles and their commentaries on first reading by the International Law Commission at its seventy-third session on 3 June 2022. It thanks Special Rapporteurs Roman Kolodkin and Concepción Escobar Hernández for their hard work during all the years in leading the discussions and reporting on the topic.

France

[Original: French]

France would like to thank the International Law Commission, and in particular its Special Rapporteur, Concepción Escobar Hernández, for the considerable amount of work done on the preparation of the draft articles and the commentaries thereto, and for transmitting them to Governments. France would also like to thank the previous Special Rapporteur, Roman A. Kolodkin, for his contribution to the work on the topic. France has taken note of the appointment, on 10 May 2023, of Claudio Grossman Guiloff as Special Rapporteur. France wishes him every success as he continues the work of the Commission on the topic.

France notes the efforts made by the Commission and the Special Rapporteurs over the years to advance work on the topic “Immunity of State officials from foreign criminal jurisdiction”. In that context, it will first make some general comments before addressing each draft article in turn and drawing conclusions.

As a preliminary remark, France notes that the topic “Immunity of State officials from foreign criminal jurisdiction” has been on the Commission’s programme of work since its fifty-ninth session (2007). In view of the considerable amount of time already devoted to the topic, it is important not to conclude its consideration hastily and to take the time necessary to further develop the draft articles.

Many delicate issues remain unresolved, and France believes that a hasty conclusion of the work on the topic will make it difficult to adopt a consensual text. France has every confidence in the Commission’s ability to resolve these issues in a measured, consensual and balanced way at the second-reading stage.

In addition, France once again emphasizes the importance – on this topic in particular – of taking into account the various State practices and domestic case law precedents. By eliminating any ambiguity as to the status of a given provision – i.e.

whether it constitutes codification or progressive development – such references make it possible to assess the scope of the provision and, consequently, whether it can be invoked in practice. In that respect, France notes that the absence of an explicit characterization of the status of each draft article means that States are unable to assess whether, as far as the Commission is concerned, each draft article constitutes codification or progressive development.

France therefore invites the Commission to continue its efforts in this regard, in particular in Part Four of the draft articles.

Lastly, it is important to start thinking now about what the Commission intends the outcome of its work to be. Will a set of draft articles be transmitted to the General Assembly with a view to recommending that they be adopted in the form of an international convention? France has taken note of paragraph (13) of the general commentary to the draft articles, in which the Commission states that it will deal with this question at a later stage. However, the answer to the question is important and cannot be decided upon at too late a stage, as it will necessarily influence the way in which the work on the topic progresses.

Germany

[Original: English]

Germany wishes to express appreciation for the work of the former Special Rapporteur Concepción Escobar Hernández and the Commission as a whole on this highly relevant topic and commends the Commission on having adopted the draft articles on immunity of State officials from foreign criminal jurisdiction on first reading. The topic is of paramount importance to Germany. Germany will limit itself to some key points regarding the draft articles as developed by the Commission.

History has taught us that there are crimes where immunity cannot be upheld. Germany has been at the forefront of this historical experience – the Nuremberg trials being the starting point of the development of modern international criminal law. Hence, Germany has always been and will always be a staunch supporter of this development. International crimes are of such gravity that not to bring the perpetrators to justice is unacceptable and has the potential to undermine the credibility of the international legal order. Reports of atrocities committed in ongoing conflicts are a sad reminder of the fact how important it is to uphold the fight for accountability.

At the same time, it must be borne in mind that immunities, including those of State officials from foreign criminal jurisdiction, are a core element of protecting the international legal system, which is based on the principle of sovereign equality. Immunities of State officials from foreign criminal jurisdiction constitute an elementary basis of stable and peaceful inter-State relations. It is imperative that the right balance be struck between the need for effective criminal proceedings and the need for stability in international relations. Given the sensitivity of the issue, Germany wishes to reiterate its call for a cautious approach to the issue, which is warranted even more now that the project is nearing its end.

Germany would like to highlight the importance of clearly distinguishing between the various types of immunity under international law and, respectively, the different situations in which questions of immunity under international law might be pertinent. The draft articles as well as the concomitant debates and discourses should generally not be interpreted as carrying implications for other immunities such as, in particular, those of States in civil proceedings, etc. The need to differentiate scrupulously between the various types of immunity, that is in particular, between the immunity of States from foreign civil proceedings and the immunity of State officials from foreign criminal jurisdiction, and the situations in which immunities might be

raised is well established in international case law and also reflected in the jurisprudence of German national courts.

Ireland

[Original: English]

Ireland wishes to thank the Commission for its important work on this complex and sensitive topic, and for producing a set of draft articles and commentaries for States' consideration and comment. In particular, Ireland wishes to thank the Special Rapporteurs, Concepción Escobar Hernández and Roman Kolodkin, for their detailed consideration of this topic. Ireland also welcomes the appointment of Claudio Grossman Guiloff as the new Special Rapporteur for this topic and looks forward to engaging with him further on it.

Ireland recognizes the complexity and sensitivity of this topic which touches on important questions of international law and policy, including the sovereign equality of states, accountability for the most serious crimes under international law and the importance of stability in relations between States. Against this background Ireland welcomes the progress made in developing the draft articles to date but believes that they could benefit from further adjustment. In particular Ireland takes the view that the Commission should consider two separate texts, one consisting of rules in draft articles format that set out the scope and content of relevant immunities and the other consisting of guidelines (not draft articles) setting out procedures and safeguards. The latter should not be regarded as rules of substantive law but, instead, be provided in guideline format for the assistance of States in applying the rules reflected in the draft articles.

[…]

In conclusion, Ireland reiterates its thanks to the Commission for its work on the present draft articles and commentaries and looks forward to further engagement on them.

Islamic Republic of Iran

[Original: English]

Under international law certain State officials are entitled to absolute immunity *ratione personae*, from foreign criminal jurisdiction. Such immunity covers both acts performed in their official capacity and their private acts. The principle of immunity of the "troika" (Head of State, Head of Government and Minister of Foreign Affairs) which is well established and recognized under customary international law is the key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State. This immunity shall cease to apply to their private acts as soon as they leave office. However, they shall continue to enjoy immunity for acts performed in their official capacity without time limit, as those acts are deemed to be acts of the State.

In determining an act as "act performed in official capacity" or "act performed by individuals acting in their personal capacity", as a requirement for the possibility of enjoying immunity, the core criterion is governmental and official nature of such act. Therefore, the Islamic Republic of Iran maintains that all such activities that derive from the exercise of elements of governmental authority shall be entitled to immunity. Accordingly, the Islamic Republic of Iran believes that international crimes cannot be performed by individuals themselves, without governmental connivance.

[…]

Concerning the proposal of the Special Rapporteur on "recommended good practices", the Islamic Republic of Iran is of the view that producing such practices which are based on policy preferences and a lack of concrete measures may lead to unbalanced practices which can disrupt international legal order based on recognized general principles of international law including, but not limited to, non-intervention, international cooperation and sovereign equality of States.

[…]

Meanwhile, the Islamic Republic of Iran believes that immunity is not equivalent to impunity, limiting the scope of immunity in favour of the responsibility and accountability of State officials should benefit from sufficient, widespread, representative and consistent State practice.

[…]

In conclusion, the Islamic Republic of Iran is of the conviction that the Commission's draft articles on the topic in question shall be guided by existing rules of international law, as also evidenced in the jurisprudence of the International Court of Justice and taking into account the inevitable needs of an effective and stable international relations.

Israel

[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), the State of Israel hereby submits comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading in 2022. By reason of current events, Israel submits at this stage only some of its comments and observations, hoping to be able to supplement these in the coming weeks.

The State of Israel attaches great importance to ensuring that perpetrators of crimes are brought to justice, and to this aim supports various international efforts aimed at fighting crime and combating impunity effectively. At the same time, Israel considers that the longstanding and firmly established international legal rules on immunity of State officials from foreign criminal jurisdiction serve a vital function in expressing and safeguarding the fundamental principle of sovereign equality; in preventing serious international friction and political abuse of legal proceedings; and in allowing for the proper and unimpeded functioning of State officials in the conduct of international relations.

Accordingly, Israel attaches importance to the work of the Commission on this topic and welcomes the appointment of Mr. Claudio Grossman Guiloff as the new Special Rapporteur. While Israel appreciates the efforts undertaken by the Commission thus far and the modification of some propositions in response to State input, it considers the text adopted on first reading to be unsatisfactory in several significant respects and thus to require considerable amendment. Israel believes that during the second reading stage the Commission should revisit and grapple with the substantial problems and controversies still existing in the draft conclusions and in the commentary, and should take all the time necessary to produce an output that can usefully win general endorsement by States. Israel recalls in this regard the positive example of the multi-year second reading stage of the draft articles on State responsibility.

It is in this context that Israel wishes to make a number of particular comments and observations in order to voice its misgivings concerning both the methodology and the substance of several of the draft articles.

Codification of existing law vs. progressive development of the law

Due to the importance of the topic, and the divergent views among States on several core issues with which the draft articles are concerned, Israel believes that the Commission should limit itself to stating and clarifying international law as it currently stands. Israel shares the concern of a significant number of States, and of several members of the Commission, that certain draft articles adopted by the Commission on first reading fail to reflect accurately the current state of customary international law and constitute instead proposals for the possible progressive development of the law, or even wholly new law, but without adequately and openly acknowledging this fact.

In the view of Israel, should the Commission choose, despite the significant opposition of States, to endorse proposals for progressive development of the law in its draft articles and the commentary thereto, it ought to indicate that clearly in connection with each proposition for which that is the case.

Japan

[Original: English]

Japan extends its appreciation to the International Law Commission for its important work on the topic of immunity of State officials from foreign criminal jurisdiction. […]

The draft articles appear not in all aspects to reflect current law or State practice and *opinio juris* of States. The Commission would benefit from a more detailed elaboration on identifying where it considers the draft articles to codify existing law and where it considers the draft articles to propose the progressive development of law or new law. From this perspective, Japan encourages the Commission in its further work to take the time to carefully and soundly consider the draft articles, bearing in mind that the draft articles seem not fully supported by State practice and *opinio juris* of States.

The comments and observations here are not intended to be exhaustive. As such, this submission is without prejudice to the position of Japan on specific articles.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands has requested and received a report of the Advisory Committee on Issues of Public International Law on the draft articles. The Kingdom would like to invite the Secretary-General to take note of this report, dated 30 June 2023, which is annexed to this Note verbale. The Government's response to the advisory report is also annexed to this Note verbale.[5]

The Kingdom would like to make some comments regarding the draft articles in general and in respect of every draft article in particular.

[5] The report of the Advisory Committee on Issues of Public International Law and the Government response thereto are on file with the Codification Division of the Office of Legal Affairs of the Secretariat. The full texts are available at https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2023/10/10/ilc-draft-articles-of-the-international-law-commission-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction (last accessed on 26 January 2024) and Government response to CAVV advisory report No. 43 "ILC Draft articles on immunity of State officials from foreign criminal jurisdiction",| Government response, Advisory Committee on Public International Law (https://www.advisorycommitteeinternationallaw.nl/publications/government-response/2023/11/2/ilc-draft-articles-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction) (last accessed 26 January 2024), respectively.

In general, the Kingdom is of the view that neither the draft articles nor the commentaries provide an answer to the questions concerning the immunity of State officials. There is no consensus about the exceptions to and limits of immunity of State officials. In consequence, the Commission has focused in the draft articles on procedural aspects of competence and form. This distracts from the fundamental issues. The topic of immunity of State officials requires a careful approach that does justice to the differing views of States.

The Kingdom would also note that immunity of State officials is not a recent topic. It is therefore a matter of concern that the proposals of the Commission have an insufficient basis in the uniform State practice and *opinio juris* that is available concerning the scope and application of immunity and at the same time introduce topics for which no State practice and *opinio juris* exists. The draft articles might therefore be perceived as a progressive development of international law, but the Commission does not present them as such. However, a progressive development of international law should not be necessary for this topic as sufficient State practice is available for the application of immunity law without having to resort to procedural provisions.

In view of the fact that by adopting these draft articles the Commission seems to be aiming for the adoption of a text that can serve as a basis for treaty negotiations, the Kingdom points out that it attaches importance to the codification of immunity law, including the immunity of State officials from foreign criminal jurisdiction. However, before the adoption of extensive and detailed draft articles, it will first be necessary to reach consensus on the fundamental concepts inherent in this topic.

The Kingdom considers that the relevance of many of the proposed draft articles to immunity law and the degree of detail cannot provide an adequate basis for codifying the rules of immunity law. Many of the proposed procedural safeguards do not contribute to the rules for determining whether immunity exists and the consequences of the existence or otherwise the absence of immunity. The degree of detail places an unduly heavy burden on forum States, which would have to adapt their national legislation accordingly. In so far as support for procedural safeguards exists in State practice and the accompanying *opinio juris*, those safeguards could be included, albeit without the current degree of detail. This means that the draft articles need to be streamlined.

Liechtenstein

[Original: English]

Liechtenstein extends its appreciation to the International Law Commission for their efforts in advancing this important topic. In June 2022, the Commission adopted on first reading the draft articles on immunity of State officials from foreign criminal jurisdiction. The topic holds fundamental importance to the prosecution of the most serious crimes under international law, as it addresses the relationship between those crimes and immunity from foreign prosecution. In that regard, the Commission adopted draft article 7, which provides for limitations and exceptions to immunity *ratione materiae* (also known as functional immunity).

Liechtenstein commends the position of the Commission that functional immunity shall not apply to crimes under international law. The work of the Commission on draft article 7 is imperative for the overall fight against impunity for the core international crimes, which are: the crime of aggression, genocide, war crimes and crimes against humanity. Given that these four crimes make up what are called core international crimes, the list of crimes in draft article 7 must therefore also include the crime of aggression.

Luxembourg

[Original: French]

[See comment under draft article 7.]

Malaysia

[Original: English]

Notwithstanding the adoption of the draft articles and annex by the Commission on first reading, there is a prevailing need to address the concerns of Malaysia on the topic. Hence, the succeeding paragraphs will focus on the comments and observations of Malaysia on several key issues of the draft articles and annex, namely:

a. Crimes under international law in respect of which immunity *ratione materiae* shall not apply – issues of application of international treaties to non-State parties;

b. Application of the procedural aspect and safeguards of the draft articles in light of the significant distinction between the two types of immunity, namely immunity *ratione personae* and immunity *ratione materiae*;

c. Application of draft article 13 (request for information) in relation to the immunity of State officials from foreign criminal jurisdiction; and

d. Proposal to suspend national proceedings pending an international dispute settlement in draft article 18.

Mexico

[Original: Spanish]

Mexico wishes to begin by expressing its appreciation to the Commission for the draft articles adopted on first reading and for the work carried out in that regard.

Overall, Mexico considers the text of the draft articles to be adequate. It contains provisions that are relevant for the development and codification of international law regarding the criminal immunity of officials of foreign States.

Mexico reiterates its view concerning the relevance of the draft articles. It reaffirms the need for the community of States to have a binding legal instrument that regulates immunity from criminal jurisdiction and lays the groundwork for the development of the law in this area. This will undoubtedly provide greater legal certainty and enhance access to international justice.

Morocco

[Original: French]

Before elaborating on the observations of Morocco on certain aspects of the draft articles, it is worth recalling that the question of immunity arises as a result of the recognition of this right, and so its treatment must not affect its basic purpose, which is to ensure that State officials have the capacity to act on behalf of their States when exercising their official functions.

In general, the courts of a foreign State should not be entrusted with determining the limits on the application of immunity from foreign criminal jurisdiction enjoyed by State officials, in particular when the motivation for exercising criminal jurisdiction may serve political ends; it is important to preserve the sovereignty of the State, provided its national courts can respond adequately to any breaches of a

criminal nature committed by a State official acting in an official capacity under international law.

[…]

Morocco is grateful to the Commission for its ongoing efforts to improve the understanding and treatment of certain legal issues by Member States and expects that it will need to expand on this contribution at a later date.

[See also comment under draft article 7.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Rules on the immunity of State officials from foreign criminal jurisdiction have for long been part of customary international law. In contrast to the situation for diplomatic agents and for States as such, there is no general legal text that sets out the immunity regime relative to State officials. The Nordic countries believe that the work of the Commission represents a significant step towards a common understanding of the international legal norms applicable in this matter.

The Commission has informed that it has sought to deliver a product that can form the basis for negotiations of a treaty. Being cognizant that most of the proposed draft articles reflect customary international law and are as such already binding on States without treaty codification, the Nordic countries agree that the final draft articles could indeed constitute the basis for negotiating a treaty on the immunity of State officials from foreign criminal jurisdiction.

The concept of immunity is closely linked to the principle of sovereign equality of States. International law reflects these principles in its prescription to States not to claim jurisdiction over another sovereign State. Bearing in mind the principle of sovereign equality of States it can be noted that customary rules regarding immunity develop in line with what is necessary and functional in the exercise of international relations. Customary law is not static, and it may change in line with the practice of States and their recognition of it. The draft articles of the Commission encompass the developments over the last decades in this regard, in particular considering the relation between international criminal law and the customary rules of immunity of State officials from foreign criminal jurisdiction, as reflected *inter alia* in article 7 of the draft articles.

Having the entire set of draft articles before us, it is the view of the Nordic countries that the Commission has succeeded in drafting what is broadly a codification of the applicable customary rules, and that the draft has been both satisfactorily structured and adequately detailed. The draft is, in the view of the Nordic countries, appropriately striking the balance between the interests of the forum State and the State of the official, and in this regard, the procedural provisions of Part Four of the draft articles are particularly important, considering that they are ensuring adequate safeguards for the State of the official, while also observing the interests of the forum State.

The Nordic countries encourage the Commission to continue its effort on the draft articles so that a final draft may constitute the basis for negotiating a convention on the immunity of State officials from foreign criminal jurisdiction. In this regard, the Nordic countries have the following considerations on the draft articles adopted on first reading.

Panama

[Original: Spanish]

[T]he Permanent Mission of Panama has the honour to report that the Government of the Republic of Panama has no objections to the draft articles. Panama acknowledges that the draft articles are based on international instruments such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the United Nations Convention on Jurisdictional Immunities of States and Their Property, among others, and that they have previously been discussed by Member States, whose input helped to enrich the document elaborated by the Commission.

Poland

[Original: English]

The Republic of Poland considers the "immunity of State officials from foreign criminal jurisdiction" as a topic of paramount importance. Already in 2015, Poland presented to the Commission an "Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction" which evaluated, among other issues, terminological questions, the immunity *ratione personae* of representatives of States from foreign criminal jurisdiction, the immunity *ratione materiae* of representatives of States from foreign criminal jurisdiction, as well as the *ultra vires* acts.

It is worth reminding that Poland in the framework of the United Nations War Crimes Commission submitted formal indictments against Adolf Hitler and other prominent German Nazi leaders.[6] Furthermore just after the conclusion of the Second World War, Poland significantly contributed to the development of law relating to accountability for the crime of aggression before domestic courts. In particular, the trial of Arthur Greiser, which took place in June and July of 1946 – i.e., before the Nuremberg Tribunal issued its verdicts – involved responsibility for crimes against peace before a Polish court (in this case, the Supreme National Tribunal). Similar trials were held in 1947 for Ludwik Fischer and in 1948 for Albert Forster and Josef Biihler before the Supreme National Tribunal. In all four cases, members of the German Nazi party (NSDAP) – holding senior positions in the administration of the occupied territories – were convicted for crimes against peace.

Portugal

[Original: English]

At the outset, Portugal would like to commend the International Law Commission for the adoption of the draft articles, together with the commentaries, which have been submitted to Governments for their comments and observations.

As previously stated, Portugal strongly supports the work of the Commission on this highly topical issue, which it considers to be of the utmost importance for the fight against impunity and for the maintenance of international peace and security.

[6] https://unwcc.org/wp-content/uploads/2023/08/UNWCC-and-Head-of-State-Immunity-master.pdf.

Romania

[Original: English]

Romania thanks the International Law Commission for the opportunity to submit its written comments and observations[7] on the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading in 2022, which are set out in Chapter VI of the Report of the Commission at its seventy-third session (A/77/10). Romania expresses its sincere appreciation to the Special Rapporteur, Mr. Claudio Grossman Guiloff, to the former Special Rapporteur, Ms. Concepción Escobar Hernández, to the Drafting Committee, and to the Commission as a whole, for their work on this important topic and the preparation of the draft articles and commentaries.

Russian Federation

[Original: Russian]

The Russian Federation takes this opportunity to express its gratitude to the Special Rapporteurs Roman Anatolevich Kolodkin and Concepción Escobar Hernández, the Drafting Committee and the entire Commission for the work done on the topic of immunity. The reports of the Special Rapporteurs and the draft articles and the commentaries thereto have made an important contribution to the development of international law, clarifying the content of a number of international legal rules and reflecting their customary law character.

At the same time Russia believes that the draft articles require serious further analysis and refinement. In its current form, the text lacks a number of very important provisions and answers to a substantial number of questions arising in connection with the immunity of officials. Many of these questions are elaborated upon in the Commission's commentaries to the draft articles, but they fully deserve to be included directly in the text of the draft articles. Other questions are only outlined, without clear conclusions being provided; however, such conclusions need to be found and included in the draft text. Lastly, on a number of key questions, the Commission has, in the opinion of Russia, come to incorrect conclusions that are not consistent either with the objective content of current international law or with the needs of States for its development.

The main question among these is that of the so-called exceptions to immunity in respect of the most serious crimes under international law (draft article 7). Russia maintains that there are no such exceptions under customary international law and that such exceptions would carry a substantial risk of destabilizing international relations, without making any significant contribution to combating impunity. The attempt to "balance" draft article 7 with "procedural safeguards" cannot be considered adequate. Furthermore, as a result of this approach, the draft articles are overloaded with procedural provisions, while a number of important substantive legal issues are left aside.

Russia is also obliged to note that the draft articles have numerous technical flaws. The most significant of these are reflected in the comments set out below; however, Russia has chosen at this stage to refrain from a detailed editorial review of the draft articles in view of the large volume of substantive observations. Nonetheless,

[7] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), para. 66: "At its 3609th meeting, on 3 August 2022, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023."

the volume of these observations and editorial shortcomings of the draft articles (and the commentaries thereto) demonstrate one thing: the Commission should carefully and in detail reconsider the draft articles in their entirety, taking into account the oral and written comments of States. No artificial deadlines should be established for the work on the topic (Russia has also expressed this wish in relation to other topics on the Commission's programme of work). The quality of the final product is far more important than the speed with which it is completed. The translation into Russian of the draft articles and the commentaries thereto also needs improvement.

The question of the final form of the Commission's work should be addressed after the refinement of the draft text. The draft articles as they stand, in the form of a draft international convention, cannot serve as the basis of such a convention.

Saudi Arabia

[Original: Arabic]

[T]he Kingdom of Saudi Arabia reaffirms the importance of observing the principle of State sovereignty and the importance of the issues arising from that principle, including the immunity of States and their officials. The Kingdom once again thanks the Commission for its contributions with regard to these draft articles and trusts that the Commission will continue to work diligently on the matter before the draft articles become part of customary international law.

Singapore

[Original: English]

Singapore appreciates the role of the draft articles in the progressive development of international law. As a general observation, Singapore reiterates the importance of the draft articles and commentaries clearly distinguishing *lex ferenda* from *lex lata* where applicable. The detailed comments of Singapore on specific articles may be found in the following sections.

[…]

Singapore submits its written comments to the Commission for consideration and looks forward to further revision of the draft articles. Singapore thanks the Commission and the Special Rapporteurs for their efforts in developing the draft articles and extends its sincere appreciation.

Switzerland

[Original: French]

Switzerland wishes to thank the Commission for its outstanding work on this complex topic. The Commission's work helps to ensure a balance between combating impunity and upholding the principle of the sovereign equality of States. It is important that inter-State relations should be stable and predictable and that officials acting on behalf of their States should be independent *vis-à-vis* other States. However, it is also crucial that State officials who have committed crimes, especially violations of human rights or international humanitarian law, should bear responsibility.

Ukraine

[Original: English]

[See comment under draft article 7.]

United Arab Emirates

[Original: English]

The United Arab Emirates welcomes the opportunity to comment on the draft articles on immunity of State officials from foreign criminal jurisdiction, a project undertaken by the International Law Commission since 2006, which has proven highly controversial and continues to generate extremely divergent viewpoints, both within the Commission and among States. The United Arab Emirates expresses its gratitude to the two Special Rapporteurs for their laborious research and detailed reports, and their painstaking efforts aimed at attempting to reach an outcome that would satisfy the majority of stakeholders.

In deciding an approach for commenting on the draft articles, the United Arab Emirates has opted for a selective method aimed at providing its views on specific draft articles, along with preliminary views relating to the importance of distinguishing between *lex lata* and *lex ferenda*.

The United Arab Emirates will therefore first provide preliminary comments pertaining to the underlying lacunae in the draft articles which it has identified. Turning to the specific text of the draft articles, the United Arab Emirates sets out its view that draft article 2 fails to provide a useful definition of an "act performed in an official capacity". The comments then address why draft article 3 on persons enjoying immunity *ratione personae* should not be limited to the troika, and the serious defects in the limitations and exceptions to immunity *ratione materiae* under draft article 7. The United Arab Emirates concludes with comments regarding Part Four of the draft articles concerning procedural safeguards.

[…]

In light of the sensitive nature of the topic of immunity of State officials from foreign criminal jurisdiction, the United Arab Emirates believes that the Commission must carefully maintain the distinction between the codification and progressive development of the law in this area. In its current form, the draft articles make it difficult to distinguish between the attempted restatement of international law and proposals of new rules. The United Arab Emirates maintains that in the absence of any sufficiently developed State practice relating to relevant provisions of the project, any further consideration of the draft articles would only be suitable in the context of elaboration of a draft convention.

Though it has become common practice for the Commission no longer to distinguish clearly between the two concepts, it has retained the distinction when a draft provision contains particularly innovative language so as to alert States to the novelty of the provision and allow them to take this into consideration when deciding whether to endorse it.

The United Arab Emirates observes that a number of provisions in the draft articles have divided the Commission as to whether they constituted a codification of international law or its progressive development, or even new rules altogether. One member warned that the Commission had in the past referred to *lex ferenda* when, in reality, the Commission was suggesting elements that might be more accurately defined as *lex desiderata*:[8]

> "While the Commission's codification work was based on customary international law, progressive development was carried out on the basis of emerging rules of international law; that was different from the making of new laws, which was what *lex ferenda* usually implied. The Commission itself had

[8] *Yearbook of the International Law Commission 2012*, vol. I, p. 100, para. 31 (Murase).

not always used the term *lex ferenda* correctly, and it had to a certain extent led the Sixth Committee astray in that regard. Particular caution should therefore be taken when using the expression 'progressive development' as it related to the Commission's mandate."

With respect to progressive development of international law, the United Arab Emirates emphasizes the requirement that there must, at the least, exist an embryonic rule which is "emerging" or "developing". By contrast, in the present instance, several provisions proposed by the Commission constitute epitomes of new law. For instance, draft article 7 and draft Part Four relating to procedural safeguards are best viewed as new suggestions or proposals, not law, as they do not reflect an embryonic rule or practice from which the Commission may justify the further progressive development of the law. A number of States have objected that these provisions constitute the creation of rules *ex nihilo*, and warned of the risk of overreach by the Commission in carrying out its functions.[9] The United Arab Emirates agrees with these criticisms.

It follows that the Commission should consider deleting or revising such provisions, and if it is of the view that progressive development might be warranted, the Commission should either specify that certain provisions constitute progressive development or that the text should be proposed in the form of a draft convention. Nevertheless, serious and substantial flaws identified in the draft articles, described below, are sufficient to call into question whether, absent substantial revision, a convention based on the draft articles would attract widespread acceptance by States.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom expresses its appreciation to the former Special Rapporteurs, Concepción Escobar Hernández and Roman Kolodkin, to the Drafting Committee and to the Commission as a whole, for their work over many years on this important topic including the preparation of the draft articles and commentaries.

We also welcome the appointment of Claudio Grossman Guiloff as the new Special Rapporteur for the topic and look forward to engaging with him as he takes stock, reviews the observations of States and consults on the way forward ahead of the Commission's seventy-fifth session. In light of the fundamental importance of this topic, it is vital that the Special Rapporteur and the Commission do not rush to a second reading, but instead take the necessary time to reflect and then mould a future product which not only accurately reflects the practice of States but can also enjoy broad acceptance across the international community as a whole.

The United Kingdom has the following comments and observations on the draft articles.

General comments

The United Kingdom welcomed the Commission's decision at its fifty-ninth session to include this topic in its programme of work. The immunity of State officials from foreign criminal jurisdiction continues to offer an opportunity for the Commission to provide valuable clarification on a matter of real practical concern for both States and individuals.

[9] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, A/CN.4/713, paras. 30–31; Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (12) of the commentary to draft article 7.

The United Kingdom recognises the delicate balance of interests which the immunity of State officials represents and the potential impact on international relations. It is for that reason the United Kingdom has consistently called for the Commission to undertake a careful and thorough analysis of the *lex lata* and its policy rationale, and supported the original objective set out by Special Rapporteur Kolodkin not to formulate abstract proposals as to what international law could or should be, but to work on the basis of existing international law.

In light of that objective, the United Kingdom recalls its statements in recent Sixth Committee debates on the annual reports of the Commission[10] and reiterates that it is of vital importance for the Commission to make itself clear when it is codifying existing law and when it is suggesting the progressive development of the law, or proposing new law. This is particularly important given the Commission's acknowledgment in paragraph (12) of the general commentary that "*As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law*". It is not sufficient for the Commission to simply provide information in the commentaries from which States – or crucially practitioners and judicial authorities – can try to deduce the status of a particular provision. Instead, the United Kingdom encourages the Commission to indicate in the commentaries accompanying the draft articles in a clear and transparent manner, and taking into account relevant comments it receives from States, those provisions which it considers to reflect the *lex lata* and those which it does not.

The United Kingdom has long expressed the view that where the outputs proposed by the Commission involve the progressive development of the law, to the Commission should pay careful attention to the views of States which remain the principal law makers in international law. This is of particular importance on a topic such as this where members of the Commission have expressed a range of legal positions, and there remains a diversity of views amongst States. Therefore, while noting the Commission's statement at paragraph (13) of the general commentary that it will decide at second reading on its recommendation to be addressed to the General Assembly, the United Kingdom emphasises that, if the Commission is going to maintain the current structure of its work on this topic which contains proposals for the progressive development of the law and new law, the appropriate form for the outcome of the Commission's work should be draft articles which could form the basis for a negotiated convention.

The current structure, however, is not the only option available to the Commission: the United Kingdom encourages the Special Rapporteur and the Commission more broadly to consider whether going forward other structures might help progress the topic, for example a short product codifying those rules which are clearly and universally accepted by States as the *lex lata*, while a second product explores and analyses those areas in which the Commission considers it appropriate to propose progressive development or the establishment of new rules.

Before turning to the detail of the draft articles, the United Kingdom wishes to emphasise three key points:

[10] Most recently at the 77th (https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg_uk_2.pdf), 76th (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_uk_2.pdf), 74th (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_2.pdf), 73rd (https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf) and 72nd (https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/uk_2.pdf) sessions of the Sixth Committee.

i. first, the principle which underpins and provides the policy rationale for the law of immunity is the sovereign equality of States; immunity is not conferred for the benefit of any individual, but to ensure the harmonious exercise of jurisdiction as between sovereign States.

ii. second, immunity is a matter which should be considered at an early stage before the merits; immunity does not depend on the gravity of the act in question, nor should the existence of criminal responsibility in itself preclude the availability of immunity.

iii. third, immunity does not mean impunity: the United Kingdom has a deep seated and abiding commitment to tackling impunity in all its forms. In particular, the United Kingdom notes that any immunity from foreign criminal jurisdiction which the official of a State may have is subject to waiver by that State, including through a treaty or other agreement. Furthermore, it is universally accepted that the immunity of a State official from the jurisdiction of the forum State does not exempt that official from the jurisdiction of their own State. Furthermore, the invocation by a State of immunity *ratione materiae* in respect of acts performed by one of its officials is an acknowledgement that those acts should be treated as the acts of that State, thereby potentially engaging its responsibility on the international plane.

[…]

The United Kingdom reiterates its thanks to the Commission for its work preparing the current draft articles and commentaries. It looks forward to further engagement with the Commission going forward as it reflects on the observations of States and revises the draft articles and accompanying commentaries accordingly.

United States of America

[Original: English]

The United States appreciates the opportunity to provide written comments on the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction, which were adopted on first reading on 3 June 3 2022, and associated commentaries. The United States recognizes and appreciates the efforts of the Commission to take into account the views of States. The United States also wishes to recognize and thank the efforts of two prior Special Rapporteurs on this project, most recently Ms. Concepción Escobar Hernández and, before her, Mr. Roman Anatolevich Kolodkin. The United States welcomes Mr. Claudio Grossman Guiloff as the new Special Rapporteur and looks forward to a continued dialogue on the form and substance of this complex and challenging project.

The topic of immunity of State officials from foreign criminal jurisdiction is of vital importance and practical significance. The United States remains prepared to engage with the Commission on this topic and committed to identifying the rules under which State officials performing their official duties overseas are adequately protected – particularly in those jurisdictions which allow for private parties (as opposed to State entities) to initiate a criminal prosecution – and ensuring that those responsible for international crimes do not go unpunished.

The Commission's mandate is to document the areas in which States have established international law or to propose new rules for States to consider adopting through conventions or State practice. In addressing customary law, the Commission needs to ensure its work is well supported by relevant practice and properly distinguishes between efforts to codify international law and recommendations for its progressive development.

The draft articles in many instances are not supported by sufficient State practice and *opinio juris*, and accordingly do not reflect customary international law. Rather, the draft articles frequently appear to articulate new legal duties or proposals for the progressive development of the law but do so without adequately acknowledging that intention. This lack of clarity makes it difficult to determine how much weight to accord various provisions as reflecting (or not) existing international law and thereby undermines the overall utility of the draft articles to States and risks misapplication by others who look to work products of the Commission as authoritative.

Our concern is heightened by the striking lack of consensus regarding these draft articles. The United States and others have consistently objected to draft article 7, which presents a clear example of this issue. Disagreement is evident among States, the Drafting Committee, and even the two prior Special Rapporteurs, who reached opposite conclusions with respect to international crimes exceptions to functional immunity. The Commission's split vote in 2017 that advanced the provisional adoption of draft article 7 underscores this division and was a highly unusual deviation from the normal consensus process that has promoted support for the work products of the Commission.[11] When the draft articles were adopted on first reading [in 2022], it was noted that although there was not a vote, concerns about draft article 7 had not been resolved.[12] The commentary to draft article 7, too, notes various theories for the international crime exceptions rather than presenting a unified legal rationale. The failure in this draft to reach consensus on whether or how there are or should be exceptions or limitations to functional immunity for international crimes, and the reasons for it, undermines the entire endeavor, including by exposing ambiguities in the draft articles' definition of an "official act." Additional State practice and broadly supported legal rationales would provide a foundation for consensus on these sensitive issues. As currently written, the draft articles risk uneven application, interference with existing State processes, and resulting increased tension among States. An alternative approach would be to recraft draft article 7 so that instead of trying to set forth a list of crimes that would not benefit from functional immunity it instead addresses the issue conceptually by delineating the factors or considerations that States should weigh in assessing whether a particular defendant charged with serious crimes would not benefit from functional immunity in a specific case. The practice in the United States has been to consider the application of functional immunity on a case-by-case basis.

The United States urges the Commission to take advantage of the appointment of the new Special Rapporteur to revisit these issues and refocus the draft articles on the codification of customary international law. In light of the controversy regarding the support for certain proposed provisions in the draft articles, a refocus on the codification of existing customary international law would be most useful to States and least harmful to what is now a workable immunity doctrine. Those aspects of the current draft articles that are not ripe for codification could be set aside until there is additional accumulation of widespread and consistent State practice performed out of a sense of legal obligation. The Commission should consider additional revision of the progressive elements of the draft articles, either by the Drafting Committee or refer these elements to a study group. The Commission should also consider presenting those elements in an annex to the commentaries that makes clear these elements do not reflect current international law.

[11] Concepción Escobar Hernández, Special Rapporteur, Sixth report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/722, para. 12.

[12] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (3) of the commentary to draft article 7.

The Commission notes that it "has 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."[13] The United States recommends that before either step is taken, the Commission start afresh on the areas of disagreement and work toward consensus. The start of Special Rapporteur Grossman's tenure provides an opportunity to take into account new ideas and perspectives. Additionally, recent events around the world have made clear the implications of these draft articles and should be given due consideration. The United States urges the Commission not to rush the next phase of review of the draft articles to give adequate consideration to States' concerns.

[…]

The United States notes that the below comments, which include both general views and specific suggestions for changes to the current draft, reflect an effort by the United States to engage in constructive dialogue with the Commission on the draft articles. The below comments should be understood in this specific context and not as representing approval by the United States of future work on or application of the draft articles and commentary with regard to international criminal law issues outside the context of the draft articles. The absence of comment by the United States on a particular provision of the draft articles or commentaries should not be understood to indicate the absence of concerns with respect to that provision.

[…]

While the United States appreciates the considerable effort that the Commission has put into considering the complex issues inherent in this topic, the current draft articles in many instances are not supported by a widespread and consistent State practice and *opinio juris*, and accordingly, as a whole, they do not reflect customary international law. Instead, the draft articles in many instances articulate new legal duties or proposals for the progressive development of the law without adequate acknowledgement of that intention. This lack of clarity undermines the overall utility of the draft articles to States and increases the risk of misapplication by practitioners. The United States urges the Commission to take the additional time needed to refocus the draft articles on the codification of customary international law. Those aspects of the current draft articles that are not ripe for codification could be set aside from the draft articles until there is sufficiently widespread and consistent State practice evidencing *opinio juris*. In that respect, the Commission should consider referring the progressive elements of the draft articles to a study group for further consideration or setting forth those elements in an annex to the commentary that makes clear their status as not reflecting current international law. The United States hopes that these written comments are helpful to the Commission in advancing its work and that the Commission will revisit the complex issues over which there continue to be significant differences and recommit to the traditional approach of working towards consensus.

The United States appreciates the opportunity to have its views considered and the time and attention that the Commission and the two prior Special Rapporteurs have devoted to this important and complex topic. It looks forward to continued engagement with the Commission to help address the remaining significant issues before the draft articles and commentary are finally adopted.

[13] Ibid., paragraph (13) of the general commentary (noting further that "[a]s is customary, the Commission will take this decision when it adopts the draft articles on second reading, which will enable it to benefit from any comments made by States on this issue.").

B. Specific comments on the draft articles[14]

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

Austria

[Original: English]

As to draft article 1, paragraph 3, the "without prejudice" clause for international courts and tribunals, Austria welcomes that this clause was moved from draft article 18 to draft article 1. However, there is still the question to what extent the phrase "international criminal courts and tribunals" also encompasses hybrid or internationalized criminal courts and tribunals. The commentary on this draft article mentions in paragraph 25 courts and tribunals created by resolutions of the United Nations Security Council under Chapter VII of the Charter of the United Nations and hybrid or internationalized tribunals created by domestic law, including as a result of initiatives originating from universal or regional international organizations. However, the commentary lacks a clear indication as to which of these institutions are encompassed by article 1, paragraph 3.

Brazil

[Original: English]

Brazil welcomes the scope of the immunity of State officials from the criminal jurisdiction of another State identified in article 1 by the International Law Commission.

Brazil agrees that the articles shall not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals. In this context, Brazil echoes the commentaries of the Commission to the phrase "as between the parties to those agreements" in article 1, paragraph 3. Brazil reinforces that the intention of the phrase is "to highlight that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal" (A/77/10, para. (26) of the commentary to draft article 1).

It is a basic norm of general international law, codified in article 34 of the Vienna Convention on the Law of Treaties, that "a treaty does not create either obligations or rights for a third State without its consent".

Therefore, while the articles do not affect treaty obligations related to international tribunals, these international agreements do not affect immunity of officials from non-party States. In relations between a State bound by concurring treaty and customary obligations and a State bound only to the latter, the rule by which both States are bound governs their mutual rights and obligations.

Czech Republic

[Original: English]

[See comment under general comments.]

[14] Quotations of the draft articles and commentaries thereto in the comments and observations as submitted have been omitted where appropriate. The full text of the draft articles and commentaries is contained in document A/77/10.

France

[Original: French]

France notes the absence of a definition of the terms “immunity” and “criminal jurisdiction”. While the latter is defined, “for merely descriptive purposes”, in paragraph (5) of the commentary to draft article 1, “immunity” is not. A definition of “immunity” would make it possible to draw a distinction between “immunity from jurisdiction”, “immunity from measures of execution” and “inviolability”, which France believes would be useful. These concepts may be confused in practice. Furthermore, although the Commission specifies “that the scope of the draft articles is limited to immunity from foreign criminal jurisdiction”,[15] other forms of immunity are mentioned several times elsewhere in the draft articles (for example, art. 9, para. 2 (b); art. 11, para. 1; and art. 14, para. 4 (b)). These references do not, however, make clear the meanings of the forms of immunity concerned.

In addition, France shares the reservation expressed by one member of the Commission concerning the term “international agreements”, as reflected in paragraph (25) of the commentary. Since not all international criminal courts are established by international agreements, using that term could have the effect of limiting the scope of the “without prejudice” clause. The clause could therefore be reformulated to clearly restrict the scope of the draft articles to a State’s domestic courts, excluding any other type of court or tribunal (international, internationalized or hybrid). In the same vein, paragraph (3) of the general commentary could be amended to replace the word “specifically” with the word “exclusively”.

Ireland

[Original: English]

Ireland agrees that the draft articles should be without prejudice to the immunities enjoyed by categories of individuals such as diplomatic envoys and consular officers which are already regulated by existing legal instruments (draft article 1, paragraph 2).

As a strong supporter of accountability, Ireland agrees with the inclusion of a “without prejudice” provision in the draft articles in order to address their relationship with the rules governing international criminal courts and tribunals. Ireland therefore welcomes the inclusion of such a provision at draft article 1, paragraph 3, and support its proposed positioning within the draft articles. It suggests however that for the sake of greater legal certainty it be amended to refer also to international agreements “relating to the operation of” international criminal courts and tribunals as well as to “other instruments establishing and relating to the operation of international tribunals” (such as Security Council resolutions).

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands would prefer a more comprehensive approach to the immunity of State officials than that now envisaged by the Commission. For example, the draft articles should also provide for rules on the inviolability of State officials and the prohibition on executing a judgment or any other measure of execution in respect of State officials (immunity from execution).

[15] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paragraph (13) of the commentary to draft article 9.

As regards the conflict clause in draft article 1, paragraph 3, concerning the relationship between the draft articles and the rights and obligations of States in relation to international criminal courts and tribunals, the Kingdom would prefer this clause to be deleted. The rights and obligations of States concerning international criminal tribunals, including whether or not immunity should be granted under a statute or founding treaty of an international criminal tribunal, is a matter for the contracting parties. Whether or not State officials are granted immunity in the inter-State settlement of disputes has nothing to do with procedural conditions such as those proposed in the draft articles. If it is nevertheless to be retained, this aspect of the clause should be clarified.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

In the view of the Nordic countries, draft articles 1 and 2 adequately define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction and establish the key elements and definitions of their content. They also draw a useful distinction towards the special rules of international law relating to immunity from foreign criminal jurisdiction.

Furthermore, the Nordic countries are in favour of the explicit reference of draft article 1, paragraph 3, to the international agreements establishing international criminal courts and tribunals, recognizing the autonomy of the legal regimes applicable to such international criminal courts and tribunals. The clause does not go beyond the remit of the draft articles, nor does it give rise to hierarchical relationships between any rules, but rather merely separates different legal regimes, whose validity and separate fields of application will still be preserved. The Nordic countries concur with the view that issues relating to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles, as such issues are governed by a legal regime of their own, as stated in the commentary to the draft articles.

Russian Federation

[Original: Russian]

Paragraph 1

The introductory provision set out in draft article 1, paragraph 1, does not in itself give rise to any observations. However, it has a practical meaning only if all the concepts contained in it – “immunity”, “State officials”, “criminal jurisdiction” – are clear to the reader (legal practitioner). Yet, of these concepts, only that of “State official” is defined in draft article 2 (Definitions).

According to paragraph (5) of the commentary to draft article 1, the Commission decided not to include in the draft articles definitions of the terms “criminal jurisdiction” and “immunity”. The Russian Federation has previously expressed doubt as to whether it is possible or desirable to formulate such definitions. However, in stating that position, Russia was assuming that the draft articles would indicate in some other way what was meant by the concepts in question. In particular, in what way do the draft articles distinguish criminal jurisdiction from other types of jurisdiction? What manifestations of criminal jurisdiction are precluded by immunity? In their current form, the draft articles do not provide answers to these questions. Yet they are by no means theoretical in nature.

"Criminal jurisdiction"

With regard to "criminal jurisdiction", it must be remembered that, in different States, different approaches are taken with regard to individual responsibility of natural persons for offences. It seems that it should be established in the draft articles or the commentaries thereto that immunity may exist not only in the context of acts that are formally placed in the category of "crimes" under national law, and not only in the context of procedures that are formally placed in the category of "criminal procedures", but also when holding an individual accountable for other acts and/or under other procedures that have a number of features in common with criminal prosecution for the commission of crimes.

For example, in the Russian Federation, in addition to the concept "crimes", which are covered by the Criminal Code and entail "criminal responsibility", there is also the concept of "administrative offences", which are covered by the Code of Administrative Offences and entail "administrative responsibility". In the administrative prosecution of an individual, there may be procedures and penalties that are comparable to those used in criminal proceedings. The Russian Federation believes that foreign officials may enjoy immunity from jurisdiction in respect of administrative offences, as provided in the Code of Administrative Offences itself.

There is a distinction in many national legal systems between different types of offences entailing individual responsibility and the corresponding procedures. Suffice it to point out the variety of terms used to denote crimes and other offences: "crimes" proper, "delicts" or "torts", "felonies", "misdemeanours", "contraventions", "infractions", and analogous concepts in other languages.

Moreover, in a number of States, "criminal jurisdiction" in the strict sense can be used only when a criminal case is brought before a court. In other States, including Russia, the concept of criminal proceedings also covers the acts of entities involved in the investigation of crimes, starting with the institution of a criminal case by an official of the police or other law enforcement agency. It is obvious that the question of immunity may arise at the pretrial stage, which, accordingly, must be included in the concept of criminal jurisdiction for the purposes of the draft articles (see paragraph (7) of the commentary to draft article 8 and paragraph (5) of the commentary to draft article 9).

Thus, the Commission needs to find a way (in the text of the draft articles or in the commentaries thereto) to make clear to the reader where and how it draws the boundaries of the concept of criminal jurisdiction. The Special Rapporteur Ms. Escobar Hernández attempted to do so (A/CN.4/661, para. 42); the Commission's apparent inability to reach an agreed solution or produce an agreed text relating to this issue should not be a reason to abandon the task altogether.

"Immunity"

Similarly, as presented, the draft articles lack not only a definition but even a description of the concept of immunity. In the view of the Russian Federation, the draft text would benefit from the inclusion of a separate article establishing what forms of exercise of criminal jurisdiction are blocked by immunity. Both of the Commission's Special Rapporteurs examined this matter in detail (see A/CN.4/631, paras. 38–51, and A/CN.4/722, paras. 64–96). The Russian Federation favours an approach whereby immunity prevents the State exercising jurisdiction from taking steps to prevent a foreign official from performing his or her official functions (arrest, restriction of movement, summons to appear before a court or other body, freezing of bank accounts, etc.). On the other hand, steps that are not directed at a foreign official personally and do not prevent his or her activity (institution of criminal proceedings,

evidence-gathering, questioning of witnesses, and inviting the official to voluntarily give testimony) cannot be considered violations of immunity. This approach is supported in particular by the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France),* in which the Court formulated the criterion "constraining act of authority" (*I.C.J. Reports 2008,* p. 177 at pp. 236–237, para. 170; see also para. (6) of the commentary to draft article 9).

Such a separate article on the concept of immunity could also provide for the following elements:

– The procedural nature of immunity (see paragraph (8) of the commentary to draft article 1; in the view of the Russian Federation, this characteristic is key to determining the nature of immunity, and it is incorrect to retain it only in the commentaries without including it directly in the text of the draft articles);

– The principle that immunity is granted not for the personal benefit of officials but for the effective exercise of State functions (see paragraph (5) of the general commentary to the draft articles);

– Confirmation that immunity does not fully exempt an official from criminal responsibility or from the substantive rules of criminal law or, in cases in which the official is present in the territory of another State, from the obligation to comply with the laws and regulations of that State (see paragraph (8) of the commentary to draft article 1).

It could also be noted in the commentary to such an article that the words "*пользуются*", "enjoy", "*bénéficient*" and "*se benefician*" reflect prevailing usage and should not be interpreted as legitimizing some kind of benefit or pleasure that officials derive from immunity.

In addition, it could be clarified in the commentaries that the granting of immunity "for the effective exercise of State functions" means, in particular, the effort to protect an official from pressure from a foreign State in the form of a threat of criminal prosecution, and also from damage to his or her reputation that could arise from arbitrary accusations that he or she has committed crimes.

The presence of such a separate article containing a definition or detailed description of immunity would also make it possible to avoid certain technical issues that have arisen in connection with the draft articles (for example, the relationship between the concepts "immunity from jurisdiction" and "immunity from the exercise of jurisdiction" and the relationship between the "existence" and the "application" of immunity).

Paragraph 2

Draft article 1, paragraph 2, does not give rise to any observations.

The Russian Federation considers that military forces are mentioned in this paragraph by way of reference to international treaties governing the status of the military forces of a State that are lawfully located in the territory of another State (see paragraph (14) of the commentary to draft article 1). Accordingly, the paragraph does not concern the existence or absence of immunity from jurisdiction for the military forces of a State participating in armed conflict against another State that prosecutes them, for example, for the commission of war crimes. The Russian Federation supports the view, well established in international law, that combatants who have committed war crimes do not enjoy immunity from the jurisdiction of the adversary State. At the same time, this issue merits further study in the context of the

definition of “official” (see the comments of the Russian Federation on draft article 2 below).

Paragraph 3

The Russian Federation has stated on many occasions that it is against the inclusion in the draft articles of any separate rules relating to international criminal jurisdiction, and it continues to maintain that position. Russia is therefore opposed to draft article 1, paragraph 3, especially because, as currently drafted, it raises more questions than it answers.

In particular, it is difficult to accept that the relationship between the draft articles and obligations in the context of international criminal tribunals is formulated using a “without prejudice” construction. Such an approach would in fact mean giving the constituent instruments of international tribunals greater legal force than the rules set out in the draft articles. Yet it could equally well be argued that the development of the international criminal justice system should not in turn affect the immunity of State officials (at least officials of those States that do not participate in the international body in question).

Moreover, despite the criticism that has been voiced, the Commission has retained the wording relating to “international agreements” establishing international courts. Russia still considers that wording infelicitous, if only because in practice international judicial bodies have not by any means been established solely on the basis of international agreements. Furthermore, the use of the word “agreements” itself appears to be a conscious rejection of the generally accepted term “treaties”, which requires convincing justification.

In its desire to “preserve the achievements of recent decades in the field of international criminal law” (paragraph (21) of the commentary to draft article 1), the Commission has lost sight of the really important practical issue that arises at the nexus of national criminal jurisdiction and the jurisdiction of international judicial bodies. It would seem necessary, in the commentaries, and perhaps also directly in the text of the draft articles, to include a provision that criminal procedure measures taken by the competent authorities of a State in respect of an official of another State in response to a request from an international justice body constitute a form of exercise of criminal jurisdiction by the first State and, accordingly, are covered by the rules on immunity. In other words, the obligations of a State in the context of the constituent treaty of an international justice body do not exempt that State from obligations to respect the immunity of officials of States that are not parties to that treaty.

Switzerland

[Original: French]

Draft article 1, paragraph 3

Switzerland welcomes the Commission’s efforts to preserve the achievements of the recent decades in the field of international criminal law, in particular those relating to the establishment of the International Criminal Court. The Commission should not ignore the progress made by the international community in the field of international criminal law or diminish the rules already in place.

Among these achievements, it is particularly noteworthy that State officials do not enjoy any form of immunity based on their official capacity before international criminal courts. Specifically, immunity cannot constitute an obstacle to criminal

prosecution by the International Criminal Court.[16] As an international court acting on behalf of the international community, the Court's jurisdiction may also extend to the officials of States that are not parties to the Rome Statute, regardless of any immunities they might enjoy.

Switzerland believes that draft article 1, paragraph 3, should be amended to ensure that the draft articles do not inadvertently provide a basis for calling into question the jurisdiction and functioning of the International Criminal Court, which lies at the very heart of the achievements made in the field of international criminal law. Switzerland therefore proposes that the phrase "as between the parties to those agreements" be deleted.

Switzerland also questions the choice of the term "international agreements". As pointed out by one member of the Commission, some international criminal courts have been created by Security Council resolutions.[17] Switzerland invites the Commission to consider a way to reword paragraph 3 so that it includes these courts, so as not to jeopardize achievements in the field of international criminal law.

United Arab Emirates

[Original: English]

[See comment under draft article 7.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom broadly welcomes the scope of the draft articles as set out in paragraph 1 of draft article 1. As stated previously in Sixth Committee, the United Kingdom agrees with the Commission's decision to limit the topic to immunity from criminal jurisdiction: although immunity from civil jurisdiction may share some common features, there are some very different considerations in play and the two topics are subject to distinct State practice and *opinio juris*.

Nevertheless, the United Kingdom queries whether – in the absence of precise definitions – the Commission has made sufficiently clear what it considers the terms "immunity from criminal jurisdiction" and "immunity from the exercise of criminal jurisdiction" to mean. In practice, forum State authorities may need to consider a range of privileges and immunities that could affect the imposition of coercive measures on the official of another State, including whether that official enjoys inviolability of person or can be required to give evidence as a witness. It would be beneficial if the Commission could elaborate both on the measures it considers to constitute the exercise of criminal jurisdiction and the interplay between immunity from that jurisdiction and other forms of privileges and immunities.

The United Kingdom supports the inclusion of paragraph 2 of draft article 1 which excludes from the scope of the draft articles special rules of international law conferring immunity from criminal jurisdiction, some of which – such as the Vienna Convention on Diplomatic Relations – represent long established frameworks reflecting the settled legal view of the international community as a whole. The

[16] See article 27, paragraph 2, of the Rome Statute of the International Criminal Court of 17 July 1998: "Immunities […] which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

[17] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (25) of the commentary to draft article 1.

United Kingdom notes that these special rules of international law may derive from custom or treaty, and that, while the examples provided by the Commission in paragraph 2 constitute the main examples of relevant *lex specialis*, they are not an exhaustive list. In particular, there may be other forms of international contact and cooperation which arise on an ad hoc basis requiring additional special rules, for example conferences, commissions and international judicial or arbitral proceedings. The United Kingdom also underlines that, while military personnel are often the subject of specific agreements between States, particularly when stationed abroad, they will otherwise be covered by the topic in the same way as any other State official.

The United Kingdom also respects the intention behind paragraph 3 of draft article 1: the topic concerns immunity from national jurisdiction, therefore it should not extend to prosecutions before the International Criminal Court or other international courts or tribunals. It is also important that the international community preserve the progress it has made over the years in tackling impunity and ensuring the accountability of those accused of international crimes. Nevertheless, the United Kingdom encourages the Commission to look again at the wording of the paragraph to see whether it could be further clarified or improved.

Finally, the United Kingdom recalls its statement in the sixty-third session of the Sixth Committee that, while inclined to agree with Special Rapporteur Kolodkin that the position of family members is, generally speaking, outside this topic, the issue may have some relevance to Heads of State (particularly sovereigns). The United Kingdom continues to believe that, if the Commission proceeds without consideration of the position of family members, it should do so on the basis of an appropriate savings provision.

United States of America

[Original: English]

Article 1 sets forth the scope of the draft articles. The United States notes that, in addition to immunity from criminal jurisdiction, Heads of State, Heads of Government, and Foreign Ministers who enjoy personal immunity also benefit from personal inviolability, a protection that informs their treatment in the criminal context. While inviolability may be beyond the scope of this project, additional thought as to the intersection of inviolability and immunity would add greater clarity with respect to the treatment of officials who enjoy personal immunity from foreign criminal jurisdiction. Such consideration may also serve to distinguish and clarify the treatment of foreign officials with only functional immunity.

The United States understands paragraph 3 to mean that the draft articles are not intended to derogate from the rights and obligations of States that are party to, for example, the Rome Statute of the International Criminal Court. In turn, any rights or obligations arising from agreements, such as the Rome Statute, only operate as among Parties to such agreements. The commentary reinforces this meaning, where it notes, "[p]aragraph 3 emphasizes the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals."[18] Further, "conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal."[19]

The United States suggests changing "establishing international criminal courts" in paragraph 3 to "relating to" international criminal courts, as this would be

[18] Ibid., paragraph (22) of the commentary to draft article 1.
[19] Ibid., paragraph (26) of the commentary to draft article 1.

clearer about addressing a broader range of agreements, such as the Agreement on the Privileges and Immunities of the International Criminal Court.

2. Draft article 2 – Definitions

Austria

[Original: English]

The definitions in draft article 2 are limited to "State official" and "act performed in an official capacity". Austria suggests including a definition of the term "State of the official" as well, especially since this term is often used in the text. It needs to be clarified that the State meant in this wording is not necessarily identical with the State of nationality of the official. For Austria, the definition of an "act performed in an official capacity" raises questions, as it differs from the terminology used by the Commission in the context of the 2001 articles on responsibility of States for internationally wrongful acts. There, reference is made to "exercising elements of governmental authority" (see e.g. the title of article 5 of the articles on State responsibility), while draft article 2 speaks of "exercise of State authority". Austria would favour to return to the terminology established in the context of State responsibility since, otherwise, it would not be clear which acts would be covered by the expression "exercise of State authority".

Brazil

[Original: English]

In draft article 2, Brazil encourages the Commission to include a definition of foreign criminal jurisdiction that comprehends both adjudicatory and enforcement powers of States.

Brazil also urges the Commission to include examples of the exercise of foreign criminal jurisdiction in its commentaries. It is also essential to observe that any kind of detention or arrest by the enforcement institutions of a State necessarily entails the exercise of its own criminal jurisdiction, regardless of whether it is a provisional or definitive arrest, or whether the arrest warrant stems from a domestic criminal proceeding, or an extradition request from another State, or a request for arrest and surrender from an international criminal court.

Czech Republic

[Original: English]

The Czech Republic notes with satisfaction that the Commission, in its commentary to draft article 2, subparagraph *(b)*, refers to the **relationship** of the acts performed in an official capacity (and, thus, of immunity *ratione materiae*) **to the regime of responsibility of States for internationally wrongful acts**. The Czech Republic agrees with the conclusion that not all of the criteria for the attribution contained in the draft articles on the responsibility of States for internationally wrongful acts seem generally applicable in this regard, due to the fact the scope of the immunity *ratione materiae* covers only acts performed by "State officials in their official capacity". On the other hand, unlike the Commission, the Czech Republic is of the opinion that the criteria of attribution set out in article 7 of the draft articles on State responsibility, which deals with conduct in excess of authority or contravening the instructions, should be taken into account when considering the definition of acts performed in an official capacity (and thus immunity *ratione materiae* of State officials). Otherwise, States could avoid their responsibility under international law for illegal acts, committed by their State officials, by asserting that these State officials acted only for their own benefit and in their own interest.

As expressed by the United Kingdom House of Lords in its decision in the case of *Jones* v. *Saudi Arabia* of 14 June 2006, "the circumstances in which a State will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law, … including the cases when the state is liable for acts done under colour of public authority, whether or not they are actually authorized or lawful under domestic or international law". Importantly, it does not mean that the State official would not be personally responsible for its actions, since, as pronounced by the European Court of Human Rights in the same case, "there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts. This potential dual liability is reflected in article 58 of the draft articles, which provides that the rules on attribution are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State. … Thus, as the existence of individual criminal liability shows, even if the official nature of the acts is accepted for the purposes of State responsibility, this of itself is not conclusive as to whether, under international law, a claim for State immunity is always to be recognised in respect of the same acts." In the view of the Czech Republic, it would be useful if the Commission could further clarify the interrelation among the immunity *ratione materiae* of State officials from foreign criminal jurisdiction and the responsibility of States for internationally wrongful acts.

[See also comment under general comments.]

France

[Original: French]

France has taken note of paragraph (18) of the Commission's commentary, in which it explains that it has used the French term "*représentants de l'État*" for the English term "State official". However, France would like to emphasize that, in its view, the term "*représentants de l'État*" is inadequate to cover all situations and is, in that respect, not an exact equivalent of the English term "State official". The term "*agents de l'État*" might therefore be preferable. There are three reasons for this.

First, although the meaning of the terms used in the draft articles "bears no relation to the meaning that each term may have in domestic legal systems" (para. (18) of the commentary), the first rule of interpretation of an international text is that its ordinary meaning should be followed. For the purposes of the draft articles, "*représentant de l'État*" means "any individual who represents the State or who exercises State functions, and refers to both current and former State officials". However, in the ordinary meaning of the word, a "*représentant*" is "any individual who represents the State", but not necessarily one "who exercises State functions". Giving a term a meaning other than its ordinary meaning creates an ambiguity that could, ultimately, restrict the scope of the provision and therefore of the draft articles: at first glance, it seems as though only "*représentants de l'État*" in the strict sense of the term will be considered to fall within the scope of the draft articles.

Moreover, the use of the term "*représentant*" entails, first and foremost, consideration of the formal status of the beneficiary of immunities in the State apparatus. However, in the commentary, the Commission does not rule out the possibility that a person having no formal link to the State may be designated a State

official ("*représentant de l'Etat*"),[20] which, incidentally, appears to be in line with practice recognizing the existence of de facto State officials.

In the light of the foregoing, it would be helpful if the Commission could further explain its approach by providing a definition of "*agent de l'État*", in order to demonstrate why this term would not be appropriate in the context of the draft articles, which, as things stand, is not obvious.

In fact, neither the courts nor the doctrine[21] limit themselves to either term. For example, the International Tribunal for the Former Yugoslavia refers to "*agents de l'État*" but also to "*responsables officiels*",[22] while the European Court of Human Rights prefers the term "*agent*" to the term "*représentant*"[23] and the International Court of Justice uses the two interchangeably.[24] In 2004, the Court of Cassation of France ruled that "foreign States and bodies *or persons* acting on their orders or on their behalf enjoy immunity from jurisdiction".[25] In 2021, the Court referred to "the immunity of foreign States and their officials ('*représentants*')", stating that:

> "Under international custom, in the absence of international provisions to the contrary that are binding on the parties concerned, the officials of a State ("*agents d'un État*") cannot be prosecuted for acts falling into this category before the criminal courts of a foreign State."[26]

Third, France is not convinced by the explanation offered by the Commission, in its commentary to draft article 2, for its choice of the terms "officials" in English, "*représentants*" in French and "*funcionarios*" in Spanish:

> "Although the Commission is aware that they do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term "State official" in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer." (para. (18))

In the view of France, the fact that the term in the English version of a text is appropriate does not justify the use of an inappropriate term in the other versions of the text, especially given that the use of "*représentants*" is not standard. Indeed, the translation of the term "officials" as "*représentants*" is not found in other areas of

[20] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paragraph (15) of the commentary to draft article 2.

[21] *Cf.* Institut de droit international, *Résolution sur l'immunité de juridiction de l'Etat et de ses agents en cas de crimes internationaux*, 2009.

[22] *Cf.* Tribunal pénal international pour l'ex-Yougoslavie, *Le Procureur c/ Tihomir Blaškić*, affaire no IT-95-14-AR 108 *bis*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de la chambre de première instance II rendue le 18 juillet 1997, 29 October 1997, paras. 38–41.

[23] *Cf.* Cour européenne des droits de l'homme, *Jones et autres c. Royaume-Uni*, nos 34356/06 et 40528/06, CEDH 2014.

[24] *Cf.* Cour internationale de Justice, *Immunités juridictionnelles de l'État (Allemagne c. Italie; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012*, pp. 131 and 138, paras. 71 and 87.

[25] Court of Cassation, First Civil Chamber, 27 April 2004, No. 01-12.442 (emphasis added).

[26] Court of Cassation, Criminal Chamber, 13 January 2021, No. 20-80.511, paras. 25 and 28 (emphasis added).

international law, which more often employ the terms "*fonctionnaires*",[27] "*hauts responsables*"[28] or "*agents*".[29]

Therefore, France believes that the term "*agents de l'État*" would probably be more appropriate than "*représentants*".

It can also be noted that, in paragraph (8) of the commentary to draft article 2, the Commission states that "the individuals who may be termed 'State officials' ... must be identified on a case-by-case basis". Moreover, in paragraph (15) of the commentary, the Commission states that "for the purposes of defining 'State official', what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant". It would be useful to clarify the extent to which the legal link of nationality is relevant for determining "State official" status, in particular for individuals who do not have the nationality of the State they represent or, as the case may be, for those who have the nationality of the forum State.

Ireland

[Original: English]

Ireland agrees with the use of the term "State official" in favour of the alternatives which were considered by the Special Rapporteur and the Drafting Committee, in particular "State organ".

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands considers that the draft articles should better reflect State practice and *opinio juris*, and has also stressed this in its responses to the various reports of the Commission to the General Assembly on this topic. There is a trend towards recognition of exceptions to immunity *ratione materiae* at international and national levels. The Kingdom takes the position that, under international law as it stands, functional immunity does not automatically apply to international crimes.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

As the two terms defined in article 2 mainly relate to immunity *ratione materiae* and not to immunity *ratione personae*, it could be considered to move these two definitions to articles 5 and 6 respectively.

The main concern of the Nordic countries regarding the introductory provisions and in particular article 2 on definitions is, however, that the term "criminal jurisdiction" is not defined. The ordinary meaning of this term, and perhaps the first

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[27] *Cf.* section 9 a) de l'Accord entre l'Organisation des Nations Unies et les États-Unis d'Amérique relatif au siège de l'Organisation des Nations Unies, 26 juin 1947 ; article 6 de l'Accord entre le Gouvernement de la République française et l'Organisation des Nations Unies pour l'éducation, la science et la culture relatif au Siège de l'UNESCO et à ses privilèges et immunités sur le territoire français, 2 juillet 1954 ; *Annuaire de la Commission du droit international, 2001*, vol. II, 2e partie [publications des Nations Unies, *numéro de vente*: F.04.V.17 (Part 2)], projet d'articles sur la responsabilité de l'État pour fait internationalement illicite et commentaires y relatifs, p. 41, para. 7).

[28] *Cf. Annuaire de la Commission du droit international, 2001*, vol. II, 2e partie [publications des Nations Unies, *numéro de vente*: F.04.V.17 (Part 2)], projet d'articles sur la responsabilité de l'État pour fait internationalement illicite et commentaires y relatifs, p. 42, para. 6).

[29] *Cf.* titre VI de l'Accord général sur les privilèges et immunités du Conseil de l'Europe, 2 septembre 1949 ; article 224 de la Convention des Nations Unies sur le droit de la mer, 10 décembre 1982.

that comes to mind, would be that "criminal jurisdiction" means the act by a court to establish criminal responsibility through criminal proceedings. But several other acts and measures exist as part of the criminal jurisdiction of a State, including governmental, police, investigative and prosecutorial acts and measures. This matter is discussed in the commentaries to article 9, paragraphs (5)–(6) and (11)–(14), and it is confirmed there that the understanding of "criminal jurisdiction", at least in relation to article 9, should be the broader approach including any acts and measures under a State's criminal jurisdiction. In this regard it could be noted that an approach where "criminal jurisdiction" also includes coercive measures would in practice mean that the rules of immunity also entail inviolability of the official of the other State. An accurate definition of "criminal jurisdiction" as part of the draft articles is hence essential both to the legal and practical scope of these draft articles, not the least for the practitioners that will apply the rules of these articles in their everyday work. It is therefore the understanding of the Nordic countries that the term "criminal jurisdiction" needs to be defined, or explained in another way, in the introductory provisions draft articles and elaborated further in commentaries to this provision.

[See also comments under draft articles 1 and 5.]

Russian Federation

[Original: Russian]

The Russian Federation supports the inclusion in the draft articles of a separate article on definitions of terms and agrees that it is necessary to establish in that article definitions of "State official" and "act performed in an official capacity". As mentioned above in its comments on draft article 1, Russia would not rule out the addition to this draft article of definitions of other terms, first and foremost the term "immunity".

The text of draft article 2 *(a)* and *(b)* is generally acceptable.

With regard to subparagraph *(a)*, the Russian Federation agrees with the choice of the English term "State official" and the Russian term "*должностное лицо государства*". Russia notes the explanation in paragraph (18) of the commentary on the reasons for choosing particular terms to translate the concept into the other official languages. While it does not question the priority to be accorded to the speakers of each language in this regard, Russia would nonetheless suggest that the suitability of the word "*représentant*" (representative) in French be further assessed. This appears to potentially narrow the scope of the definition of the term "official": for example, a former official who is abroad on a private trip cannot in any way be a "*représentant*". It is also difficult to apply the word to lower-level officials, who nonetheless enjoy immunity. Finding clear equivalents of terms is important in part because there have been a number of controversial court decisions in French-speaking countries relating to immunity issues.

With regard to the content of the definition of the term "official", Russia suggests that the Commission further consider the possibility of reflecting in the text of the draft article the considerations currently set out in paragraphs (13) and (16) of the commentary. By analogy with article 4 of the 2001 articles on responsibility of States for internationally wrongful acts, the following wording could be added to the definition of "State official": "whether the individual exercises legislative, executive, judicial or any other functions, whatever position the individual holds in the organization of the State, and whatever his or her character as an official of the central government or of a territorial unit of the State" (see also A/CN.4/673, para. 144). This would remove possible doubts on the part of the legal practitioner as to whether any State officials do indeed enjoy immunity from foreign criminal jurisdiction.

Furthermore, Russia notes that there are a number of references in the commentaries to the draft articles to the possibility of a situation in which an official

is not a national of the State that he or she serves (see paragraph (2) of the commentary to draft article 3 and paragraph (8) of the commentary to draft article 16). This point appears to be quite significant. An appropriate provision should be reflected either directly in the definition of the term "official" or in the commentary to draft article 2. It should also be emphasized in the commentary in that context that the rights of "the State of the official" are vested precisely in the State that the official serves or served and not the State of his or her nationality. At the same time, the State of nationality retains all the rights vested in it in connection with the official's nationality, including in the context of consular support and diplomatic protection.

Another question that should be addressed in the commentary is whether the concept "official" covers military personnel, and where the line is drawn between combatants (who do not enjoy immunity in respect of war crimes committed during armed conflict) and military officials (for example, members of the staff or central apparatus of the Ministry of Defence who arguably enjoy immunity on an equal footing with officials of other State bodies).

It is also of interest whether the concept "official" covers members of parliaments and other collegial bodies if they do not have their own individual powers. In the view of the Russian Federation, in the event of an attempt to prosecute a member of a collegial body for a decision of that body and/or for a vote to adopt a decision of that body, the question of immunity should be considered in the same way as it is considered in other cases. This idea should preferably be reflected in the commentary to draft article 2.

With regard to subparagraph (b), the Russian Federation supports the proposed formulation, which suggests that any act that a State official performs in the exercise of State authority is an act performed in an official capacity and is therefore covered by immunity. Russia notes that the words "in the exercise of State authority" are consistent with articles 5 to 9 of the 2001 articles on State responsibility, which refer to the "exercise [of] elements of governmental authority" as a criterion for the attribution of conduct to a State.

Russia supports the idea that the starting point for characterizing an act as having been performed in an official capacity is the attribution of that act to the State (see paragraph (24) and the beginning of paragraph (25) of the commentary to draft article 2). Russia also agrees that the question of immunity may arise only in the performance of an act by an official; consequently, an act that is attributed to a State but is performed by an individual who is not an official (see articles 8, 9, 10 and 11 of the articles on State responsibility) does not give rise to immunity.

However, the Russian Federation cannot agree with some of the assertions included in the Commission's commentary to draft article 2. In particular, it is puzzled by the assertion in paragraph (25) of the commentary that acts performed by officials purely in their own interest are not considered acts performed in an official capacity. Furthermore, it cannot agree that immunity does not cover acts performed by officials in excess of their authority or in contravention of instructions. Russia sees no reason to depart in this context from the logic of article 7 of the articles on State responsibility, under which the fact that an act is *ultra vires* does not prevent the attribution of the act to the State. In attempting to remove such acts from the scope of the concept of acts performed in an official capacity, the Commission confuses the question of the "capacity" in which an individual acts with the motivation for his or her actions. The idea that an act of an official that is attributable to a State for the purposes of State responsibility is at the same time considered to have been performed in a private capacity for the purposes of the individual's responsibility appears to be no more than a legal fiction.

In the view of the Russian Federation, the question of whether an act was performed in the interest of the individual or of the State and whether it was within or in excess of the official's authority must be decided by the State that the official serves. In practice, it is to be expected that, if an act is performed against the interests of that State, the State will not invoke the immunity of its official. If the State chooses to claim immunity, it thereby establishes that the act was performed in an official capacity and assumes international responsibility for the act in question. It would be absurd to afford the State exercising jurisdiction the possibility of disputing such a claim by the State of the official. A possible exception could be clear cases of abuse – that is, situations in which the State claims the immunity of an official in respect of an act that was obviously outside the scope of State functions – but such situations would also require detailed justification and in any case should remain the exception rather than the rule.

This is important also because leaving the resolution of the matter to the State exercising jurisdiction opens the door to abuse by that State. For example, in paragraph (33) of the commentary to draft article 2 (and also in paragraphs (25) and (26) of the commentary to draft article 7), the Commission asserts that acts of corruption cannot be considered official acts. This approach is contrary not only to objective reality (an official is capable of committing acts of corruption precisely because he or she is an official, and in the absence of such official capacity an act of corruption would be impossible), but also to the very purpose of immunity: if acts of corruption are excluded from the scope of immunity, States will be able to exert pressure on foreign officials under the threat of accusing them of corruption. This would impede the independent exercise by these officials of their official functions, in violation of the principle of the sovereign equality of States, which the rules on immunity are designed to safeguard. (This does not mean that the Russian Federation seeks to ensure impunity for its officials who have committed acts of corruption. Combating corruption is an important priority of the Russian Government. Russia believes that efforts to combat corruption should be carried out within the framework of the national law of each State and the international treaties in that area, and supports the expansion of international cooperation to combat corruption.) The same logic applies to other acts that are difficult to reconcile with contemporary ideas of proper conduct by the State and its officials, but that cannot be performed without being an official.

United Arab Emirates

[Original: English]

Draft article 2 fails to provide a useful definition of an "act performed in an official capacity"

The United Arab Emirates expresses its disappointment as to the limited outcome reached by the Commission on what should have constituted the core of its work on this topic, a practicable definition of an "act performed in an official capacity". It regrets that in the formulation of draft article 2, the Commission has missed the opportunity to provide functional guidance. While the United Arab Emirates sympathizes with the Commission regarding the difficulty of this exercise, it regrets that the Commission did not seriously attempt to streamline a process for characterizing an act as official, choosing instead to rely on draft article 7.

The criteria offered by the commentary rely on circular tautologies and provide little guidance in identifying the scope of the notion. For instance, paragraph (30) of the commentary to draft article 2 notes, "[s]uch acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act

in question has been performed by a State official, is generally attributable to the State and has been performed in 'the first exercise of State authority'".

In this context, the United Arab Emirates also wishes to confirm the understanding, in light of draft article 14, paragraph 1, that when determining whether an individual is a "State official" and "an act performed in an official capacity" as defined in draft article 2, subparagraphs *(a)* and *(b)*, respectively, it shall be necessary to take into account the law and practice of the State of the official. This may address the official's status and position within the authority of the State and their powers and authority. While this understanding is currently reflected to an extent in the commentary for draft article 2 (*a*),[30] it is unaddressed in the commentary for draft article 2 (*b*), where the point is however equally relevant.

As to the relevance of the issue of the attributability of the official's act to the State under the Law of State Responsibility, the Commission's instruction proves rather limited. The commentary emphasizes the connection between immunity of foreign officials and State responsibility,[31] although it transpires from the debates that the starting point of this discussion was that "the question of individual responsibility is in principle distinct from the question of State responsibility".[32]

The commentary constitutes a missed opportunity to provide clarity and guidance in this regard, including insofar as it does not explain how to reconcile the fact that particular conduct of a State official is likely to be attributable to the State on the one hand, with the counter-intuitive result under the approach proposed in the draft Articles that a State official may not benefit from immunity, on the other hand.

In this sense, the United Arab Emirates is also concerned by the Commission's attempts to minimize the linkage between attribution and immunity, as well as its apparently instrumental efforts to dismiss the relevance of bases of attribution which are inconsistent with or undermine the position taken in draft article 7 as regards the lack of immunity *ratione materiae* for certain international crimes.

Paragraph (25) of the commentary to draft article 2, whilst acknowledging the relevance of the rules of attribution contained in the 2001 articles on the responsibility of States for internationally wrongful acts as a "point of departure", nonetheless cautions that they were established "in the context and for the purposes of State responsibility" and suggests that their application in the context of immunity should be "examined carefully".[33]

The commentary then suggests that "[f]or the purposes of immunity, the criteria for attribution set out in articles 7–11" of the articles on State responsibility "do not seem generally applicable". No coherent explanation is given for the wholesale exclusion of the application of those provisions; the only (partial) explanation is the Commission's view that "acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity".[34] This, however, fundamentally misrepresents the scope and purpose of article 7 of the articles on States responsibility.

That provision does not constitute a free-standing and separate basis for attribution of conduct to the State. Rather, its purpose is to make clear that the conduct

[30] Ibid., paragraphs (5) and (8) of the commentary to draft article 2.
[31] Ibid., paragraphs (24) of the commentary to draft article 2.
[32] Concepción Escobar Hernández, Special Rapporteur, Fourth report on the immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, para. 99.
[33] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (25) of the commentary to draft article 2.
[34] Ibid.

of the organs of a State, or the conduct of entities empowered by it to exercise governmental authority, is to be regarded as attributable even if it was carried out outside the authority of the organ or person concerned or contrary to instructions.[35] As such, article 7 is an essentially adjectival provision, which supplements and clarifies the bases of attribution contained in articles 4 to 6 of the articles on State responsibility.[36]

Further, pursuant to article 7 of the articles on State responsibility, *ultra vires* conduct is to be regarded as attributable only if the organ, or person or entity exercising elements of governmental authority "acts in that capacity" in carrying out that conduct in question. As such, article 7 is not concerned with the attribution of "purely private acts" as the commentary wrongly implies; instead, as the Commission's commentary on the articles on State responsibility make clear:

"Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State".[37]

The Commission's mischaracterization of article 7 of the articles on State responsibility thus has the effect of minimizing the principal subject matter with which it deals, i.e., the rule that conduct which is ultra vires or otherwise unlawful is in principle attributable to the State if the relevant official or individual was acting in their official capacity in carrying out the relevant conduct.

In sum, the approach adopted by the Commission in formulating draft article 2 is rather disappointing and leaves States without guidance as to how to assess issues relating to the immunity of a foreign official from criminal proceedings within their domestic legal systems.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees with the Commission that it is essential to provide a definition of "State official" and "act performed in an official capacity" given the centrality of these terms to the draft articles as a whole. In light of ever-evolving governance structures and the need for the draft articles to maintain relevance across diverse domestic legal regimes, the United Kingdom also agrees with the Commission's decision not to provide an exhaustive list by name of either the officials or acts which might be covered by the topic, but instead to provide criteria which can be applied on a case-by-case basis. However, the United Kingdom would encourage the Commission to review these broadly drafted definitions to ensure, first, that they provide sufficient precision and clarity as to what "official acts" are and so what may fall within – or without – the scope of immunity *ratione materiae*; and, second, that they do not stray beyond the normative scope of the rules that the Commission is seeking to codify.

As set out by the Commission in the commentary accompanying the draft articles, the United Kingdom supports the Commission's explanation that an "act performed in an official capacity" may mean a positive act or an omission, and that the junior rank of a person within a State's governmental hierarchy does not preclude their categorisation as a "State official" provided that they represent the State or exercise State functions. The United Kingdom would also emphasise that the

[35] *Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, chap. IV, paragraph (8) of the introductory commentary to Part One, chap. II.

[36] Ibid., paragraph (9) of the commentary to draft article 7.

[37] Ibid., paragraph (7) of the commentary to draft article 7.

distinction between an "act performed in an official capacity" and an act performed in a private capacity is not the same distinction which is drawn between *acta jure imperii* and *acta jure gestionis* in the context of State immunity from foreign civil jurisdiction. Finally, it would be beneficial if the Commission could include in the commentary relevant information as to whether acts performed *ultra vires* should be considered to constitute "acts performed in an official capacity".

United States of America

[Original: English]

Article 2 provides definitions for two of the terms that arise in the draft articles: "State official" and "act performed in an official capacity." As a matter of format, the United States notes that draft article 2 proceeds with subparagraphs *(a)* and *(b)*, while other subparagraphs are presented as a numbered list.

"State official"

With respect to the definition of a "State official," the United States agrees with the explanation provided in the commentary that this is a broad category in which the hierarchical level of the official is not significant in determining the applicability of functional immunity.[38] Despite this breadth, some questions about the definition remain. The commentary indicates that with respect to immunity *ratione materiae*, States generally decide which individuals are its officials, given the "variety of national legal systems."[39] The commentary accordingly instructs that "these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what is understood by 'State functions' depends to a large extent on the laws and organizational capacity of the State."[40] While the categorizations by sending States may be difficult to generalize, the commentary does not resolve how forum States should assess this threshold concept when determining the applicability of immunity.

The United States further notes that while former officials do enjoy functional immunity for acts previously taken in their official capacity, it suggests that the articulation of this principle would be better placed in draft article 6, which addresses the scope of the immunity. Paragraph 2 of draft article 6 also more accurately captures the scope of functional immunity for former State officials in stating that "[i]mmunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials." The reference to "ceas[ing] to be State officials" captures the confusion that arises from defining "State officials" as "current and former … officials" in draft article 2 *(a)* and lends further support to addressing the temporal scope of functional immunity of former State officials in draft article 6. Accordingly, the United States proposes deletion of the last clause of draft article 2, paragraph (*a*) ("and refers to both current and former State officials").

The United States notes the explanation in the commentary that this definition is not reflective of international law but is "autonomous, and must be understood to be for the purposes of the present draft articles."[41] This caveat could be considered as a model flag to apply to other articles that also present a proposal for the progressive

[38] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (16) of the commentary to draft article 2.

[39] Ibid., paragraphs (8) and (13) of the commentary to draft article 2.

[40] Ibid., paragraph (13) of the commentary to draft article 2.

[41] Ibid., paragraph (5) of the commentary to draft article 2 ("There is no general definition in international law of the term 'State official'").

development of the law rather than the codification of customary international law, such as draft article 7.

"Act performed in an official capacity"

The United States turns next to the definition of an "act performed in an official capacity." In contrast to the definition of a State official, defined in terms of the exercise of "State *functions*" or State representation, an official act is defined in terms of the exercise of "State *authority*" (emphases added). The use of these two terms creates a contrast, the significance of which is not clear. Are State functions a broader category than State authority? If so, does the language in subparagraph *(b)* define an official act in a narrower sense than acts that are attributable to the State through its functions? The definition of an official act could be narrower than the definition of a State official because officials may, as the commentary notes, act *ultra vires*.[42] Under such circumstances, the act of a State official may not be regarded as an official act, yet may be attributable to the State (as contemplated by article 7 of the 2001 articles on responsibility of States for internationally wrongful acts). Yet the commentary suggests that the use of different terms is possibly interchangeable, emphasizing the "connection between the act and the exercise of State functions and powers."[43]

A more robust and precise explanation of the underlying rationale for what is (and is not) an act performed in an official capacity would improve the draft articles overall. The commentary refers to but does not articulate the basis for which acts are performed in an official capacity. While the commentary notes that unlawful acts are not necessarily exempt, the challenge is how to assess whether criminal conduct constitutes an official act in light of the facts and circumstances of a given case.[44] The lack of clarity on this point will pose a challenge to uniform application of the draft articles. The commentary also contends that this definition is "without prejudice" to limitations and inapplicability of immunity in draft article 7, but the rationale is not clear.[45] If functional immunity applies to acts performed in an official capacity, then the meaning of official acts must logically be part of the explanation for any exceptions.

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

Brazil

[Original: English]

Brazil understands that the substantive and temporal elements in draft articles 3 and 4, concerning the immunity *ratione personae* of Heads of State, Heads of Government and Ministers of Foreign Affairs during their respective terms in office reflect customary international law.

This immunity has been recognized in case law at both the national and international levels. The International Court of Justice has reiterated that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States,

[42] Ibid., paragraph (25) of the commentary to draft article 2 (The duelling contrast between acts performed in a personal capacity and official capacity is a helpful start).

[43] Ibid., paragraph (23) of the commentary to draft article 2.

[44] Ibid., paragraph (25) of the commentary to draft article 2; Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, A/CN.4/755, para. 100.

[45] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (35) of the commentary to draft article 2. As explained below, the United States does not believe that draft article 7 reflects customary international law.

both civil and criminal" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at pp. 20–21, para. 51).

The International Court of Justice, after carefully examining State practice, including national legislation, was "unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at p. 24, para. 58). The same applies to Heads of State and Government.

In this context, the controversial customary international law avenue adopted by the Appeals Chamber of the International Criminal Court in 2019, in the *Jordan Referral re Al-Bashir Appeal*, seems to contradict well-established principles and rules of international law.

According to the settled jurisprudence of the International Court of Justice, "A Head of State enjoys in particular *full immunity from criminal jurisdiction and inviolability* which protects him or her *against any act of authority of another State*" (emphasis added) (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 117 at pp. 236–237, para. 170).

It is important to distinguish, on one side, the domestic jurisdiction of States before which Heads of State and Government and Ministers for Foreign Affairs enjoy full immunity and, on the other side, the complementary jurisdiction of international courts, including the International Criminal Court.

In this regard, the International Court of Justice has already "examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals". It found that these rules, including article 27 of the Rome Statute, "do not enable it to conclude that any such an exception exists in customary international law *in regard to national courts*" (emphasis added) (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at p. 24, para. 58).

State practice is convergent in this regard.

Czech Republic

[Original: English]

[See comment under general comments.]

France

[Original: French]

France endorses the wording of draft article 3, which, in its view, reflects the state of customary international law and is in line with the case law of the International Court of Justice,[46] as well as the latest case law of the Court of Cassation of France.

Indeed, in a ruling of 15 December 2015, the Criminal Chamber denied the immunity of a Second Vice-President of the Republic on the grounds that it was clear from the evidence presented at trial that the applicant's functions were not those of a Head of State, Head of Government or Minister for Foreign Affairs.[47]

[46] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 51.

[47] Court of Cassation, Criminal Chamber, 15 December 2015, No. 15-83.156.

France notes that, in paragraph (15) of the commentary to draft article 3, the Commission states that it "considers that 'other high-ranking officials' do not enjoy immunity *ratione personae* for the purposes of the present draft articles".

Ireland

[Original: English]

Ireland is satisfied that the present text of draft articles 3 and 4 reflect customary international law on the personal immunities of the Heads of State and Government and the Foreign Minister of a State from the criminal jurisdiction of any other State, and agrees that such immunities are limited to this troika and do not extend to any other office holder.

Islamic Republic of Iran

[Original: English]

[See comment under general comments.]

Israel

[Original: English]

Paragraph (2) of the commentary to draft article 3 notes two main reasons for the immunity *ratione personae* of the high-ranking State officials of which it speaks, namely their inherent position in representing the State in its international relations and the need to enable them to travel to exercise their function. These reasons are very much applicable to other high-ranking officials of the State, such as Ministers for Defense, as has been recognized in the case-law of various national courts. Israel recalls that a number of members of the Commission, too, held the view that immunity *ratione personae* is enjoyed by high-ranking State officials other than the troika, as mentioned in paragraph (11) to the commentary.

Therefore, Israel suggests that draft article 3 accurately reflect the existing law by incorporating a flexible criterion for immunity *ratione personae* that is based on the functions the officials perform and can accommodate the different constitutional structures of States.

If the Commission decides to retain the current text of the draft article, it should be made clear that it does not reflect existing customary international law.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands agrees with the Commission that the Head of State, Head of Government and Minister for Foreign Affairs are protected by immunity *ratione personae* and also indicates that this interpretation does not prevent other State officials, for example the members of an official mission, from enjoying this far-reaching form of immunity in certain circumstances.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries support the systematic distinction drawn between immunities *ratione personae* and *ratione materiae* and that such distinction represents two legal regimes and merits two separate parts establishing their specifics.

Nevertheless, the rationale for both these types of immunity follows from the principle of sovereign equality of States and the need to facilitate the maintenance of stable international relations, and they share significant common elements. Even if elaborated in two separate parts, the Nordic countries therefore think that certain considerations related to one may be observed also when considering the other.

The Nordic countries consider the substance of the rules as expressed in the draft articles 3 and 4 on immunity *ratione personae* to represent long established customary international law and fully support the substance as detailed in these two draft articles.

The Nordic countries agree with the assessments and conclusions of the Commission as set out in paragraphs (11)–(15) of the commentaries that the customary rules on immunity *ratione personae* as they presently stand cover the Head of State, Head of Government and Minister for Foreign Affairs.

[See also comment under draft article 4.]

Russian Federation

[Original: Russian]

The Russian Federation supports this draft article, which establishes (absolute) personal immunity for the "troika" of senior State officials.

However, Russia suggests that the Commission revisit the question of which other officials holding comparable positions might enjoy absolute immunity. These are officials whose duties are closely connected with international cooperation and/or with fundamental issues of State sovereignty. In other words, the criterion for granting absolute immunity could be the high risk that, in the event of an attempt by a foreign State to exercise criminal jurisdiction over the individuals in question, there would be obstacles to the discharge by such individuals of their duties, with negative consequences for the sovereign equality of States (see A/CN.4/601, paras. 120 and 121).

In addition, attention should be paid to those officials who, while not formally the highest-ranking or second highest-ranking officials in the State, de facto occupy a comparable position in the national hierarchy. Examples could include the following offices, functions or situations: Vice-President (especially in a country in which there is no separate office of Head of Government); former Head of State (especially if he or she is granted special honoured status, such as "founder of the State"); heir to the throne (especially if he or she formally or actually performs the functions of regent); supreme spiritual or religious leader (especially if he or she performs State leadership functions); leader of the ruling party (especially in a State in which the role of the ruling party is enshrined in law in some form); commander-in-chief of the armed forces; representative of the monarch (viceroy or governor-general); and leader of a provisional or transitional governing body. Individuals who have been elected to the office of Head of State but who have not yet taken office (and, similarly, the heir to the throne in the period after the death of the monarch and before the official accession to the throne), and also individuals temporarily performing the duties of a given office (for example, the speaker of parliament when serving as Acting President), form a special category.

The Russian Federation considers it appropriate to consider this question in such detail partly because, in its history over the course of the twentieth century, there were prolonged periods in which an individual who was unquestionably the national leader and the most senior State figure did not formally occupy any State office. There is no doubt that such individuals enjoyed personal immunity from foreign criminal jurisdiction. The question is how to reflect that situation in the draft articles.

Similarly, in addition to the Minister for Foreign Affairs, a State may have an office of minister for particular aspects of international cooperation (foreign trade, cooperation with countries of the region, etc.) There are also examples of States in which the most senior official responsible for international affairs is not the Minister for Foreign Affairs but another individual to whom the Minister for Foreign Affairs is subordinate.

It would appear that this issue could be resolved either by recognizing the possibility of granting absolute immunity to individuals outside the "troika", or by recognizing the troika itself as a flexible concept that does not have to be understood specifically as three individuals (after all, there are countries in which the functions of Head of State are performed by two or even three individuals, but which also have a Head of Government and a Minister for Foreign Affairs).

United Arab Emirates

[Original: English]

The category of State officials enjoying immunity *ratione personae* should not be limited to the "troika"

The Commission made the choice of limiting personal immunity to the "troika", namely the Head of State, the Head of Government, and the Minister of Foreign Affairs. The United Arab Emirates would like to register its support for the position that immunity *ratione personae* should extend beyond the troika. The United Arab Emirates will make two preliminary comments regarding this issue.

First, the draft articles do not adequately address the situation of *de facto* leaders, despite the question having been raised during the debates in the Commission. The commentary simply makes a *renvoi* to the definition of an "act performed in an official capacity".[48] This, however, is not a satisfactory approach. The concept of an "act performed in an official capacity" is inherently linked to immunity *ratione materiae*, and, therefore, is not relevant to the particular situation of *de facto* leaders.

Second, another issue raised during the debates concerned the timing of the transfer of power from a departing leader to a new one. The commentary specifies only that the immunity "is accorded exclusively to persons who actually hold that office".[49] Newly elected leaders may not take up their duties immediately, and sometimes only in the months following election. It is, therefore, important to provide guidance on whether a newly elected leader may or may not enjoy immunity *ratione personae* in the interim period before formally taking up office.

Moving to the crux of draft article 3, the commentary explains that the Commission was driven by two reasons in limiting immunity *ratione personae* to three specific offices within a State's political structure: State representation and functionality.[50] The Commission limits immunity *ratione personae* to the troika based on the rationale that "these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State" and that "they must be able to discharge their functions unhindered".

[48] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (15) of the commentary to draft article 2.

[49] Ibid., paragraph (5) of the commentary to draft article 3.

[50] Ibid., paragraph (2) of the commentary to draft article 3.

In the view of the United Arab Emirates, by proposing to limit immunity *ratione personae* to the troika, the Commission has failed to reflect the true position resulting from a thorough analysis of the practice, as well as the grounds in international law which support the conclusion that other high-ranking State officials also enjoy immunity *ratione personae.*

In support of this position, the United Arab Emirates emphasizes that the commentary summarizes the polarized positions within the commission as to the scope of immunity *ratione personae*, including the debates around the use of the expression "such as" by the International Court of Justice in the *Arrest Warrant* case when specifying the circle of persons who enjoy this category of immunity.[51]

The United Arab Emirates is of the view that the approach adopted by the Court in that case is better understood as being illustrative rather than prescriptive. Whilst the second Special Rapporteur recognized during the debates the growth of "international activity" undertaken by "other high-level State officials participating more frequently in international relations", she was however of the view that this was "carried out on the basis of unilateral and internal decisions of the State in which they performed certain functions".[52] The United Arab Emirates respectfully disagrees. In today's world, and regardless of a State's internal organization, many senior members of government (ministers and vice-ministers or the equivalent thereof) have increasingly taken on roles of representation of the State in matters just as paramount as foreign affairs, and without meeting with opposition from other States.

In addition, the Commission should have acknowledged that representation of the State and unhindered discharge of functions are not the only underpinnings of immunity *ratione personae*. With respect to at least one member of the troika – the Head of State – immunity *ratione personae* has its roots in the position that the Head of State is the embodiment and personification of the State. This rationale means that individuals who, in light of their status within a sovereign entity, have a defined role in the constitutional architecture of the State that is so closely connected to the ontological conceptualization of that State (i.e. a crown prince, an heir apparent) may enjoy immunity *ratione personae* in a similar manner as the sovereign.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

There is broad acceptance that under customary international law a serving Head of State, Head of Government and Foreign Minister enjoy personal immunity from foreign criminal jurisdiction during their term in office. However, whether such immunity may extend to other high ranking officials is less clear. Several cases in the domestic courts of the United Kingdom have shown the courts' willingness to recognise the personal immunity of other senior officials such as a Defence or Trade Minister.[53] Though the precise rationale and criteria on which entitlement to such immunity may be based continues to be unsettled, the United Kingdom would note that the International Court of Justice left the question open as to which officials enjoy personal immunity in the *Arrest Warrant* case.[54] The United Kingdom would encourage the Commission to explore this area further and – as with the definitions in Part One – to

[51] Ibid., paragraph (11) of the commentary to draft article 3.

[52] *Yearbook of the International Law Commission 2013*, vol. I, p. 19, para. 12 (Ms. Escobar Hernández).

[53] See, for example, *Re Mofaz* ILDC 97 (UK 2004) and *Bo Xilai* ILDC 429 (UK 2005).

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at pp. 20–21, para. 51: "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".

consider whether it might be productive to identify criteria rather than taking a purely enumerative approach. In this regard, whilst the Commission is not examining immunity arising from membership of a special mission, it would be valuable for it to review relevant State practice and clarify that there is a distinction between immunity *ratione personae* and the immunity arising from membership of a special mission.

United States of America

[Original: English]

The status-based immunity of Heads of State, Heads of Government, and Ministers for Foreign Affairs from foreign criminal jurisdiction is well grounded in customary international law and confirmed by the International Court of Justice.[55] As written, draft article 3 is a useful and clear statement of existing customary international law.

The commentary notes some disagreement within the Drafting Committee, a few members of which apparently question whether other high-ranking officials might enjoy such immunity based on their status alone. The United States does not find support in customary international law for an expansion of immunity *ratione personae* beyond Heads of State, Heads of Government, and Ministers for Foreign Affairs.

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

Brazil

[Original: English]

[See comment under draft article 3.]

Czech Republic

[Original: English]

[See comment under general comments.]

France

[Original: French]

France endorses paragraph 3 of draft article 4, which clarifies the scope of immunity *ratione personae* and its relationship with immunity *ratione materiae*.

With regard to the terminology used, France notes that the French term "*extinction*" could be replaced with "*cessation*", as used in the English version.

Ireland

[Original: English]

[See comment under draft article 3.]

Islamic Republic of Iran

[Original: English]

[See comment under general comments.]

[55] Ibid., pp. 22–26, paras. 54–61.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands considers that the scope of the immunity *ratione personae* reflects positive law and that this immunity for the Head of State, Head of Government and Minister for Foreign Affairs extends to all acts, including those that qualify as crimes under international law. This immunity *ratione personae* ends when the term of office of these officials ends. This is also reflected in the Dutch International Crimes Act (*Wet internationale misdrijven*).

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

As to the structure of article 3 and 4, the Nordic countries concur with the approach of dividing the matter in two, firstly defining the persons to whom the immunity *ratione personae* applies and secondly establishing the substantive and temporal elements. However, the structure and order of the rules of these two articles could merit further consideration. Both paragraphs 1 and 3 of article 4 relate to the temporal elements and could hence have been put after each other as paragraphs 2 and 3. Also, the substantive elements could naturally have been stated before the temporal elements. It could furthermore be considered if there is a need to define the persons to whom the immunity *ratione personae* applies in a separate article, or if article 3 and 4 could be merged in to one article with four paragraphs.

Alternatively, it could be considered if the temporal element of paragraph 2 could be merged into the paragraph regarding the persons enjoying immunity *ratione personae*, since the content of the rule will be the same. The first paragraph on immunity *ratione personae* could simply be put "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction during their term of office", then followed by paragraphs 2 and 3 of article 4.

[See also comment under draft article 3.]

Russian Federation

[Original: Russian]

Draft article 4 does not give rise to any objections, on the understanding that the considerations set out above in relation to draft article 3 necessitate editorial clarifications in draft article 4.

In the context of this draft article, the Russian Federation suggests that the Commission consider further whether the scope of immunity *ratione personae* is essentially the same as the scope of immunity *ratione materiae*. In other words, are there procedural measures of the State exercising jurisdiction that would be permissible in respect of officials who enjoy immunity *ratione materiae* but impermissible in respect of individuals who enjoy immunity *ratione personae*? In the sixth report of the Special Rapporteur (A/CN.4/722, section II.C), Ms. Escobar Hernández attempted, for each type of procedural measure, to draw a distinction between the effects of immunity *ratione personae* and of immunity *ratione materiae*. However, the associated conclusions have been practically excluded from the text of the draft articles.

Paragraphs 1 and 2 of draft article 4 contain the expression "term of office", which is not entirely apt. That wording implies some kind of predetermined period of time. Such an approach might be applicable, for example, to presidents, who are

elected for a specific period. However, with monarchs and Ministers for Foreign Affairs, for example, as a rule there is no predetermined "term of office". Furthermore, the concept "term of office" creates unnecessary doubt as to the applicability of immunity to officials whose term of office has been terminated (or extended) in disputed circumstances. It would be more appropriate to use wording that refers not to the "term" but to the fact of being in office. These considerations also apply to the expression "term of office" in draft article 6, paragraph 3.

Switzerland

[Original: French]

Draft article 4, paragraph 3, and draft article 6, paragraph 3

Switzerland notes that the two above-mentioned paragraphs specify the link between immunity *ratione personae* and immunity *ratione materiae*. To avoid repetition, this issue could be addressed in a single paragraph.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees that paragraphs 1 and 2 of this draft article as formulated by the Commission reflect the *lex lata*, not least as identified by the International Court of Justice in the *Arrest Warrant* case. It is broadly accepted that the troika enjoy full and absolute immunity for their term in office. The United Kingdom notes, however, that such immunity is, in essence, a time-limited and suspensive procedural bar: once such a person has left office, they may again be held criminally responsible by a foreign forum State for acts carried out before they took office or for acts carried out in a private capacity while in office.

The United Kingdom agrees with the Commission that paragraph 3 should be structured as a "without prejudice" provision. Immunity *ratione personae* and immunity *ratione materiae* are distinct forms of immunity with separate and differing justifications: the functional immunity to which a former Head of State is entitled in respect of their official acts while in office and which subsists after they have left that office does not derive from the personal immunity to which they were entitled during their term of office.

United States of America

[Original: English]

Like draft article 3, draft article 4, paragraph 1 correctly reflects customary international law in that immunity *ratione personae*, or personal immunity, is status based, and afforded to the "troika" of Heads of State, Heads of government, or Ministers for Foreign Affairs. When the official no longer holds the position, personal immunity terminates, and the official only enjoys immunity for prior official acts, or immunity *ratione materiae*. The United States further agrees that personal immunity covers all acts, as reflected in the text of paragraph 2. In addition, the United States recommends that the commentary to this provision address the intersection of personal immunity from criminal jurisdiction and personal inviolability, a distinct protection that informs the official's treatment and may add clarity to the scope of immunity *ratione personae*.

The United States notes that paragraph 3 refers to the "rules of international law," which the United States understands to be a reference to customary international law and treaty-based international law and believes this should be clarified in the commentary. Alternatively, it may be useful to simplify paragraph 3 so it reads "The

cessation of immunity *ratione personae* is without prejudice to the application of immunity *ratione materiae*."

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

Austria

[Original: English]

As to draft article 5 on persons enjoying immunity *ratione materiae*, it is the view of Austria that the reference to "State official acting as such" is too broad. This definition could also include activities which exceed the competences of the official in the forum State.

Brazil

[Original: English]

Articles 5 and 6 on immunity *ratione materiae* of State authorities also reflect customary international law. In particular, Brazil agrees that immunity *ratione materiae* with respect to acts performed in official capacity subsists after the individual has ceased to be a State official, as established in article 6, paragraph 2, and in the jurisprudence of the International Court of Justice.

Czech Republic

[Original: English]

[See comment under general comments.]

France

[Original: French]

France does not have any comments with respect to draft article 5.

Ireland

[Original: English]

[See comment under draft article 7.]

Islamic Republic of Iran

[Original: English]

[See comment under general comments.]

Kingdom of the Netherlands

[Original: English]

This draft article clearly confirms that all State officials enjoy functional immunity from prosecution or trial by third States. This remains the case even after their term of office has ended.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

In the same way as described above on article 3 and 4, the Nordic countries consider the substance of the rules elaborated in article 5 and 6 on immunity *ratione materiae* to represent long established customary international law. These draft articles adequately reflect the normative elements of the rules of *immunity ratione* materiae, setting out clearly the material and temporal scope of such immunity and highlighting its basic characteristics, namely that it is granted only in respect of "acts performed in an official capacity" and that it is not time limited. Articles 5 and 6 fully cover the substance of the customary rules of immunity *ratione materiae* and the Nordic countries endorse the content elaborated in these two draft articles and further described in the commentaries.

The interrelation between article 2, article 5 and article 6 could in the view of the Nordic countries be considered further. As touched upon above, both the terms of article 2 specifically relate to the content of articles 5 and 6. The subject matter of article 5 is to define the persons to whom the immunity *ratione materiae* applies, and the term "State official" defined in article 2 *(a)* is the core in this regard. Therefore, it could be considered to move this definition to article 5. Even though "State official" is a term used also in Part Four, the need for a definition of the term relates to article 5, and the use of the term in Part Four would remain unaffected by incorporating the definition into article 5. The only substantial use of the term "act performed in an official capacity" defined article 2 *(b)* is made in article 6, and this could hence merit that the definition is moved to article 6, particularly to make article 6 more accessible. Acts performed in "official capacity" is also mentioned in article 4, paragraph 2, but there is no need for the definition of the term in this relation since article 4, paragraph 2, covers all acts performed, both in private and official capacity. On this basis the two definitions of article 2 could be considered merged into article 5 and 6 respectively.

Furthermore, the Nordic countries believe that it could be considered further if the specification of the persons to whom the immunity *ratione materiae* applies needs to be separated into an article distinct from the article setting out the subject matter of the immunity *ratione materiae* rule. The content of the rule would be the same, even if article 5 and article 6, paragraph 1, were merged into the wording "State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity."

[See also comment under draft article 3.]

Romania

[Original: English]

[See comment under draft article 7.]

Russian Federation

[Original: Russian]

The combined meaning of draft article 5 and draft article 6, paragraph 1, is that immunity exists only when an official (1) acts as such and (2) performs an act in an official capacity. These two criteria are formulated in such a way as to suggest that each of them must be fulfilled independently of the other. Yet an official "acts as such" only when he or she performs "acts in an official capacity". There is no discernible gap between these concepts. It is impossible to imagine an act in the performance of which an individual acted in an official capacity (under draft article 5) but which itself turned out not to have been performed in an official capacity (under draft article 6), and vice versa. The Russian Federation therefore considers that the two criteria in question should be reduced to one criterion, the appropriate place for which would be draft article 6, paragraph 1. In that case, it would be necessary to further assess the desirability, in principle, of retaining draft article 5.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom emphasises the functional nature of the immunity *ratione materiae* described in draft article 5, which is limited to "State officials ***acting as such***" (emphasis added). The United Kingdom has no further comment on this draft article.

United States of America

[Original: English]

The United States finds that the current phrasing of draft article 5 introduces unnecessary confusion. The simple answer to the question of which persons enjoy immunity *ratione materiae* is State officials, and the United States questions the use of the phrase "acting as such." This phrase is not found elsewhere in the draft articles, including draft article 2, which instead defines the central concept of "acts performed in an official capacity." The commentary explains that the phrase "acting as such" is meant to distinguish functional immunity from personal immunity by referring to the official nature of the acts of the officials.[56] However, attempting to describe the scope of immunity *ratione materiae*, which applies to official *acts*, in terms of officials themselves creates a lack of clarity as to the applicable standard. The limit to which persons enjoy this immunity is not the status of the official but rather whether the act was done in an official capacity. The phrase "acting as such" also creates redundancies with draft article 6. Draft article 6, paragraph 1, addresses the scope of the immunity and provides that "State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity."

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

Brazil

[Original: English]

[See comment under draft article 5.]

[56] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (3) of the commentary to draft article 5.

Czech Republic

[Original: English]

[See comment under general comments.]

France

[Original: French]

In order to make paragraph 3 of draft article 6 clearer, it could be worded so as to indicate that individuals "continue to enjoy immunity from jurisdiction with respect to ...".

Ireland

[Original: English]

[See comment under draft article 7.]

Islamic Republic of Iran

[Original: English]

[See comment under general comments.]

Kingdom of the Netherlands

[Original: English]

This draft article too is uncontroversial and reflects the law as it stands. However, in order to streamline the draft articles, confirmation that functional immunity continues after cessation of the personal immunity of the Head of State, Head of Government and Minister for Foreign Affairs as set out in draft article 6, paragraph 3 could better be included in the commentary to this draft article.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comments under draft articles 3 and 5.]

Romania

[Original: English]

[See comment under draft article 7.]

Russian Federation

[Original: Russian]

[See comment under draft article 5.]

Switzerland

[Original: French]

[See comment under draft article 4.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes paragraph 1 of this draft article which underlines the functional nature of immunity *ratione materiae*. Paragraph 2 also accurately reflects the positive *lex lata*, in that immunity *ratione materiae* – by virtue of the fact the act was performed in an official capacity rather than by whom it was performed – continues to subsist even once the person has ceased to be a State official.

The United Kingdom suggests that it would be clearer to state expressly in paragraph 3 that the continuing immunity is immunity *ratione materiae*. That would both align the provision with paragraph 1 of the draft article and also avoid the implication that ongoing functional immunity is derived from immunity *ratione personae*:

"Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity ***ratione materiae*** with respect to acts performed in an official capacity during such term of office." (suggested addition in bold and underlined)

United States of America

[Original: English]

Draft article 6, paragraph 1, limits immunity *ratione materiae* to acts performed in an official capacity. This provision refers back to draft article 2 *(b)*, which defines the phrase "an act performed in an official capacity" to mean "any act performed by a State official in the exercise of State authority." The views of the United States about the benefits of the commentary engaging in a deeper consideration of what is and is not an act performed in an official capacity are found in the United States comments to draft article 2 *(b)*.

Draft article 6, paragraphs 2 and 3, provide that functional immunity subsists even after the individuals concerned have ceased to be State officials, and that individuals who formerly enjoyed personal immunity continue to enjoy immunity as to their prior official acts. Both provisions are consistent with customary international law and track State practice with respect to the treaty-based immunities of diplomats, consular officers, and United Nations officials, who continue to enjoy "residual" immunity for their official acts even after they have left their respective offices. As noted in its comments to draft article 2, the United States prefers the inclusion of draft article 6, paragraph 2, to the reference in draft article 2 *(a)* to describe the scope of immunity *ratione materiae*.

[See also comment under draft article 2.]

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

Australia

[Original: English]

Australia is a strong proponent of accountability for serious international crimes. Such abhorrent crimes are contrary to the interests of all States. It is therefore in the interests of all States to ensure these crimes are prevented and their perpetrators prosecuted.

National courts play a critical role in the fulfillment of this goal, ensuring that there is no safe haven for individuals who commit crimes that breach the most fundamental norms of international law. Such exercise of jurisdiction may be particularly important in cases where the International Criminal Court does not have jurisdiction, or in the absence of a referral by the United Nations Security Council of the most serious crimes under international law to the International Criminal Court or other relevant action, such as establishing an ad hoc international criminal tribunal.

Australia considers that draft article 7, as currently drafted, reflects the progressive development of international law. However, taking into account recent practice, including by national courts, Australia acknowledges that there is a discernible trend of the non-applicability of functional immunity for serious international crimes at the national level.

Australia considers that any exception to or limitation on functional immunity would apply to serious international crimes as a category, rather than developing in respect of particular crimes. In this regard, Australia considers the scope of crimes captured by any exception must be limited to the most serious international crimes.

Austria

[Original: English]

Austria welcomes draft article 7 on crimes under international law in respect of which immunity *ratione materiae* shall not apply. Austria regards this central provision of the draft articles as a compromise, destined to contribute to combatting impunity. Like many others, Austria sees a close link between this article and the procedural provisions and safeguards contained in Part Four of the draft articles. While supporting article 7 as a central provision of the draft articles, Austria reiterates its position that the list of exceptions to functional immunity in draft article 7 is incomplete and should also contain a reference to the crime of aggression.

It is Austrian practice and *opinio juris* that no functional immunity exists for international crimes, including the crime of aggression, by virtue of customary international law. In the view of Austria, this exception also applies to the so-called "troika" after they have left office. This view is expressed in the "*Decree of the Austrian Ministry of Justice regarding jurisdiction for war crimes and other international crimes and immunities of highest officials of foreign states in Austrian criminal proceedings"* dated 5 July 2022, the concluding chapter of which reads as follows:

> **"3. Conclusion**
>
> Based on the above State practice, and in concurrence with the Office of the Legal Adviser of the Federal Ministry for European and International Affairs, the Federal Ministry of Justice holds the following legal view:
>
> 1. **Incumbent heads of state, heads of government and foreign ministers** of other States enjoy, by virtue of customary international law, **absolute immunity ratione personae** before Austrian criminal courts.
>
> 2. **All other officials of foreign states do not enjoy**, by virtue of customary international law, **functional immunity ratione materiae** before Austrian criminal courts as concerns the crimes contained in the 25th Chapter of the Austrian Criminal Code [i.e. genocide, crimes against humanity, war crimes and crime of aggression] as well as torture. **This exception also applies to heads of state, heads of government and foreign ministers of foreign States after they have left office**."

Brazil

[Original: English]

Brazil reiterates its commitment to the promotion of accountability for serious crimes under international law. For this reason, Brazil acknowledges initiatives to avoid impunity, such as the limitations suggested in draft article 7.

In the view of Brazil, article 7 does not reflect customary international law.

In this context, if the International Law Commission decides to retain current draft article 7, Brazil urges it to explicitly observe in its commentaries that it does not reflect existing rules related to the application of the criminal jurisdiction of States or State officials that benefit from immunity.

Furthermore, Brazil highlights that, if States decide to adopt a legally-binding instrument based on the articles, this provision would only apply between States parties to the possible future agreement. Under no circumstance, the limitation or exception suggested in draft article 7 could apply to a non-party State to a convention based on this language.

Czech Republic

[Original: English]

The Czech Republic welcomes the adoption of draft article 7 providing for the exceptions from immunity *ratione materiae* when the most serious crimes are committed. In its opinion, the draft article in principle properly reflects existing norms of international law and State practice, based on the absence of immunity *ratione materiae* when crimes under international law or crimes, defined in relevant treaties and committed by State officials or at their instigation or with their support or acquiescence, are committed. The Czech Republic suggests that the non-applicability of immunity *ratione materiae* in these cases is a consequence of normative incompatibility of such immunity with definitions and obligations under international law and relevant treaties, which provide for an extra-territorial criminal jurisdiction and expressly contemplate prosecution of crimes committed in an official capacity. Some of these conventions are listed in the annex to the draft articles.

However, with regard to the possible inclusion of the crime of aggression in the list of international crimes in draft article 7, the Czech Republic suggests that the Commission should seriously reconsider this issue. Given the inclusion of the definition of the crime of aggression in article 8 *bis* of the Rome Statute of the International Criminal Court, and most recently its inclusion in Annex H of the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other Crimes under International Law, adopted on 26 May 2023, the Czech Republic does not consider it tenable to exclude the crime of aggression from the list of most serious crimes under international law. It is aware of the problem of an individual crime of aggression being dependent on an act of aggression committed by a State. Nevertheless, this could be overcome by making the crime of aggression committed by officials of a State, to which the immunity *ratione materiae* shall not apply, dependent on prior determination of an act of aggression having been committed by that State by the United Nations Security Council or the United Nations General Assembly, as the case maybe.

Finally, the Czech Republic regard as prudent that the Commission did not include in the text of the draft article 7 the exception concerning crimes committed by foreign officials in the territory of the forum State. The Czech Republic also concurs with the Commission's conclusion that certain crimes, such as political

assassination, espionage, sabotage, espionage or kidnapping, or other similar crimes committed by State officials in the territory of a foreign State are subject to the territorial sovereignty of the forum State as any other crime and do not give rise to immunity *ratione materiae*. On the other hand, it may be advisable to study in more detail the legal consequences of a situation in which the home State of the perpetrator would assume, in the aforementioned circumstances, its responsibility under international law for such illegal act committed by his State official in the territory of another State. The Commission could deal with this issue in the commentaries.

Estonia

[Original: English]

Estonia appreciates the inclusion of draft article 7, which provides that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in case of certain crimes under international law. Although immunity *ratione materiae* is necessary and important to facilitate inter-State relations and to provide independence for State officials when acting in official capacity, such immunity cannot excuse the commission of international crimes and prevent prosecution for international crimes. Indeed, such crimes can never be considered a function of a State and, consequently, "acts performed in an official capacity". The commentaries to the draft articles show that the consideration of draft article 7 has given rise to an extensive debate since 2016. While the International Law Commission provisionally adopted draft article 7 and the related annex by recorded vote during in 2017, draft article 7 was adopted without a vote and previously expressed divergent views were not clarified in the commentaries. The commentaries reproduce, with minor updates, the commentaries of 2017.

Estonia regrets that the list of international crimes mentioned in draft article 7 does not include the crime of aggression. The latter is enshrined in the Rome Statute of the International Criminal Court like the crime of genocide, crimes against humanity and war crimes which are included in that list. All four Rome Statute crimes are also crimes under customary international law. In the view of Estonia, the crime of aggression should be added to the list because it is not an ordinary international crime, but the supreme international crime that contains within itself the accumulated evil of the whole as it was described by the Nuremberg Tribunal. Estonia recalls that the jurisdiction of the International Criminal Court of the crime of aggression was activated on 17 July 2018. In addition, the crime of aggression is incorporated into the domestic legal system of numerous States. There is no doubt that the crime of aggression is a great concern for the international community as a whole, and States have to prevent its commission and punish its perpetrators. The crime of aggression enables and facilitates the commission of international crimes by creating an environment of chaos and lawlessness, and therefore no immunity *ratione materiae* should apply for it.

In the commentaries, the International Law Commission explains that it did not include the crime of aggression at this time due the nature of the crime of aggression. Notably, national courts would have to determine the existence of a prior act of aggression by a foreign State and to consider the special political dimension of this crime, given that it is a leadership crime. Estonia agrees that national courts need to exercise extra caution when making jurisdictional decisions concerning the crime of aggression but these factors do not justify the exclusion of this crime from the list in question.

Because of the special nature of the crime of aggression, national courts in their proceedings must intrinsically take into account and analyse all relevant factual, political and legal aspects related to the crime of aggression. Here, States and

international organizations (both global and regional) can provide useful guidance for national courts. For example, in the case of Russia's war of aggression against Ukraine, international organizations, in particular the United Nations, have on several occasions determined that the Russian Federation is carrying out a full-fledged unprovoked and brutal war of aggression against Ukraine. Determination of the war of aggression by an international organization provides a strong and legitimate argument for national courts to decide that, *prima facie*, the crime of aggression has been committed and hence immunity *ratione materiae* does not apply.

Also, in the case of national courts making a decision whether war crimes have been committed, they must determine whether an armed conflict has occurred. When it is an international armed conflict, that is, an armed conflict between States, the decision is also politically sensitive and, to certain extent, comparable to the complexities and challenges concerning the determination of the crime of aggression. Various other serious crimes may, among other considerations, contain a politically sensitive element, but this does not mean that the perpetrators of such crimes should escape responsibility; moreover, national courts are accustomed to resist political pressure in their practice. Therefore, Estonia does not see a danger in allowing national courts to decide the non-applicability of immunity *ratione materiae* regarding the crime of aggression.

Draft article 7 includes an exhaustive list of international crimes in case of which immunity *ratione materiae* does not apply. Estonia believes that the list should be open-ended to take into account any further developments, for example, when new international crimes are codified or defined by the international community in the future. In addition, the International Law Commission admits in the commentaries that there are also other international crimes not included in the list that currently lack a universal definition under international law. We should be open to the opportunity for the definitions to develop at some point. Having an exhaustive list can unduly limit the positive effect of draft article 7 in the future.

To conclude, Estonia calls upon the International Law Commission to reconsider the wording of draft article 7. Once again, Estonia welcomes the opportunity to share its comments and observations, and it remains at the disposal of the International Law Commission to submit further comments and observation after the revision of the draft articles on immunity of State officials from foreign criminal jurisdiction.

France

[Original: French]

Draft article 7 is the provision that raises the most uncertainties and that is most divisive, both within the Commission and among States. For those reasons, France believes that the provision, as it stands, must be regarded as progressive development. France has also noted the current trend towards recognizing certain exceptions to the immunity of State officials from foreign criminal jurisdiction. Nevertheless, reflecting that trend in the draft articles gives rise to two problems.

First, there is no fixed list of crimes that might warrant an exception to immunity from jurisdiction. In that respect, France calls upon the Commission to avoid any enumeration that would have the effect of crystallizing the potential exceptions and to state the reasons for its choices.

Second, the legal consequences of this contemporary practice need to be carefully considered. Indeed, France believes that, on the basis of the current state of positive international law, there are serious grounds for considering that immunity is applicable even in the case of serious crimes under international law. The Commission

should therefore expand and substantiate its analysis of this particularly sensitive issue on the basis of State practice.

In 2021, when a former Head of State, and also various government officials, civil servants and members of the army of a foreign State, were accused of acts of torture, the Court of Cassation of France ruled that:

> "25. Under international custom, in the absence of international provisions to the contrary that are binding on the parties concerned, the officials of a State cannot be prosecuted for acts falling into this category [i.e. acts carried out in the exercise of State sovereignty] before the criminal courts of a foreign State.
>
> "26. It is for the international community to determine potential limits to this principle when it might conflict with other values recognized by that community, including the prohibition of torture.
>
> "27. On the basis of the current state of international law, the alleged crimes, however serious, do not constitute exceptions to the principle of immunity from jurisdiction."[57]

In addition, France notes that in paragraph (9) of the commentary, the Commission mentions the existence of a "trend" towards limiting the applicability of immunity *ratione materiae* before international courts. However, this issue is distinct from that of whether there are possible exceptions to such immunity before national courts, which is the only issue that concerns the Commission in its work.

It might also be noted that paragraph (24) of the commentary, on crimes of corruption and crimes "affected by the so-called 'territorial tort exception'", is ambiguous. It would benefit from being worded more clearly.

France also takes note of the Commission's decision, referred to in its commentary, "not to include the crime of aggression at this time", in view of the particular nature of the crime and its "special political dimension" (para. (21)). France shares the Commission's reservation in that regard.

More generally, France calls upon the Commission to exercise caution and rigour in its consideration of the sensitive issue of exceptions to functional immunity from criminal jurisdiction. Every effort should be made to reach a consensus on a text for draft article 7 that reflects the state of international law.

Germany

[Original: English]

To Germany, the question whether immunity *ratione materiae* does not apply to certain crimes it of utmost importance. Germany in this regard wishes to reiterate the need for the Commission to properly ground its work in the practice of States. Where the Commission wishes to go beyond the scope of what already has been recognized by States as applicable international law, this must be made explicit by designating the paragraph in question as *lex ferenda*. In the view of Germany, the Commission is well advised not to blur the lines between what the law is and what the law ought to be.

At the same time, the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed is a *conditio sine qua non* for the application of international criminal law in national courts, as such crimes are often committed by State officials. Apart from the post-Second World War Nuremberg and Tokyo trials, which were international in nature, there have been

[57] Court of Cassation, Criminal Chamber, 13 January 2021, No. 20-80.511, paras. 25–27.

thousands of national court judgements against former Nazi officials, *inter alia* in Australia, France, the United Kingdom, Italy, Canada, the Netherlands, Poland or the Soviet Union. These proceedings were not once being hindered by the assumption that the existence of functional immunity *ratione materiae* would block the criminal proceedings. Another prominent demonstration of this understanding was the *Eichmann* judgement of the Supreme Court of Israel in 1962, which was followed by a vast expansion of the application of the principle of universal jurisdiction for the most serious international crimes in various national laws. This trend was given new momentum when the Rome Statute of the International Criminal Court was concluded in 1998, which explicitly stresses its complementarity to national criminal jurisdictions. Just very recently, the United States of America amended its "War Crimes Act" in order to widen its scope of application. Germany is therefore of the view that one might speak of a norm of customary international law "*in statu nascendi*". Germany discerns a trend towards the acceptance of exceptions from immunity *ratione materiae* when it comes to the most serious crimes under international law.

Germany wishes to draw once again the attention of the Commission to an important case in the German jurisprudence on immunities of State officials in criminal proceedings. On 28 January 2021, the German Federal Court of Justice (*Bundesgerichtshof*) decided on an appeals case that involved the prior conviction of a former first lieutenant of the Afghan armed forces *inter alia* for war crimes based on the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*). The Court found that according to customary international law, criminal prosecution by a domestic court for certain war crimes was not barred by immunity *ratione materiae,* if "the acts were committed abroad by a foreign State official of subordinate rank in the exercise of his sovereign functions against non-domestic persons". The judgment addresses the issue of immunity in criminal proceedings only with regard to certain war crimes. Nonetheless, the dictum has been interpreted as providing a basis also for German courts to deem immunity *ratione materiae* inapplicable in cases involving other crimes under customary international law, i.e. also crimes against humanity, genocide and the crime of aggression, all of which are punishable under the German Code of Crimes against International Law.

The judgment by the Federal Court of Justice is the highest-ranking judicial decision in Germany on the issue of immunities of State officials from foreign criminal jurisdiction in recent times. It constitutes important German State practice and has a significant bearing also on the German government's position on the present topic. Shortly afterwards, in February 2021 and January 2022, two former members of the Syrian intelligence service were convicted for crimes against humanity, respectively for the assistance hereto, by the Koblenz Higher Regional Court.

Ireland

[Original: English]

Ireland appreciates the efforts of the Commission in attempting to formulate comprehensive rules on the scope and content of immunity *ratione materiae* but is of the opinion that some further work on draft articles 5, 6 and 7 is required if these are to accurately reflect existing customary law in this area. In particular, while acknowledging the difference of opinion within the Commission on draft article 7, in the view of Ireland the absence of a provision such as this would mean that the scope of immunity *ratione materiae* would be much broader than international law currently allows. Its view is that such immunity is in fact subject to important limits imposed by international criminal law as it has developed in recent decades. These limits, Ireland believes, should indeed be the subject of a draft article.

Whether such a draft article takes the form of a list of stated crimes or, instead, criteria by which States may determine whether immunity *ratione materiae* will apply in certain types of cases is ultimately a matter for the Commission but Ireland can certainly see attractions to the latter approach.

As to what such criteria might be, in the view of Ireland these should reflect the development of international criminal law since the Second World War, as a result of which certain acts constituting violations of customary international rules intended to protect values of the highest importance to the whole international community have become crimes under international law. A number of these have been codified by international convention. In respect of these crimes international law permits the exercise of universal jurisdiction by the forum State over non-resident aliens present on its territory alleged to have committed the crime outside that territory. The rules criminalizing these acts also expressly contemplate commission of the crime by State officials or those carrying out a State policy and are specifically intended to entail individual criminal responsibility regardless of the status of the perpetrator or whether he or she acted pursuant to an order of a Government or of a superior. These developments of the law would have been pointless if they were not also intended to supersede pre-existing rules conferring functional immunity on the perpetrator.

The universal jurisdiction attaching to such crimes under customary international law is permissive and may be contrasted with the approach taken in some cases where the crimes have been codified by convention. Under some of the instruments concerned the exercise of universal jurisdiction is no longer discretionary – States parties have an obligation to exercise that jurisdiction or, alternatively, to extradite the person concerned to a State prepared to do so.

Accordingly, in the view of Ireland immunity *ratione materiae* before a foreign domestic court does not – and cannot – apply in cases of crimes under international law such as torture, genocide, crimes against humanity and serious violations of the laws and customs of war. The crime of aggression – the most serious crime under international law – can also be added to this list with the question of the prior determination of an act of aggression being left to what is currently Part Four of the draft articles. The absence of the crime of aggression from a list of crimes in draft article 7 could imply a hierarchy between the most serious crimes under international law and undermine attempts to seek accountability where acts of aggression have been committed.

If the Commission chooses to maintain a list of crimes rather than formulate criteria, Ireland is of the view that the inclusion of two crimes on the present list that fall within the ambit of crimes against humanity – namely the crimes of *apartheid* and enforced disappearances – creates confusion. Though the commentary to draft article 7, paragraph 1, seeks to clarify the rationale for including these two crimes in their own right, this approach could imply that other crimes which come within the ambit of crimes against humanity but are not listed in draft article 7 are somehow excluded.

As regards draft articles 5 and 6, Ireland agrees that, read together and subject to draft article 7, they reflect existing customary law. However, Ireland believes it would be more helpful if draft article 5 were amended to read "Subject to draft article 7, State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction in accordance with draft article 6."

Islamic Republic of Iran

[Original: English]

The Islamic Republic of Iran once again expresses its dissent with the list of crimes enumerated in draft article 7 as well as the annexed list of international treaties referred to therein, since all the listed treaties are not universally accepted, and the definitions therein fail to enjoy universal acceptance.

Draft article 7 does not reflect customary international law as it lacks State practice. As a matter of fact, the manner in which draft article 7 has been provisionally drafted, namely, adoption through vote in the Commission indicates that there has been a fundamental divergence of opinions and views on certain issues among its members, raising difficulty to conclude whether draft article 7 reflects *lex lata*. Needless to say that this was the first time in the history of the Commission that its members adopted the draft article after a recorded vote. By the same token, the Islamic Republic of Iran is not yet convinced that this draft article is a reflection of codification of existing international law, rather it should be regarded as a progressive development of the existing law, even *lex ferenda*.

It should be noted that draft article 7 is contrary to the established jurisprudence of the International Court of Justice. In this relation it should be recalled that the Court in its Judgment in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* (*I.C.J. Reports 2002*, p. 3 at pp. 24–25, paras. 58–59) has accepted that the immunity of State officials originates from customary international law.

In the same vein, the European Court of Human Rights in the case of *Al-Adsani* v. *the United Kingdom* (2001), considered that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through respect of another State's sovereignty". The European Court of Human Rights, in the aforementioned case as well as in the case of *Jones and others* v. *the United Kingdom* (2014), ruled that granting immunity from jurisdiction to State officials in civil proceedings with respect to torture was not a violation of article 6 of the European Convention on Human Rights. More recently, the European Court of Human Rights, in the case of *J.C. and Others v. Belgium* (2021), did not uphold the applicants' argument that State immunity from jurisdiction could not be maintained in cases involving inhumane or degrading treatment.

The approach of European Court of Human Rights is in line with the approach that was implicitly accepted by the International Court of Justice. It has been bolstered by the latter Court in the judgment of case concerning *Arrest Warrant of 11 April 2000*, wherein it implies that the substantial rules of international law cannot overcome procedural rules. The Court further in the Judgment of the Case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*I.C.J. Reports 2012*, p. 99), when explaining the issue of the case, denied to differentiate between both types of immunity, namely, *ratione materiae* and *ratione personae.*

It should be noted that immunity of officials is distinct from immunity of States. The commentary of draft article 7 makes reference to some cases and national legislation which are related to immunity of States to establish an exception to immunity of officials from foreign criminal jurisdiction. Obviously, such legislation and cases could not help the Commission to show a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

The Commission is expected to take the principle of sovereignty and its ensuing components, principally the immunity of State before the courts of another State, as

its departure point and avoid confusing this subject with the subject of accountability of State officials. In this regard, the Court's ruling in the Case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* (*I.C.J. Reports 2008*, p. 117), that a claim of immunity for a State official is, in essence, a claim of immunity for the State, merits especial attention.

It should be regarded that resort to national legislation of some States in defining the concept "act performed in official capacity" is irrelevant. In this respect, national case-law and practice of national courts cannot be given the same weight as the jurisprudence of international courts and tribunals. The jurisprudence of international judicial bodies [is] quite important and can be informative for the study. The review of the judgments of these bodies clarifies the mere fact that criminal nature of the acts cannot constitute sufficient basis to exclude them from being an official act and consequently disregard and undermine immunity.

The Islamic Republic of Iran would also like to refer to paragraph (8) of the commentary on draft article 7, that it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; and that further, immunity does not depend on the gravity of the act in question.

Nevertheless, in spite of the disagreement echoed by several Member States and divergent views among members of the Commission, the same commentary of the 2017 with minor updates was disappointingly adopted in respect to the aforesaid draft article.

Israel

[Original: English]

Israel shares the view, expressed by other States as well as by several members of the Commission itself, that draft article 7 does not reflect the current state of customary international law, nor should it be welcomed as a proposal for progressive development of the law. The Commission should take into account the serious concerns raised by States in this regard, especially given the highly sensitive nature of this issue. The Commission should therefore allocate as much time as necessary in order to produce an output that could gain general approval among States.

Paragraph (9) of the commentary to draft article 7 refers to twenty-three judicial decisions listed in footnote 1012 in contending that "there has been a discernible trend towards limiting the *applicability* of immunity". Israel respectfully submits that these decisions cannot be seen as constituting a "discernible trend". As some members of the Commission have noted, the cases referred to in support of the existence of the alleged discernible trend are neither consistent nor clear. The draft commentary itself reflects the deep divisions within the Commission on this point, and makes clear that several members of the Commission hold the firm view that State practice does not support limiting immunity *ratione materiae*. As stated in a footnote to the commentary, members explained that out of the twenty-three cases mentioned above, only ten cases "purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied." Furthermore, it should be noted that there are also judicial decisions where immunity *ratione materiae* has been invoked and accepted by national courts in criminal proceedings.[58]

[58] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), footnote 1015.

Indeed, even after the provisional adoption of draft article 7, State practice continued to demonstrate that States do not recognize exceptions to official immunity *ratione materiae* from foreign criminal jurisdiction. These decisions are supported by additional recent judgements upholding immunity of foreign officials in other cases.

It should further be noted that State practice that is highly relevant to this topic is not always easily accessible, in particular Government decisions not to open an investigation or initiate criminal proceedings against a foreign State official on the basis of a legal conviction that there is immunity. Judicial proceedings may well be the exception, and the Commission should not lose sight of that.

It is the view of Israel that those members of the Commission who argued that draft article 7 would constitute "new law" (see paragraph 12 of the commentary) are correct in their assessment.

It is therefore the position of Israel that draft article 7 should be deleted. Israel notes that some members of the Commission voted against the draft article during the sixty-ninth session in 2017, and their position remained unchanged despite the adoption of the text in 2022, as also stated in paragraph (3) of the commentary to this provision.

Without prejudice to this position, should the Commission decide to retain draft article 7 on second reading, the Commission should make it clear that it is engaged in progressive development rather than codification of the law. The commentary must be amended so as to clearly reflect this fact. Furthermore, during the second reading, the Commission should allow sufficient time to attend to the serious problems and controversies that exist with regard to the text and scrutinize carefully any State practice invoked in connection thereto.

Japan

[Original: English]

Given an insufficiency of State practice, Japan remains cautious in recognizing that draft article 7 is grounded in State practice and considers it necessary for the Commission to redouble its efforts in analyzing such State practice to facilitate further in-depth discussion.

When it comes to the fight against impunity, the promotion of the universality of the Rome Statute of the International Criminal Court would be an optimal approach. At the same time, however, the Court's practice on immunity from prosecution before the Court is not convincing to be regarded as common practice generally applicable among States.

Japan hopes that the Commission will make further efforts to find an appropriate solution on this matter, taking into account views expressed by States.

Kingdom of the Netherlands

[Original: English]

This draft article provides a good starting point for further study by the Kingdom of the Netherlands and other Member States of the issue of the exception to functional immunity. This is not yet fully crystallised in Dutch legal practice and it is noted that the final decision on the exercise of jurisdiction is a matter for the courts. In respect of this issue, the Commission could consider the possibility of the limitation of functional immunity being based on the factors of individual criminal responsibility and universal jurisdiction.

The Kingdom has previously expressed the view in the General Assembly that an exhaustive list of crimes should not be included, because that would exclude important crimes and hinder the development of the concept of crimes under international law to which immunity would not apply. This results in a preference for a general reference to "crimes under international law" to which immunity *ratione materiae* does not apply. A general reference would leave scope for the concept of "crimes under international law" to be interpreted in the light of customary international law and the development of international criminal law. Examples could be included in the commentary to the draft article, provided it is clear that they are intended as illustrations and not as an exhaustive list. The commentary could then examine in more detail the possible applicability of functional immunity to corruption-related crimes and to territorial crimes committed without the forum State having given consent to enter its territory or to perform within its territory the sovereign activity in the context of which the crime was committed.

Latvia

[Original: English]

In June 2022, the International Law Commission at its seventy-third session adopted, on first reading, the draft articles on immunity of State officials from foreign criminal jurisdiction after more than a decade long consideration of the topic. The importance and complexity of the topic is marked by its scope, namely, it addresses the relationships between crimes under international law and immunity *ratione materiae*. Draft article 7 lays out crimes under international law in respect of which immunity *ratione materiae* shall not apply. Currently, draft article 7 includes three out of four the most serious crimes of concern to the international community as a whole: war crimes, crimes against humanity and the crime of genocide, failing to include the crime of aggression. Therefore, immunity *ratione materiae* applies to the crime which previously mentioned crimes usually are derived from.

While the Commission justified the inclusion of war crimes, crimes against humanity and the crime of genocide as "the crimes of the greatest concern to the international community as a whole" that are included in article 5 of the Rome Statute, it did not apply the same reasoning for the crime of aggression.[59] The main considerations to not include the crime of aggression in 2017, although it was at the time also included in article 5 of the Rome Statute, were that, **firstly**, the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, **secondly**, the special political dimension of this type of crime, given that it constitutes a "crime of leaders", **thirdly**, the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court's jurisdiction over this crime.[60] Even though the Commission has updated its reasoning on the third consideration, excluding it from the commentary, as jurisdiction of the International Criminal Court over the crime of aggression has been activated since 2018, the other two reasons have remained.

The international realm has changed significantly since 2017 when draft article 7 was provisionally adopted by the Drafting Committee. Russia's aggression against Ukraine in 24 February 2022 has proven that accountability gap for the crime of aggression still exists and international community must close this gap to prevent impunity. Therefore, Latvia takes the view, that the crime of aggression shall be

[59] *Yearbook of the International Law Commission 2017*, vol. II (Part Two), p. 127, para. 17.
[60] Ibid., para. 18.

included in the list of draft article 7. Further written comments will lay out main considerations to uphold its position.

In the commentary to draft article 7, the Commission recognizes the need to balance the purpose of immunity for which it was established (to protect the sovereign equality and legitimate interests of States) and accountability for the most serious international crimes. In the view of the Commission "[s]triking this balance will ensure … that it [*ratione materiae*] is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law."[61]

Taking into account the specific provisions for the International Criminal Court to exercise its jurisdiction over the crime of aggression, international community may find itself in the situations where, on the one hand, immunity *ratione materiae* blocks attempts to ensure accountability before national judicial bodies, on the other hand, failure of the international community to establish international tribunals, before whom immunities do not apply, stalls the efforts to ensure accountability for the crime of aggression.

This would thus contradict the intentions of the Commission to establish the criminal responsibility for the most serious crimes under international law (which is also the crime of aggression according to article 5 of the Rome Statute) by applying balanced approach, because in previously mentioned situations immunity *ratione materiae* will prevail and, thus, will impunity.

Returning to the arguments outlined by the Commission on exclusion of the crime of aggression from draft article 7, Latvia indicates the following.

Firstly, regarding the nature of the crime of aggression, it should be emphasized that although, the adjudication of this crime may lead national courts to the determination whether the use of force by another State complies with international law, it is not a special feature to the proceedings in which crime of aggression is considered. To the contrary, national courts, in order to answer preliminary questions in the context of proceedings for other most serious crimes under international law, will need to make conclusions on the legality of the use of force.

Secondly, although the Commission rightfully determines that the crime of aggression has a special political dimension, this determination can be also applied to the other most serious crimes under international law listed in draft article 7. In the opinion of Latvia, the Commission has found and introduced safeguards and procedural provisions that will serve to avoid the possibility to exercise foreign criminal jurisdiction over State officials in a political or abusive manner.

Liechtenstein

[Original: English]

Draft article 7 correctly endorses the non-applicability of immunity *ratione materiae* to the crime of genocide, crimes against humanity and war crimes. However, for completeness, the crime of aggression must also be included in the list of crimes in draft article 7 to which functional immunity does not apply. The crime of aggression, as defined under international law, [62] is a leadership crime, which necessitates overcoming immunities to ensure meaningful accountability as well as the future prevention of the crime of aggression through the deterrent effect of the law.

[61] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (10) of the commentary to draft article 7.

[62] Article 8 *bis*, Rome Statute of the International Criminal Court.

Including the crime of aggression in draft article 7 would be consistent with the criteria provided by the Commission itself for the selection of crimes featured in draft article 7. As stated in the commentary to draft article 7, the main reason for the inclusion of those crimes in the scope of the provision was that those "are the crimes of the greatest concern to the international community as whole" and "are included in article 5 of the Rome Statute".[63] According to this reasoning, the crime of aggression must be present among the list of draft article 7.

Jurisprudence

Recognizing the absence of immunity *ratione materiae* with respect to the crime of aggression would confirm with the teleology behind the criminalization of a certain type of conduct directly under international law and the practice concerning the inapplicability of immunity to those crimes. Since Nuremberg, international criminal law has provided for the absence of functional immunities in respect to all crimes under international law. Article 7 of the 1945 London Charter stated that the "official position of defendants […] shall not be considered as freeing them from responsibility". The International Military Tribunal, which described the crime of aggression as the "supreme international crime"[64], endorsed the principle enshrined in the Charter by stating that "[t]he principle of International Law, under certain circumstances protects the representatives of State, cannot be applied to acts which are condemned as criminal by International Law".[65] The Nuremberg Judgment's legacy regarding the inapplicability of functional immunity to proceedings for crimes under international law was not confined to international proceedings, but was couched in general terms and hence pertained to domestic proceedings as well.

There have been many other proceedings both before national and international courts for crimes under international law since Nuremberg. Although most cases did not directly relate to the crime of aggression, they further bolstered the body of precedents confirming that, in conformity with the basic idea underlying the very concept of criminality under international law, there is no functional immunity for the commission of crimes under international, including the crime of aggression.

In 1948, the Tokyo Tribunal followed the same approach as its predecessor in Nuremberg, applying the principle of irrelevance of the official position to the prosecution of crimes under international law. Similarly, in 1962, in the case against Eichmann, the Supreme Court of Israel proceeded to reject functional immunity for crimes under international law by stating that those who commit such heinous crimes "cannot seek shelter behind the official character of their task or mission"[66]. The International Criminal Tribunal for the former Yugoslavia has also emphatically rejected the application of immunity *ratione materiae* to crimes under international law through its case law. In the *Blaškić* judgement of 1997, the Appeals Chamber of the Tribunal recognized that functional immunity cannot be invoked before *national* or international jurisdiction for crimes under international law, even if the perpetrators have or had acted in their official capacity[67]. This view was confirmed

[63] *Yearbook of the International Law Commission 2017*, vol. II (Part Two), p. 127, para. 17.

[64] International Military Tribunal, Judgement of 1 October 1946 in: The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August, 1946 to 1st October, 1946), p. 422.

[65] Ibid., p. 448.

[66] *Attorney-General of the Government of Israel v. Eichmann*, Record of Proceedings in the Supreme Court of Israel, Appeal session 7, Appeal Session 7, p. 29.

[67] *Prosecutor v. Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of the trial chamber II of 18 July 1997, Appeals Chamber, Case No. IT-95-14, 29 October 1997, para. 41.

by decisions issued in other cases before the Tribunal, such as the *Karadžić* case[68] and the *Milošević* case[69].

The case law reviewed above, unequivocally supports the view that, as a matter of customary international law, State officials do not enjoy functional immunity for crimes under international law and that no differentiation in that regard should be made with respect to the crime of aggression. This is also the position widely held in international legal scholarship, including most recently, a statement issued by the Dutch Advisory Council on Public International law[70].

Recent developments

The most recent addition to the relevant body of State practice consists of the accountability efforts with respect to the Russian Federation's aggression against Ukraine. In the past year, numerous States have supported the establishment of a Special Tribunal on the Crime of Aggression against Ukraine. Some have voiced a preference for an international model due to international law jurisprudence that personal and functional immunities do not represent a bar to the prosecution of senior leaders for international crimes before international criminal courts and tribunals that are acting on behalf of the international community as a whole. Others have voiced a preference for an "internationalized" model anchored in Ukrainian law. This position must also be seen as supporting the view that State officials do not enjoy functional immunity for the crime of aggression before national jurisdictions.

The Commission's own work

The inclusion of the crime of aggression in the list of crimes of draft article 7 would also be in line with the previous work of the Commission. The Commission has consistently rejected the application of immunity to all crimes under international law without distinction. Principle III of the 1950 Nuremberg Principles, draft article 3 of the 1954 Code of Offenses against the Peace and Security of Mankind, and draft article 7 of the 1996 Code of Crimes Against Peace and Security of Mankind, all determine that the official position of a person does not relieve them from responsibility for the commitment of a crime under international law, including the crime of aggression.

While the Commission has so far decided not to include the crime of aggression within the scope of draft article 7, this position needs urgent reconsideration to better reflect recent developments and the current state of affairs with regard to functional immunities under international law. In order to avoid a serious inconsistency in the treatment of crimes under international law and in order to confirm the principle of accountability for all crimes under international law, the Commission must confirm the inapplicability of functional immunity *ratione materiae* in proceedings for crimes under international law without exception, hence ensuring such accountability also encompasses the crime of aggression.

[68] *Prosecutor v. Karadžić et al.*, Decision on the application by the Prosecution for a formal request for deferral by the government of Bosnia and Herzegovina of its investigations and criminal proceedings in relation to Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber, Case No. IT-95-5-D, 16 May 1995, paras. 23–24.

[69] *Prosecutor v. Milošević*, Decision on preliminary motions, Trial Chamber, Case No. IT-02-54, 8 November 2001, paras. 26–34.

[70] Advisory Committee on Public International Law (CAVV), *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory report No. 40, 12 September 2022, p. 11–12.

Conclusion

One of the purposes of criminal accountability is to deter future offenders and prevent recurrence of the crime in the future. The crime of aggression is a leadership crime. In order to ensure effective prosecutions, it is therefore essential to overcome immunities for the most senior leadership before foreign domestic criminal courts. The crime of aggression, a core international crime and one of the four core crimes contained in the Rome Statute, must be included in the list of crimes in draft article 7.

[See also comment under general comments.]

Lithuania

[Original: English]

In response to [the] request [of the Commission] and recognizing the importance of the topic in current international background, Lithuania appreciates the progress and efforts made by the Commission towards a compromise solution on draft articles and takes the possibility to present its observations with a special focus on the most controversial provision which is draft article 7 "Crimes under international law in respect of which immunity *ratione materiae* shall not apply".

Draft article 7, paragraph 1, explicitly lists six crimes under international law in respect of which immunity *ratione materiae* (functional immunity) shall not apply, namely: genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances. However, the crime of aggression, which is one of the four core crimes under international law enriched in article 5 of the Rome Statute and over which the States Parties to the Rome Statute agreed to activate the International Criminal Court's jurisdiction in 2017, is excluded.

In principle, Lithuania is of the position that as a matter of customary international law, State officials shall not enjoy functional immunity for crimes under international law, including the crime of aggression, which is recognised as one of the gravest crimes. This position is based on the following arguments and legal grounds:

– In the view of Lithuania, the inclusion of crimes in draft article 7 should be based on either their *jus cogens* character, their inclusion in the Rome Statute, or gravity. The international criminal law along with the International Criminal Court aim to protect the highest values of the international community (peace, security, well-being, human rights, etc.) and to prevent committing the crimes under international law. It is in the interest of the international community as a whole to investigate and repress such crimes. Paragraphs 4 and 5 of the Preamble of the Rome Statute guide accordingly that the most serious crimes must not go unpunished, as well as the impunity for the perpetrators of these crimes must go to an end. In the view of Lithuania, draft article 7, must be in line with these principles rather than creating legal gaps or uncertainties in favour of impunity.

– As to the discussion[71], which crimes are of particular concern to the international community, or which are the most serious ones, or qualify as crimes under customary international law, neither draft article 7 nor its commentary explicitly address the basic concern: why certain crimes are on the list and others are not. The Commission's reasoning to include article 7 in the draft is as follows: (1) there is a discernible trend towards limiting the applicability of immunity from

[71] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (20) of the commentary to draft article 7.

jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law, and (2) it is necessary to recognise the unity and systemic nature of international law and to prevent immunity from becoming a procedural mechanism to block the implementation of international law norms regarding accountability and individual criminal responsibility[72]. The arguments are convincing and justifiable. However, in fact, the current wording of draft article 7, containing selective list of crimes, in the view of Lithuania, is inconsistent with the systematic approach, development of international law, expectations of the international community as well as current geopolitical challenges and threats to international peace and security. In particular, the exclusion of aggression defies logic and has no legal basis whatsoever. First, in 1966, the Commission provided the crime of aggression as the sole example for what may be construed as a *jus cogens* norm[73]. Second, the crime of aggression is recognized as a separate crime, alongside genocide, crimes against humanity, and war crimes in article 5 of the Rome Statute. Third, in terms of gravity, the United Nations General Assembly and the Commission described aggression as the gravest of crimes against peace and security[74]. For these reasons, the crime of aggression, in the point of view of Lithuania, should be within the scope of draft article 7.

– There is no doubt, that the definition of the crime of aggression[75] involves a personality element as well as a political component. Namely, the crime of aggression is defined as "planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". While an act of aggression is qualified as "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, …".[76] So, by definition, the crime of aggression is a leadership crime, that is impossible to be committed without the State's involvement and exercise of official policy. Usually, it is the State's leader (or the most senior official) who rules to commit act of aggression against another State.

– It might be agreed that immunities derive from the idea of the State sovereignty. In general, the purpose of immunities is to allow State representatives to effectively exercise their official functions and represent the State in international relations. As regards the scope of immunity *ratione materiae*, the State officials enjoy the immunity from foreign jurisdiction only with respect to acts performed in an official capacity, however such "protection" continues to subsist after the individuals concerned have ceased to be State officials. Given that the crime of aggression is, by definition, the only crime that can be committed by persons in their official capacity, the application of functional immunity would be inconsistent with definition of the crime of aggression under the Rome Statute as there would be no one to prosecute and try for the crime of aggression. Moreover, 123 States Parties to the Rome Statute of the International Criminal Court subscribe to article 27, paragraph 2,[77] of the Rome Statute that allows immunity (including immunity *ratione personae*) to be

[72] Ibid., paragraphs (9) and (10) of the commentary to draft article 7.

[73] *Yearbook of the International Law Commission 1966*, vol. I (Part Two).

[74] Draft Code of Offences against the Peace and Security of Mankind with commentaries, 1954 (https://legal.un.org/ilc/texts/instruments/english/commentaries/7_3_1954.pdf).

[75] Article 8 *bis* (1) of the International Criminal Court Statute.

[76] Article 8 *bis* (2) of the International Criminal Court Statute.

[77] Article 27 (2) of the International Criminal Court Statute ("Irrelevance of official capacity"): *"2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*".

waived even if it relates to the performance of official acts also in cases of other three major categories of international crimes – crimes against humanity, war crimes and genocide. Such broad representation supports recognition that waiving of immunities in cases of gravest international crimes is possible. Therefore, adoption of draft article 7, as proposed, would implicate another contradiction with the Rome Statute.

– It shall not mean that the breach of international law can be legitimised or justified as official policy or functioning of a State. The principle that "a right does not rise from wrongdoing" (lat. *Ex injuria jus non oritur*) must be borne in mind in this context as well. Even though an immunity acts as a procedural bar to the initiation of proceedings against protected persons by foreign jurisdictions[78], it shall not become one more "weapon" in conduct of aggression and let the perpetrator avoid accountability and enjoy the impunity. Therefore, it should not be acceptable, that individuals responsible for international crimes, including the crime of aggression, would be able to hide behind the shield of sovereignty of the State for which they perform their duties. The Commission is responsible for the progressive development of international law. It may be observed that international law has long been moving away from a sovereignty-centred approach towards a human rights-centred approach, and that the protections afforded by sovereignty have been steadily narrowing. From the perspective of the development of international criminal law and the practice of the International Criminal Court, it is evident that the protection of sovereignty through immunities has also narrowed. Therefore, the draft article 7 proposal would not only be contrary to existing international law (in the sense of the Rome Statute) but would also disrupt the progressive development of the international law.

– Lithuania supports and follows the path of progress in international law, as well as when it comes to immunities. Even though the Lithuanian national law does not regulate immunities in detail, it refers to international law (treaties) as universally recognised standards. The Constitution of the Republic of Lithuania[79] along with the constitutional jurisprudence gives guidance that the criminal laws of the Republic of Lithuania relating to liability for international crimes may not establish standards lower than those laid down by generally recognised rules of international law[80]. The Criminal Code of the Republic of Lithuania also gives preference to international treaties to which Lithuania is a Party, when it comes to applicability of immunities from criminal jurisdiction under international law and crimes committed in the territory of Lithuania[81]. Lithuanian national courts follow the approach, that those responsible for crimes

[78] General principles of international criminal law – Factsheet | International Committee of the Red Cross (https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet).

[79] Article 135 (1) of Constitution of the Republic of Lithuania (https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21892): "*In implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice*".

[80] Whilst interpreting constitutional provision of Article 135 (1), the Constitutional Court ruled that in the good faith performance of international obligations arising out of universally recognised international law, *inter alia*, *jus cogens* norms, which prohibit international crimes, the criminal laws of the Republic of Lithuania relating to liability for international crimes may not establish standards lower than those laid down by generally recognised rules of international law. Ruling of the Constitutional Court of the Republic of Lithuania, dated 18 March 2014.

[81] Article 4 (4) of the Criminal Code of the Republic of Lithuania: "*The issue of criminal liability of the persons who enjoy immunity from criminal jurisdiction under international law and commit a criminal act in the territory of the Republic of Lithuania shall be decided in accordance with international treaties of the Republic of Lithuania and this Code*".

under international law may not be able to avoid investigation and prosecution by a domestic court because of immunities they rely on their official capacity. In Lithuania's January 13th case[82], the extended panel of seven judges of the Supreme Court of Lithuania noted that the lower courts' exclusion of some convicted persons from the status of combatant on a basis of the functional immunity of state officials was justified in the light of the provisions of international law. As the Supreme Court referred, the international rules stipulate that persons responsible for the commission of international crimes cannot rely on functional immunity from national or international jurisdiction even if they committed those crimes in their official capacity.

To sum up, Lithuania believes that the Commission should first follow its own established practice[83]. The Commission has recognised the fact that a person who committed a crime under international law and acted as Head of State or responsible Government official does not relieve them from responsibility under international law. The Commission has also recognised the irrelevance of the official position for the prosecution of crimes under international law. Second, the provisions of the Rome Statute shall be taken into account while construing exceptions to the functional immunities.

Any implication of hierarchy between the crimes provided for in article 5 of the Rome Statute would bring unwanted consequences of categorisation. Therefore, we believe, that draft article 7 shall be revised in line with the developments of international law and States' practice, taking into account the current challenges the international justice is facing and the sense of impunity that the exclusion of crime of aggression would foster.

So, from the above, Lithuania is of the position that the crime of aggression should be added to the list of international crimes, mentioned in draft article 7, in respect of which immunity *ratione materiae* shall not apply.

Luxembourg

[Original: French]

At the outset, Luxembourg considers that the subject matter of the draft articles is of fundamental importance for the prosecution of crimes under international law, as it deals with the relationship between such crimes and immunity from foreign prosecution. In this respect, it notes that the Commission has adopted draft article 7, which provides for exceptions to immunity *ratione materiae* (also known as functional immunity).

Draft article 7 accurately reflects customary international law insofar as it confirms the non-applicability of immunity *ratione materiae* to the crime of genocide, crimes against humanity and war crimes. However, Luxembourg notes that draft

[82] In 2022, the Supreme Court of Lithuania issued its ruling in the January 13th case. In this case over 60 high-ranking officials of the Soviet Union were found guilty and sentenced to imprisonment for their commitment of crimes against humanity and war crimes in respect of the State of Lithuania and its people. The officials of foreign country were found guilty of killing, torture or other inhumane treatment of persons protected by international humanitarian law or violation of the protection of their property, prohibited war attacks, use of prohibited means of war, i.e. preparation of criminal acts against the State of Lithuania, planning and carrying out a military operation in January 1991, occupying the Press Palace, the Vilnius TV Tower, the Lithuanian Radio and Television Building and other objects, introducing a curfew (lat.lt).

[83] Principle III, of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal adopted by the International Law Commission in 1950; draft article 3 of the 1954 Code of Offences against the Peace and Security of Mankind and draft article 7 of the 1996 Code of Crimes Against Peace and Security of Mankind.

article 7, as currently worded, does not include the crime of aggression in the list of crimes to which functional immunity does not apply.

Luxembourg agrees with the commentary to draft article 7, which indicates that the main reason that those crimes were included within the scope of application of the draft article was that they are "the most serious crimes of concern to the international community" and are included in article 5 of the Rome Statute of the International Criminal Court.[84] Yet, despite this reasoning, the Commission decided not to include the crime of aggression in the list of crimes provided in draft article 7.

When the Commission provisionally adopted draft article 7 at its 3378th meeting on 20 July 2017, it gave the lack of consensus among its members on this point as the reason for its decision.[85] In its commentary to article 7, the Commission refers to the "political dimension" of the crime of aggression, stating that in view of its nature as a "crime of leaders", the crime of aggression engages the responsibility of the State. Consequently, the courts of one State would be able to decide whether another State had committed an act of aggression, which could have repercussions for international relations. The prosecution of the officials of one State for the crime of aggression by the courts of other States would undermine the sovereign equality of States and the principle *par in parem imperium non habet*.[86]

However, this does not convincingly explain the distinction made between the application of functional immunity to the crime of aggression as opposed to other crimes under international law.

First, the International Criminal Court has had jurisdiction over the crime of aggression since 2018, which the Commission implicitly acknowledged by deleting the aforementioned argument from the commentary to draft article 7 in the version of the draft articles adopted on first reading.[87] However, no change has been made to the scope of the provision once the jurisdiction of the International Criminal Court over the crime of aggression went into effect. However, allowing immunity to apply to the crime of aggression while excluding its application to crimes of genocide, war crimes and crimes against humanity creates an unjustified difference in the treatment of these crimes under article 5 of the Rome Statute.[88]

Second, while it is true that the crime of aggression has a political dimension, the same can be said of any crime under international law. These crimes are often, if not usually, committed by agents of the State, and in all cases, the proceedings are likely to have a political dimension. The International Court of Justice has rightly noted in its long-standing jurisprudence that the fact that a question has political

[84] Rome Statute of the International Criminal Court, article 5, paragraph 1, and preamble, paragraph 4.

[85] See summary record of the 3378th meeting of the International Law Commission held on 20 July 2017, A/CN.4/SR.3378, paras. 16 and 17.

[86] Report of the International Law Commission on the work of its sixty-ninth session, *Official Records of the General Assembly*, *Seventy-second Session*, *Supplement No. 10* (A/72/10), p. 134.

[87] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), chapter VII.

[88] See also report No. 40 of the Dutch Advisory Committee on Public International Law, dated 12 September 2022, entitled "Challenges in prosecuting the crime of aggression: jurisdiction and immunities", p. 12: "if it is accepted that the crime of aggression can be prosecuted by other States […], there seems to be no reason why the crime should be treated differently from other international crimes in respect of immunity".

aspects does not suffice to deprive it of its character as a legal question.[89] The Court has made it clear through its jurisprudence that it "cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law".[90] Luxembourg believes that analogous reasoning applies in the present context.

As for the specific requirement that the crime of aggression be a "crime of leaders", it implies that this crime will be committed on by "person[s] in a position effectively to exercise control over or to direct the political or military action of a State",[91] such as Heads of State and other State representatives at the highest level. Although this means that the prosecution of the crime of aggression by a foreign criminal court may sometimes be impossible owing to the application of personal immunity, it does not explain why such acts, which constitute one of the most serious crimes at the international level, cannot be prosecuted before foreign courts once these persons are no longer in office.

In this context, it is worth noting that, unlike personal immunity, functional immunity is not limited in time and protects against prosecution for acts performed in an official capacity even after the persons in question no longer hold the position of a State leader.

Although the Commission was unable to present convincing reasons for excluding the crime of aggression from the scope of draft article 7, there are, by contrast, strong arguments in favour of recognizing, as an element of existing customary international law, the non-applicability of functional immunity to crimes under international law, including the crime of aggression.

First, recognizing that immunity *ratione materiae* does not apply to the crime of aggression would be consistent with the purposes underlying the criminalization of a certain type of conduct directly under international law and with existing practice in respect of the non-applicability of such immunity to these crimes. Since its inception, international criminal law has provided for the absence of functional immunity for all crimes under international law. Article 7 of the 1945 Charter of the International Military Tribunal provides that "the official position of defendants […] shall not be considered as freeing them from responsibility" – a position confirmed by the Tribunal.[92] Article 27 of the Rome Statute also enshrines the irrelevance of official capacity to the exercise of criminal jurisdiction over the person concerned.

The reasoning behind this approach is that individuals have duties under international law that override their obligation to obey State law. A person who has committed an international crime cannot claim immunity on the grounds of having acted under the authority of the State, if the State, in authorizing the act, had exceeded

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[89] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 233–234, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 415, para. 27.

[90] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 415, para. 27; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 233–234, para. 13; *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57, at pp. 61–62; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p. 4, at pp. 6–7; *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, at p. 155.

[91] Rome Statute of the International Criminal Court, article 8 *bis*, paragraph 1.

[92] Judgment of 1 October 1946 of the International Military Tribunal in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22*, London, His Majesty's Stationery Office (1946–1951), p. 422.

its competence under international law. It would be puzzling, at the very least, if this line of reasoning did not apply to the crime of aggression, considered by the International Military Tribunal to be the "supreme international crime".

The most recent development in State practice is the effort to ensure accountability for the aggression by the Russian Federation against Ukraine, and this State practice is linked directly to the crime of aggression. Accordingly, this year, many States expressed support for the establishment of a special tribunal for the crime of aggression against Ukraine. They believe, at least implicitly, that the suspects would not benefit from functional immunity before such a tribunal, regardless of the model it was based on.

The inclusion of the crime of aggression in the list of crimes in draft article 7 would also be in line with the Commission's previous work, as it has always rejected the application of immunity to crimes under international law and recognized the irrelevance of official capacity for the prosecution of such crimes. Consequently, if the Commission chooses to stand by its decision to omit the crime of aggression from the scope of draft article 7, it would be departing from its position on the non-applicability of immunities to crimes under international law, at least as regards the crime of aggression.

In this context, it should also be noted that the absence of the crime of aggression in draft article 7, paragraph 1, far from reflects consensus within the Commission. Following the provisional adoption of draft article 7, a considerable number of members expressed concern that the crime of aggression had not been included among the crimes to which functional immunity does not apply.[93]

In conclusion, while the Commission has decided, for now, not to include the crime of aggression within the scope of draft article 7, Luxembourg believes that this point deserves to be re-examined, especially in the light of the written observations submitted by States. To avoid inconsistency in the treatment of crimes under international law and to reaffirm the principle of accountability for all such crimes, the Commission should confirm the non-applicability of functional immunity in proceedings relating to crimes under international law, including the crime of aggression.

Malaysia

[Original: English]

Crimes under international law in respect of which immunity *ratione materiae* shall not apply – issues of application of International Treaties to non-State parties

Draft article 7 has listed the crimes under international law which is understood to be in accordance with their definitions in the treaties enumerated in the annex to the present draft articles. Although draft article 7 provides that immunity *ratione materiae* enjoyed by the State officials from the exercise of foreign criminal jurisdiction shall not apply to crimes of genocide, war crimes, and crimes against humanity, such definitions are enumerated in the Rome Statute of the International Criminal Court, of which not all States are signatories.

The same applies to the International Convention on the Suppression and Punishment of the Crime of Apartheid and the International Convention for the Protection of All Persons from Enforced Disappearance. Thus, Malaysia requests the

[93] See *Yearbook of the International Law Commission 2017*, vol. I, 3378th meeting, pp. 266–268, paras. 60–73.

Commission to further clarify how best to apply draft article 7 in respect of such circumstances, including the possible inclusion of provisions on reservations made by States parties.

Mexico

[Original: Spanish]

With regard to the list of crimes in article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), Mexico agrees with the Commission that there is a need to contemplate how immunity from criminal jurisdiction shall apply in respect of the alleged commission of certain specific crimes.

This is because the international community has expressed particular concern about these crimes, as reflected in numerous binding and non-binding instruments, and international and domestic courts have emphasized their seriousness and reiterated that they are prohibited. Mexico also agrees that the commission of some of the crimes listed in this article may constitute a violation of peremptory norms of general international law (*jus cogens*).

Morocco

[Original: French]

In view of the crucial importance of this issue and the special attention assigned to it by the Kingdom of Morocco, a preliminary examination of this question raises the following points:

– Noting that draft article 7 sets out a category of crimes under international law in respect of which immunity *ratione materiae* shall not apply, the Kingdom of Morocco recalls its commitments at the multilateral level under legal instruments developed under the auspices of the United Nations and in line with "Geneva Law" relating to the crime of genocide, war crimes, the crime of apartheid, torture and enforced disappearance.

– It is also worth noting the potential added value of the Commission's draft articles on prevention and punishment of crimes against humanity; the question of whether a diplomatic conference should be convened is still under discussion.

– It follows from the preceding observation that the list set out in the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph 2", should be updated if the Commission or an international conference of plenipotentiaries succeeds in elaborating an international convention.

– Morocco wonders whether it would not have been appropriate to also include the Geneva Conventions, given their anteriority and universality, in the list of treaties referred to in connection with war crimes.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries support draft article 7. In their view, no rules of immunity should apply in national jurisdictions for the gravest international crimes, and it is important that genocide, crimes against humanity and war crimes are included in the enumeration. At the same time, the Nordic countries do not rule out the possibility of adding other categories of crimes to this list, nor of expanding list of treaty instruments found in the annex. Their wish to recall their commitment to the Rome

Statute of the International Criminal Court and underline the importance of harmonizing the draft articles with the Rome Statute. Regarding draft article 7, the Nordic countries also support article 14, paragraph 3. This paragraph establishes specific safeguards for the State of the official when the forum State is considering prosecution for one of the crimes enumerated in draft article 7. The purpose of paragraph 3 is to balance the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith, and the Nordic countries find that the wording of the paragraph succeeds in fulfilling this purpose.

The Nordic countries also support the approach of identifying treaty instruments that define relevant crimes in an annex.

[See also comment under draft article 14.]

Poland

[Original: English]

In this comment, Poland will limit its observations to the catalogue of crimes for which immunity does not apply (set out in draft article 7). As it stated in the Sixth Committee debate in 2022 and in 2023, Poland has doubts about the appropriateness of omitting the crime of aggression from this article. The Commission justified this decision with two arguments: first, the requirement that national courts would have to determine the existence of a prior act of aggression by the foreign State; and second, the special political dimension of this type of crime because it is committed by political leaders. We ought to be aware, however, that to a large extent the same arguments could be applied to war crimes, crimes against humanity and genocide. It is difficult to imagine that domestic courts can adjudge the responsibility of representatives of foreign States accused of having committed one of these crimes without directly or indirectly engaging the issue of a foreign State's responsibility. With respect to the second argument of the Commission, it certainly cannot be denied that declaring that a representative of another State has committed a crime has significant political implications. Both current and historical practice involving disputes between States clearly indicates that genocide, crimes against humanity and war crimes all involve substantial political dimension.

Furthermore it is to be noted that already in 2016, during the deliberations of the Commission on article 7, a significant number of Commission members were in favour of including the crime of aggression in the catalogue of crimes for which immunity does not apply[94].

Such an approach was in full conformity with the evolving discussion of the individual criminal responsibility of those perpetrating the crime of aggression against Ukraine and efforts towards establishing a potential special tribunal in this respect. Several recent statements by the group of States are based on the conviction that immunity *ratione materiae* does not apply to the crime of aggression:

– In a decision taken on 15 September 2022, the Committee of Ministers of the Council of Europe "noted with interest" the proposal submitted by Ukraine "to establish a special *ad hoc* tribunal for the crime of aggression against Ukraine"[95]. The Reykjavik Declaration from the 4th Summit of Heads of State and Government of the Council of Europe, which took place in Reykjavik on

[94] Cf. A/CN.4/SR.3328, p. 335; A/CN.4/SR.3329, p. 340–341; A/CN.4/SR.3329, p. 342; A/CN.4/SR.3331, pp. 355, 357; A/CN.4/SR.3360, pp. 8, 14; A/CN.4/SR.3361, pp. 8, 12, 14; A/CN.4/SR.3362, p. 6; A/CN.4/SR.3364, pp. 15–16.

[95] Ministers Deputies, "Consequences of the aggression of the Russian Federation against Ukraine", Decision taken at the 1442nd meeting, CM/Del/Dec(2022)/1442/2.3, 15 September 2022, para. 3.

16 and 17 May 2023, stated: "We welcome international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression as highlighted at the Summit of the Special Tribunal's Core Group chaired by President Zelenskyy (…) We call on all member States to ensure that perpetrators within their jurisdiction can be tried";[96]

– The European Council in its Conclusions of 23 March 2023 "firmly committed to ensuring full accountability for war crimes and the other most serious crimes committed in connection with Russia's war of aggression against Ukraine, including through the establishment of an appropriate mechanism for the prosecution of the crime of aggression, which is of concern to the international community as a whole."[97] In its Conclusion of 29–30 June 2023, the Council welcomed "the fact that the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) is ready to start its support operations".[98] Finally in its Conclusion of 26–27 October 2023, the European Council stated that "Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine and other most serious crimes under international law. The European Council calls for work to continue, including in the Core Group, on efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy";[99]

– More than 30 States supporting the Bucha Declaration of 31 March 2023[100] that: "Affirm that those responsible for planning, masterminding and committing the crime of aggression against Ukraine must not go unpunished"[101];

– On 18 April 2023, the G7 States declared: "We support exploring the creation of an internationalized tribunal based in Ukraine's judicial system to prosecute the crime of aggression against Ukraine";[102]

– The 18th Plenary Session of the Diplomatic Conference for the Adoption of the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes (MLA Convention)in Ljubljana on 26 May 2023 adopted the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, providing in article 6 that the Convention can be applied to conduct which is a

[96] United around our values – Reykjavik declaration (2023), p. 5: https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html.

[97] Conclusions – 23 March 2023, para. 5, https://www.consilium.europa.eu/en/press/press-releases/2023/03/23/european-council-conclusions-on-ukraine/.

[98] European Council meeting (29–30 June 2023) Conclusions, para. 7, https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf

[99] European Council meeting (26–27 October 2023) Conclusions, para. 7, https://www.consilium.europa.eu/media/67627/20241027-european-council-conclusions.pdf.

[100] https://www.president.gov.ua/en/news/povna-vidpovidalnist-ce-te-sho-privchaye-agresora-do-miru-vo-82009.

[101] https://www.president.gov.ua/en/news/buchanska-deklaraciya-shodo-vidpovidalnosti-za-najtyazhchi-z-82005.

[102] G7 Japan 2023 Foreign Ministers Communique, 18 April 2023, https://www.state.gov/g7-japan-2023-foreign-ministers-communique.

crime of aggression.[103] Fifty-three States took part in negotiating that Convention, with another 15 present as observers.[104]

All of these documents, which refer to the possibility of prosecuting perpetrators of crimes of aggression or criminal cooperation in this regard, do not provide for any exception due to the applicability of immunity for State officials. Nor do they contain any clause stipulating that States positions in question are without prejudice to the immunities of State officials under international law. Thus they constitute significant evidence of support for prosecution of the perpetrators of the crime of aggression, including before domestic courts.

Such an approach is also confirmed by the practice of individual States. For example, of the twenty-three States in the Group of Eastern European States, eighteen criminalize aggression in their penal codes.

Furthermore, reconsideration of the issue of inserting the crime of aggression into draft article 7 is also needed from a systemic perspective. Omitting this crime from the draft text would seem to exclude the right of States that fall victim to aggression to exercise jurisdiction over individuals who have committed that crime against them. Thus, there is a need to ensure that law relating to immunities of foreign officials coheres with the norms of *jus ad bellum* and *jus in bello*.

Finally, if the Commission were to decide to change the wording of draft article 7 by deleting the list of crimes and replacing it with a generally formulated rule, Poland is of the view that the provision in question should declare that functional immunity is not applicable to crimes covered by the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

Portugal

[Original: English]

At this juncture, Portugal would like to focus its comments on draft article 7, namely the need for further analysis and elaboration of the list of exceptions provided. Portugal takes this opportunity to reiterate its satisfaction with the adoption, by the Commission, of draft article 7 on international crimes for which immunity *ratione materiae* does not apply. As stated before, Portugal shares the view that the immunity should also not apply to the crime of aggression, and Portugal recommends that the Commission revise this draft article accordingly. The rationale behind the inclusion in draft article 7 of crimes such as crimes against humanity, war crimes and genocide also applies to the crime of aggression.

Indeed, Portugal firmly believes that this legally complex and politically challenging issue must be based on a very clear, limited and value-laden approach. Serving the interests of the international society means striking a balance between State sovereignty, individual rights, and the need to avoid impunity.

Therefore, there is a level of non-compliance with international law that can never be exceeded. Atrocities such as genocide, crimes against humanity, war crimes and the crime of aggression cannot simply be ignored by the operation of immunity.

[103] Ljubljana-The Hague Convention On International Cooperation In The Investigation And Prosecution Of The Crime Of Genocide, Crimes Against Humanity, War Crimes And Other International Crimes 26 May 2023, Original: English, https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf.

[104] List of Participants, MLNINF.I, 26 May 2023, Original: English, https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/List-of-Participants.pdf.

The crime of aggression, under international law, is of fundamental importance in maintaining peace, promoting global justice, and preventing the abuse of State power. By recognizing and criminalizing the illegitimate use of force between States, the international society seeks to prevent unnecessary conflicts and preserve a stable global environment. The prohibition of the crime of aggression helps to dissuade States from engaging in actions that could trigger hostilities.

Its recognition as a serious offence in international law highlights a commitment of States to justice. The inclusion of this crime within the jurisdiction of international tribunals, such as the International Criminal Court, aims to hold those who make decisions that lead to illegitimate aggression individually accountable. This reinforces the notion that no leader should be above the law.

The debate around the immunity of State officials, both within and outside the Commission, is illustrative of a broader debate on the core principles that must underpin international social relations in the face of contemporary complexities. Immunity can never exist as a privileged exception that undermines individual rights and the public order.

Romania

[Original: English]

Romania welcomes the provisions of draft article 7, which identifies the international crimes that preclude the application of immunity *ratione materiae* (also known as functional immunity). Draft article 7, as a reflection of customary international law, provides that immunity *ratione materiae* from foreign criminal jurisdiction shall not apply in respect of the core crimes of international law, i.e. the crime of genocide, crimes against humanity and war crimes.

However, draft article 7 does not include within its scope the crime of aggression, which represents, as well, a crime under international law, which at times when it occurs offers the context for the commission of other crimes under international law in respect of which as determined by the Commission the functional immunity *does not apply*.

Romania disapproves, however, of the decision *not* to include the crime of aggression among the instances that preclude the operation of functional immunity for the reasons identified below.

Romania contends that draft articles 5 and 6 correctly specify that State officials acting as such enjoy functional immunity concerning acts performed in an official capacity. Functional immunity continues to subsist after the individuals concerned have ceased to be State officials. Romania agrees that immunity *ratione materiae* applies also to Heads of State, Heads of Government, and Ministers for Foreign Affairs who are no longer in office and thus no longer enjoy personal immunity.[105]

Nevertheless, functional immunity is not absolute, and in some instances, its application can be excluded. Romania maintains that international crimes constitute such an exception to functional immunity. Extensive and uniform State practice indicates already formed customary international law in this regard. In its commentary on draft article 7, the Commission has already identified numerous cases where domestic courts have repeatedly ruled that there is no immunity *ratione materiae* for persons who have committed international crimes.[106] Furthermore, State

[105] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), para. 68, draft articles 3, 4 and 6, paragraph 3.

[106] Ibid., paragraph (9) of the commentary to draft article 7, footnote 1012.

practice in this regard is not limited solely to judicial decisions. Some States, as the Commission has already pointed out, have included in their domestic legislation the non-applicability of functional immunity in relation to international crimes.[107] This tendency is also reflected in the literature and the judgments of international tribunals.[108]

Having established that the exception for international crimes is of a customary nature, Romania asserts that the crime of aggression should also be in the list of crimes for which no such immunity applies.

The Commission decided not to include the crime of aggression, "in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime, given that it constitutes a 'crime of leaders'."[109]

Regarding the point that the crime of aggression has a special political dimension, it is important to acknowledge that all international crimes might possess such a political dimension, especially when committed in an official capacity. While international crimes can certainly be committed as private acts, they are most often committed in an official capacity. The individuals responsible for these crimes, acting from a leadership position, use State institutions, such as the military or police, to carry out these acts. Moreover, in certain cases, international law itself requires the special status of the perpetrator, i.e. that the acts be committed by officials. Such is the case with the Convention Against Torture, which stipulates that "the term 'torture' means any act […] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[110]

Hence, Romania argues that a "political dimension" is inevitable when it comes to international crimes, and this should not bar the crime of aggression from being included in draft article 7, as an exception from the operation of immunity *ratione materiae.*

As for the argument that the national courts would be required to determine the existence of a prior act of aggression by the foreign State, Romania would like to argue again that this may be the case with other international crime. In the case of crimes against humanity, for example, a national court may be required to determine the existence of a State policy to carry out a systematic or widespread attack on the civilian population. Similarly, when focusing on an alleged genocide, courts may have to consider the State policy in order to prove the special intent to commit genocide.

Additionally, it is worth noting that the Commission itself referred to the crime of aggression in its past works. For instance, in the Draft Code of Crimes against the Peace and Security of Mankind,[111] as well as in the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.[112]

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[107] Ibid., footnote 1013.

[108] Ibid., footnote 1014.

[109] Ibid., paragraph (21) of the commentary to draft article 7.

[110] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85, article 1.

[111] Article 16 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind provides that "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."

[112] Principle III of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal states that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

The Nuremberg Tribunal considered the crime of aggression the "supreme international crime"[113] and found that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law."[114]

National courts have also excluded the operation of functional immunity in relation to international crimes, in cases such as the one against *Eichmann*.[115] More recent practice on this matter can be observed in the case law of the International Criminal Tribunal for the former Yugoslavia,[116] and in the inclusion of the crime of aggression in the Rome Statute of the International Criminal Court.[117]

It is for the above-mentioned reasons that Romania considers that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction does not apply in respect of the crime of aggression, and that the crime of aggression should therefore be added to the international crimes listed in draft article 7.

Alternatively, if the Commission decides not to add the crime of aggression, Romania would favour a more general wording which mentions that functional immunity does not apply in respect of international crimes, without listing said crimes.

Russian Federation

[Original: Russian]

The Russian Federation has repeatedly stated its position on this draft article. Draft article 7 does not reflect customary rules of international law. Nor does it constitute progressive development of international law in a desirable direction.

It is a matter of particular regret that the Commission adopted draft article 7 by vote. This circumstance itself demonstrates that the draft article constitutes neither codification of existing rules nor universally supported progressive development. This is also evidenced by the diversity of views of States in the Sixth Committee.

Russia fully supports the arguments of those members of the Commission who voted against draft article 7, as set out in paragraph (12) of the commentary. (Here, tribute should be paid to the Commission for the fact that, having adopted draft article 7 by vote, it considered it necessary to set out in detail in the commentary the position not only of the majority but also of the minority.)

It should be emphasized in particular that the examples of judicial decisions and legislative acts included in the commentary (paragraph (9) and footnotes 1012, 1013

[113] Judgment of 1 October 1946 of the International Military Tribunal in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22*, London, His Majesty's Stationery Office (1946–1951), p. 421.

[114] Ibid., p. 447.

[115] *Attorney-General of the Government of Israel* v. *Eichmann*, Judgement of the Supreme Court of Israel.

[116] *Prosecutor* v. *Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997, Appeals Chamber, Case No. IT-95-14, 29 October 1997, para. 41; *Prosecutor* v. *Karadžić et al.*, Decision on the application by the Prosecution for a formal request for deferral by the government of Bosnia and Herzegovina of its investigations and criminal proceedings in relation to Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber, Case No. IT-95-5-D, 16 May 1995, para. 23–24; *Prosecutor* v. *Milošević*, Decision on preliminary motions, Trial Chamber, Case No. IT-02-54, 8 November 2001, paras. 26–34.

[117] 1998 Rome Statute of the International Criminal Court (last amended 2010), art. 8 *bis*.

and 1014) by no means demonstrate the existence of a "trend" towards recognition of exceptions to immunity:

– These decisions and laws come from a small number of States, almost exclusively Western States. In the remaining regions of the world there is no such "trend"; demonstrating this by means of examples of judicial decisions might be difficult, for the simple reason that, if the rules on immunity are correctly applied, a case does not usually reach the stage of a judicial decision at all. In the West, too, national judicial practice in this regard is inconsistent (see footnote 1015).

– All the cases presented involve the State concerned attempting not to recognize the immunity of foreign officials from its own jurisdiction. There is no more reason to consider these cases a "trend" towards exceptions to immunity than there is to consider them violations of the rules of international law on immunity. Judicial decisions and laws in which the State waived the immunity of its own officials from foreign jurisdiction would carry significantly more weight.

In attempting to formulate and justify exceptions to immunity as ostensibly arising from the need for harmonized application of the system of international law as a whole, that is, in attempting to present these exceptions as a purely legal phenomenon, the Commission repeatedly makes essentially political and, moreover, inconsistent arguments, thereby illustrating the artificiality of the entire construct of exceptions:

– Specifically, the main argument in favour of exceptions is the fact that they concern the most serious crimes under international law, in respect of which the entire international community has an interest in preventing impunity. However, in paragraph (21) of the commentary, the Commission justifies its decision not to include the crime of aggression among those crimes in respect of which there is an exception to immunity on the basis of purely political considerations, contrary to the position of a number of members of the Commission, who have characterized the crime of aggression as the most serious of all international crimes. As a result, in the case of genocide, apartheid, torture, etc., the seriousness of the crime is considered by the Commission to be grounds for not recognizing immunity, whereas in the case of aggression it is grounds for recognizing it.

– The political considerations presented in the commentary in relation to the crime of aggression are also fully applicable to the other serious international crimes: an accusation against a foreign official of genocide, apartheid, torture and so on, has no less a "political dimension" than an accusation of aggression. In footnote 1031, it is recognized that the determination by a national court that another State has committed an act of aggression would violate the principle of the sovereign equality of States. The same can be said at least for genocide and apartheid, and indeed, in general, an attempt to prosecute a foreign official violates the sovereign equality of States. This is precisely where the phenomenon of immunity itself arises.

– The commentary contains no legal arguments that exceptions should not apply to the "troika" of senior officials. This conclusion, too, was obviously reached by the Commission for solely political reasons, which highlights the weakness of the legal argument about the integrity of the international legal system.

– In the commentary to paragraph 3 of draft article 14, the Commission acknowledges that the application of draft article 7 may have a significant impact on the political relations between States (paragraph (15)) and that draft article 7 opens the door to "politically motivated or improper use of exceptions

to immunity". On the basis of this argument (which in itself should be an argument against draft article 7), the Commission advances a purely political requirement: that the question of immunity be considered at "an appropriately high level". Yet immunity is a legal rather than a political category. The forum State should not be given the "right" to "grant" immunity to a foreign official, especially not on the basis of political considerations. However, in the commentary it is expressly stated that the determination should be made by "authorities [that] have sufficiently high-level decision-making power".

– In addition, in draft article 14, paragraph 3 (b) (ii), the application of exceptions to immunity is dependent on whether any other State is exercising jurisdiction over the same crime. Yet such a fact cannot have anything to do with the existence or absence of immunity. In paragraph (26) of the commentary to draft article 14, this approach is justified by the desire to avoid a "conflict between respect for immunity and establishment of criminal responsibility". In this way, a political factor is again brought to bear in resolving a legal issue.

The artificiality of the grounds for exceptions to immunity is also demonstrated by the fact that, in order to justify those grounds, the Commission attempts to present such crimes as torture, corruption and a number of others as acts performed in a private capacity. It is quite obvious that such crimes can be committed solely in the performance of duties of officials, which means that they are acts performed in an official capacity (see also above in the context of draft article 2 (b)).

The Russian Federation believes that attempts by some States to prosecute officials of other States for the commission of the most serious crimes under international law are the best illustration of the very raison d'être of immunity. All such cases have led to strained political relations between States, and not one of them can be seriously considered an important step towards the prevention of impunity. Charging a foreign official with a serious international crime is in itself an infringement of the sovereign equality of States. Such a charge also interferes with the normal exercise by the official of his or her duties, not least because of the reputational damage caused by the charge. Furthermore, allowing exceptions to immunity would mean giving unscrupulous States significant leeway to exert pressure on foreign officials under the threat of being accused of a serious crime. Lastly, there is no logic in prohibiting States from charging foreign officials with relatively minor offences if they are allowed to charge them with the most serious crimes.

The international community has yet to develop effective mechanisms to prevent impunity for the most serious crimes under international law. The practice of recent decades shows that neither so-called "universal jurisdiction" nor international criminal justice constitute such mechanisms. In many cases, attempts to exercise national or international jurisdiction in violation of the immunity of officials have served only to prolong conflicts, thereby only exacerbating people's suffering.

It is impermissible for a State to commit wrongful acts that constitute crimes under international law. However, the Russian Federation believes that mechanisms of accountability for such acts should remain primarily in the realm of inter-State relations. The waiver by States of the immunity of their officials or the prosecution by States themselves of their own officials can only be welcomed. However, attempts by individual States to hold officials of foreign States individually criminally responsible without the consent of those States are a bad-faith and improper substitution for the international legal responsibility of the State.

On the basis of the foregoing, the Russian Federation insists on the deletion of draft article 7 from the draft articles.

This does not prevent individual States from unilaterally waiving the immunity of their officials, whether in connection with specific acts or in general, including on a reciprocal basis in relations with other States that take a similar decision. Such unilateral acts or bilateral arrangements cannot impose any obligations on third States or limit their rights to the immunity of their officials.

Lastly, paragraph (27) of the commentary to draft article 7 refers to the case in which a crime is committed by a foreign official who is present in the territory of the State exercising jurisdiction without the consent of that State. Russia agrees that such crimes are not covered by immunity and proposes that this be recorded in the draft articles, as suggested by both Special Rapporteurs.

Given the fundamental position of the Russian Federation on the deletion of draft article 7, comments on the annex seem unnecessary.

[See also comment under general comments.]

Saudi Arabia

[Original: Arabic]

[T]he Kingdom of Saudi Arabia expresses reservations regarding draft article 7, on crimes under international law in respect of which immunity *ratione materiae* shall not apply. The definitions of such crimes are still under discussion in the Sixth Committee. Moreover, these crimes are defined in international treaties to which not all States are parties. Accordingly, there is no international consensus with regard to such crimes. In addition, these crimes are not defined in the domestic laws of all Member States. This could open the door to an expanded interpretation of these crimes and thus lead to an increase in arbitrary accusations against officials of foreign States, creating serious tensions in international relations.

Singapore

[Original: English]

Singapore notes that draft article 7 has been the subject of much debate in both the Commission and the Sixth Committee. The debate reflected different positions held by members of the Commission as well as member States on whether limitations and exceptions to immunity *ratione materiae* exist under customary international law. The differences in views may be seen in the Commission's adoption of draft article 7 by vote.

Singapore shares the belief that the most serious crimes under international law should not be allowed to be committed with impunity. However, the view of Singapore is that it remains tenuous to conclude that there exists a discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of the specified list of crimes under international law. The body of case law, national legislation and treaty law that may be relied upon to illustrate such a trend under international law remains limited and unconvincing. Singapore notes that this observation was shared by a number of members in the Commission.[118]

Singapore agrees with what some members of the Commission have pointed out, that is, that most national laws do not even regulate immunity *ratione materiae* of State officials, and that none of the relevant treaties addressing the specified crimes

[118] See Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraphs (12) and (20) to (23) of the commentary to draft article 7. See also ibid., footnote 1015.

preclude immunity *ratione materiae* of State officials from foreign criminal jurisdiction.[119]

There also remains insufficient State practice or jurisprudence to support a proposition that exceptions to immunity of State officials exist under international law for the specified list of crimes, or that there is a trend towards such exceptions to immunity.

The fundamental principle underlying the granting of immunity is sovereign equality of States. The purpose behind conferring immunity to State officials lies not in the granting of personal benefit but in ensuring the officials' ability to represent their States or to exercise State functions, thereby protecting the rights and interests of the States.[120] State-to-State interactions require a clear, predictable framework. Therefore, there needs to be caution in the creation of exceptions to immunity when these are not backed by sufficient, uniform State practice.

For the reasons stated above, draft article 7 should not be included as a draft article.

Switzerland

[Original: French]

Switzerland supports draft article 7, which excludes the application of immunity *ratione materiae* to certain crimes under international law. However, it is of the view that the crime of aggression must be included in the list of crimes under international law to which immunity *ratione materiae* does not apply.

Switzerland notes that the Commission "has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them".[121] In the light of these criteria, Switzerland notes the following:

The crime of aggression is indisputably one of the most serious crimes of concern to the international community. The general prohibition on the use of force is one of the most fundamental rules of relations between States and is enshrined in the Charter of the United Nations.[122] The prohibition of aggression is a peremptory norm of general international law, recognized as a *jus cogens* norm.[123] The unjustified use of force often leads to very serious acts in its wake, such as war crimes or crimes against humanity. In a war of aggression, aggression is, by its very nature, the crime that gives rise to all other crimes.

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[119] Ibid., footnotes 1016 and 1017.

[120] Ibid., paragraph (5) of the general commentary.

[121] Ibid., paragraph (11) of the commentary to draft article 7.

[122] Charter of the United Nations, Article 2, paragraph 4.

[123] *Jus cogens* comprises peremptory norms of customary international law that must be respected in all circumstances. Such norms are universally applicable and are hierarchically superior to other rules of international law. Any treaty or another legal act that contradicts *jus cogens* is null and void.

The prohibition of aggression is recognized as a norm of *jus cogens* in the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the International Law Commission at its seventy-third session in 2022.

The international community has expressed particular concern about the crime of aggression for many years. The condemnation and prosecution of this crime – referred to at the time as a "crime against peace" – dates back to the Nuremberg trials.[124] From the outset, the International Military Tribunal held that defendants could not use the fact of their official positions to free themselves from responsibility.[125] The Commission reaffirmed the principles of individual criminal responsibility and the irrelevance of official capacity in the case of a crime of aggression in its draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996.

The crime of aggression is now one of the four international crimes covered by the Rome Statute, and the International Criminal Court has jurisdiction to prosecute and adjudicate it. As with the other crimes covered by the Rome Statute, immunities do not constitute an obstacle to criminal prosecution by the Court.[126] The criminalization of aggression under the Rome Statute is aimed at ensuring greater respect for the prohibition on the use of force by making it possible to bring to justice those who have violated it, even if they are at the highest level of government. It underscores the binding force of the prohibition on the use of force in relations between States, makes it possible to punish those guilty of breaches in this respect, and contributes through its deterrent effect to the prevention of acts of aggression and their repercussions on those affected. Many States have ratified the amendment to the Rome Statute on the crime of aggression (Kampala amendments) and have laws criminalizing aggression.[127] In Switzerland, the transposition into national legislation of the crime of aggression as defined in the Rome Statute is currently under review.[128]

Switzerland also calls on the Commission to review recent developments in the practice and *opinio juris* of States following military aggression by the Russian Federation against Ukraine. The mandate of the Commission is the codification and progressive development of international law. It must also take into account and maintain the progress made by the international community in recent decades in the fight against impunity for the most serious crimes under international law, including the crime of aggression.

In view of the above, Switzerland strongly recommends that the crime of aggression be added to the list of crimes under international law in draft article 7.

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[124] Charter of the International Military Tribunal (London, 8 August 1945), article 6: "The Tribunal […] shall have the power to try and punish persons who […], whether as individuals or as members of organisations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

[125] Charter of the International Military Tribunal, article 7: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

[126] See Rome Statute of the International Criminal Court, article 27, paragraph 2.

[127] Some of the States that have ratified the Kampala amendments have transposed the definition as it appears in the Rome Statute into their domestic law. Other States already had laws criminalizing the crime of aggression that overlapped with the amendment of the Rome Statute. Still other States, which have not yet ratified the amendment to the Rome Statute, already have laws criminalizing aggression.

[128] The Swiss Federal Council has been tasked with elaborating and submitting to the Swiss Parliament a draft bill on incorporating the crime of aggression into the Swiss Penal Code and the Military Penal Code.

Ukraine

[Original: English]

In June 2022 the International Law Commission adopted on first reading the draft articles on immunity of State officials from foreign criminal jurisdiction. The topic holds fundamental importance to the prosecution of crimes under international law as it addresses the relationship between those crimes and immunity from foreign prosecution. In that regard, the Commission adopted draft article 7, which provides for exceptions to immunity *ratione materiae* (also known as functional immunity). Draft article 7 accurately reflects customary international law insofar as it embodies the non-applicability of immunity *ratione materiae* to the crime of genocide, crimes against humanity and war crimes. But draft article 7, as currently drafted, fails to include the crime of aggression into the list of crimes to which functional immunity does not apply.

As stated in the commentary to draft article 7, the main reason for the inclusion of the relevant crimes in the scope of the provision was that those "are the crimes of the greatest concern to the international community as whole" and "are included in article 5 of the Rome Statute"[129]. Inconsistently with this reasoning, however, the Commission decided to exclude the crime of aggression from the list of crimes of draft article 7.

The Commission justified this decision when provisionally adopted draft article 7 in 2017, by asserting in the commentary to said provision that (i) the International Criminal Court's jurisdiction over the crime of aggression had yet to be activated; (ii) as a leadership crime, the crime of aggression involved a political dimension; (iii) and that the inapplicability of functional immunity to the crime of aggression would "require national courts to determine the existence of a prior act of aggression by a foreign State"[130]. However, none of those arguments convincingly explains the distinction made to the application of functional immunity to the crime of aggression as opposed to other crimes under international law.

Firstly, the jurisdiction of the International Criminal Court over the crime of aggression has now been activated for over five years, fact that had been recognized by the Commission through the deletion of the aforementioned argument from the commentary to draft article 7 during the adoption of the draft articles on first reading. However, no modifications to the scope of the provision followed the activation of the jurisdiction over the crime of aggression by the Court.

Secondly, although it is true that the crime of aggression involves a political dimension, the same assertion can be made in relation to any crime under international law. Those crimes are often, if not typically committed by State officials, and in all those cases, the proceedings will likely involve a political dimension. Whereas this may warrant the establishment of procedural safeguards for the prosecution by national jurisdictions of crimes under international law committed by State officials, it does not justify sustaining the application of functional immunities to the commitment of those crimes. In that regard, it should be noted that the Commission dedicated the last 5 years prior to the adoption of the draft articles on first reading to the elaboration of a detailed set of provisional safeguards relating to immunity, including a specific safeguard to draft article 7, with the purpose of avoiding politically or abusive exercise of jurisdiction over State officials.

As for the leadership requirement of the crime aggression, this entails that the commitment of this crime will be restricted to individuals who are "in a position effectively to exercise control over or to direct the political or military action of a

[129] *Yearbook of the International Law Commission*, 2017, vol. II (Part Two), p. 127, para. 17.
[130] Ibid., para. 18.

State"[131], such as Heads of State and other State officials of the highest level. While this means that the prosecution of the crime of aggression by foreign criminal jurisdiction may sometimes not be possible due to the application of personal immunity, it does not explain why such acts, which constitute one of the most serious crimes of international concern, shall be barred from prosecution before foreign jurisdictions, after those individuals are no longer in office. In this context, it is worth recalling that contrary to personal immunity, functional immunity does not have a temporal limit, protecting acts performed in an official capacity from prosecution even after the individuals no longer occupy an official position. Therefore, upholding functional immunity from foreign criminal jurisdiction in foreign proceedings for the crime of aggression would effectively mean that the prosecution of this crime would be possible *only* before international criminal tribunals. Given the jurisdictional restrictions and the invariably limited capacity of such courts, permitting the application of immunity *ratione materiae* to the crime of aggression before national jurisdictions would often lead to a gap in the prosecution of this crime, allowing perpetrators to go unpunished.

Regarding the concern that the absence of functional immunity over the crime of aggression may lead to a situation where national courts have to evaluate the legality of the use of force by another State, it must again be emphasized that such a possibility is by no means a special feature of the crime of aggression. To the contrary, it has often been the case and will often be the case in the future, that national courts, in order to answer preliminary questions in the context of proceedings for genocide, crimes against humanity or war crimes, will reach conclusions on the legality of State conduct, such as conclusions on the genocidal policy of a State or a State policy to carry out a systematic or widespread attack on civilian population. Court findings on the State conduct element for the crime of aggression are essentially of the same character.

Whereas the Commission was thus unable to present compelling reasons to exclude the crime of aggression from the scope of draft article 7, there are strong arguments in favour of recognizing – as a matter of existing customary international law – the non-applicability of functional immunity to crimes under international law, including the crime of aggression.

To recognize the absence of immunity *ratione materiae* in relation to the crime of aggression would be in conformity with the teleology behind the criminalization of a certain type of conduct directly under international law and the practice concerning the inapplicability of immunity to those crimes. Since its early stages, international criminal law has provided for the absence of functional immunities in respect to all crimes under international law. A key precedent in that regard is the Nuremberg Charter and the findings of the Nuremberg Tribunal. Article 7 of the 1945 London Charter stated that the "official position of defendants […] shall not be considered as freeing them from responsibility". The principle enshrined in the Charter was endorsed by the Nuremberg Tribunal which further declared that "[t]he principle of International Law, which under certain circumstances protects the representatives of State, cannot be applied to acts which are condemned as criminal by International Law". […] [I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law."[132] As for the crime of aggression, here designated as crime against peace, the Nuremberg Tribunal considered it to be the "supreme international

[131] Rome Statute, article 8 *bis* (1).

[132] Judgment of 1 October 1946 of the International Military Tribunal in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22*, London, His Majesty's Stationery Office (1946–1951), p. 448.

crime". [133] The Nuremberg Judgment's legacy regarding the inapplicability of functional immunity to proceedings for crimes under international law was not confined to international proceedings but was couched in general terms and hence pertained to domestic proceedings as well.

The Nuremberg precedent on the inapplicability of functional immunity in proceedings for crimes under international law, including the crime of aggression, was confirmed in 1946 by the adoption by the United Nations General Assembly of a resolution on the "affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal"[134]. In 1948, the Tokyo Tribunal followed the same approach of its predecessor, applying the principle of irrelevance of the official position to the prosecution of crimes under international law.

Since then, there have been numerous other proceedings both before national and international courts for crimes under international law. Although most cases did not directly relate to the crime of aggression, they further added to the body of precedents confirming that, in conformity with the basic idea underlying the very concept of criminality under international law, there is no functional immunity for the commission of crimes under international law, including the crime of aggression.

In 1962, in the case against Eichmann, the Supreme Court of Israel rejected functional immunity for crimes under international law by stating that those who commit such heinous crimes "cannot seek shelter behind the official character of their task or mission"[135]. Grounded in the Nuremberg precedent, which it considered to have already become "part parcel of the law of nations"[136], the Supreme Court upheld that the "Act of State theory" could not be used as a defence in respect to crimes under international law.

The International Criminal Tribunal for the former Yugoslavia has also emphatically rejected the application of immunity *ratione materiae* to crimes under international law through its case law. In the *Blaškić* judgement of 1997, the Appeals Chamber of the Tribunal recognized an exception to immunity arising from the norms of international criminal law. According to this exception functional immunity cannot be invoked before *national* or international jurisdiction for crimes under international law, even if the perpetrators had acted in their official capacity. [137] This view was confirmed by decisions issued in other cases before the Tribunal, such as the *Karadžić* case,[138] the *Milošević* case,[139] to cite a few. In the latter case, when pronouncing on the validity of article 7, paragraph 2, of the Statute of the Tribunal – which determined the irrelevance of the defender's official position for purposes of criminal accountability – the Trial Chamber categorically affirmed that said provision reflected

[133] Ibid., p. 422.

[134] General Assembly resolution 95 (I), "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal".

[135] *Attorney-General of the Government of Israel v. Eichmann*, Record of Proceedings in the Supreme Court of Israel, Appeal session 7, p. 29.

[136] Ibid., p. 31.

[137] *Prosecutor v. Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997, Appeals Chamber, Case No. IT-95-14, 29 October 1997, para. 41.

[138] *Prosecutor v. Karadžić et al.*, Decision on the application by the Prosecution for a formal request for deferral by the Government of Bosnia and Herzegovina of its investigations and criminal proceedings in relation to Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber, Case No. IT-95-5-D, 16 May 1995, paras. 23–24.

[139] *Prosecutor* v. *Milošević*, Decision on preliminary motions, Trial Chamber, Case No. IT-02-54, 8 November 2001, paras. 26–34.

a rule of customary international law which traced back to the emergence of the doctrine of individual criminal responsibility under international law.[140]

In 2019, the International Criminal Court also concluded for the inexistence of immunity for crimes under international law in the Jordan Appeals Judgment in the *Al Bashir* case. Although the findings of the Appeals Judgement refer mostly to the application of immunity before an international court, the judges also reflected on some foundational questions related to immunity. For instance, in their joint concurring opinion to the decision, judges Eboe-Osuji, Morrison, Hofmański and Bossa recognized that the inquiry regarding limitation to immunity involved the reconciliation of certain interests within international law, particularly the stability of international relations, on one hand, and ensuring that such stability is not reached by means of impunity, on the other hand. Before engaging in an exercise of resolving the conflict between those interests, the judges made it clear that their considerations on the matter at hand did not concern a multitude of ordinary crimes, but rather "violations of the most serious crimes known to international law", namely genocide, crimes against humanity, war crimes and the crime of aggression,[141] without distinction.

The case law reviewed above, unequivocally supports the view that, as a matter of customary international law, State officials do not enjoy functional immunity for crimes under international law and that no differentiation in that regard shall be made in respect to the crime of aggression.

The most recent addition to the relevant body of State practice consists of the accountability efforts with respect to Russia's war of aggression against Ukraine and this practice of States directly relates to the crime of aggression. In the past year, numerous States have supported the establishment of a Special Tribunal for the crime of aggression against Ukraine. Hereby, – at least by implication – the view is taken that Russian suspects would not enjoy functional immunity before such a tribunal no matter which model will be used for its establishment.

The inclusion of the crime of aggression in the list of crimes of draft article 7 would also be in conformity with the previous work of the Commission. In the past, the Commission has consistently rejected the application of immunity to crimes under international law. Principle III, of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the Commission, reaffirmed article 7 of the Nuremberg Charter, by determining that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve them from responsibility under international law". Similarly, draft article 3 of the 1954 Code of Offenses against the Peace and Security of Mankind and draft article 7 of the 1996 Code of Crimes Against Peace and Security of Mankind, both recognized the irrelevance of the official position for the prosecution of crimes under international law.

Therefore, if the Commission chooses to maintain its decision to omit the crime of aggression from the scope of draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, it will be deviating from its historical position regarding the inapplicability of immunities to crimes under international law, at least in respect to the crime of aggression. Yet, there has been no substantial changes in international law since the adoption of the 1996 Code of Crimes that would justify this shift in the Commission's position.

In this context, it is worth noting that the absence of the crime of aggression from paragraph 1 of draft article 7 was a matter of disagreement within the Commission. Following the provisional adoption of draft article 7 in 2017, a

[140] Ibid., para. 28.

[141] *Prosecutor* v. *Al Bashir*, Joint Concurring Opinion, Jordan Appeals Judgment, ICC-02/05-01/09-397-Corr. OA 2, 6 May 2019, para. 196.

considerable number of members expressed concerns that the crime of aggression had not been included among the crimes to which functional immunity does not apply. One member[142] compellingly argued that to permit the application of immunity to the crime of aggression while, at the same time, excluding its application to the crimes of genocide, war crimes and crimes against humanity would risk undermining the Kampala Amendments and creating an unjustifiable hierarchy between the crimes provided for in article 5 of the Rome Statute.

Such is also the position widely held in international legal scholarship, including most recently, a statement issued by the Dutch Advisory Committee on Public International law.[143]

While the Commission has for the time being decided not to include the crime of aggression within the scope of draft article 7, this remains a point in special need of reconsideration, including in view of the written comments of States. In order to avoid a serious inconsistency in the treatment of crimes under international law and in order to confirm the principle of accountability for all crimes under international law, the International Law Commission must confirm the inapplicability of functional immunity in proceedings for crimes under international law, without exception and hence encompassing the crime of aggression. The crime of aggression must therefore be included in the list of draft article 7.

United Arab Emirates

[Original: English]

Limitations and exceptions to immunity *ratione materiae* under draft article 7 are not an emerging customary rule, let alone one that is ripe for progressive development

The Commission's approach has overwhelmingly favoured the inductive, teleological method, contrary to both the position initially taken by the second Special Rapporteur,[144] and to the Commission's assertion that "it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method".[145]

The United Arab Emirates maintains that draft article 7 has no foundation under customary international law and urges the Commission to revise this provision, if not delete it. The use of flawed methodologies adopted by the Commission, such as decontextualization and cherry-picking of State practice (as raised by some Commission members)[146] complicates, rather than facilitates, the codification and progressive development of the law on immunities.

[142] *Yearbook of the International Law Commission*, 2017, vol. I, 3362nd meeting, p. 130.

[143] Advisory Committee on Public International Law (CAVV), Challenges in prosecuting the crime of aggression: jurisdiction and immunities, Advisory report No. 40, 12 September 2022, pp. 11–12.

[144] "No theoretical argument, personal preference or ideology could replace practice. On the contrary, practice was the necessary starting point for any rigorous study capable of facilitating the formulation of proposals for codification and progressive development" A/CN.4/SR.3360, p. 4 (Escobar Hernández).

[145] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (11) of the commentary to draft article 7.

[146] This faulty methodology was criticized by several Commission members. For instance, Mr. Nolte during the 3331st meeting of the Commission, *Yearbook of the International Law Commission 2016*, vol. I, 3331st meeting, paras. 15–22, Mr. Hassouna during the 3361st meeting of the Commission, ibid., *2017*, vol. I, 3361st meeting, and Mr. Murphy during the 3362nd meeting, ibid., 3362nd meeting.

A. There is insufficient State practice supporting the existence of limitations and exceptions to immunity *ratione materiae*

i. There is no "trend" denying immunity ratione materiae in case of international crimes

The commentary confirms that the Commission considers that a "discernible trend" exists in relation to the non-application of immunity *ratione materiae* in respect of certain international crimes.[147] However, the commentary points to limited case law[148] and national legislation,[149] which together supposedly evince the existence of such a "trend", though it goes on to provide several "disclaimers" in relation to the case law cited, thereby diminishing its authoritative weight. In this vein, a number of members of the Commission argued that the second Special Rapporteur had failed to substantiate her premise, notably because of the paucity of decisions,[150] which the Special Rapporteur herself had conceded.[151]

The terminology employed by the Commission in this regard bears no meaning or significance. In the view of the United Arab Emirates, the assertion of a "trend" unfortunately carries no legal implication and represents an ambiguous threshold for the purposes of identifying areas appropriate for progressive development, and an entirely inappropriate one for the existence of a customary rule. In this regard, the commentary fairly and accurately reflects the position of some members, expressed during the debates, that draft article 7 does not embody customary international law,[152] which the United Arab Emirates also endorses.

In addition, the United Arab Emirates believes that progressive development requires the Commission first to establish that there has occurred a *notable* evolution of the law, resulting in ripeness for further development. It is not of the view that this is the case for limitations and exceptions to immunity *ratione materiae*.

Further, the United Arab Emirates is concerned that the Commission places excessive emphasis on the decision of the United Kingdom House of Lords in *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* to justify foreign officials being denied immunity in case of international crimes or violations of *jus cogens*.

As pointed out by one Commission member,[153] the analysis followed by the court in *Pinochet No.3* was strictly carried out in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Notably, in the *Jurisdictional Immunities* case, the International Court of Justice had been careful not to seek to draw conclusions from the *Pinochet* case.[154] The United Arab Emirates wholeheartedly disagrees with the approach and analysis of the Commission

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[147] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (9) of the commentary to draft article 7.

[148] Ibid., footnote 1012.

[149] Ibid., footnote 1013.

[150] For instance, A/CN.4/SR.3362, pp. 4–5 (Murphy); A/CN.4/SR.3361, p. 8 (Kolodkin).

[151] Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction, *Yearbook of the International Law Commission 2016*, vol. II (Part One), document A/CN.4/701, para. 220.

[152] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (12) of the commentary to draft article 7, footnotes 1015–1017.

[153] *Yearbook of the International Law Commission 2012*, vol. I, 3145th meeting, p. 121, para. 49 (Wood).

[154] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 at pp. 137–138.

in this regard. Beyond erroneously interpreting this judgement, the Commission jeopardizes the principle of *pacta sunt servanda*, and erodes State sovereignty, by seeking to extend the binding character of a decision rooted in a treaty, to States which are not a party to it.

Despite the position of the United Arab Emirates that draft article 7 does not constitute a customary rule, a position shared by the majority of States addressing this issue, if the Commission insists on including the divisive draft article 7, the Commission must unequivocally specify that such a provision constitutes a proposal for progressive development (or, a proposal for a new rule of law). States and their national courts, as well international courts and tribunals, should not be misled into considering that such an unprecedented legal provision as draft article 7, absent a disclaimer it is a proposal for progressive development, has crystallized into customary international law. In this regard, the United Arab Emirates would be unable, regrettably, to support a General Assembly resolution that welcomes the draft articles absent this essential clarification for draft article 7. The United Arab Emirates believes that the matters covered in the draft articles should be addressed in a convention agreed by States.

ii. Civil cases and legislation also do not support the existence of such a "trend"

The Commission found it acceptable to look to civil cases in order to draw conclusions applicable in the criminal context. In the words of the second Special Rapporteur, "rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, mutatis mutandis, to immunity invoked in the context of criminal jurisdiction".[155] The Special Rapporteur's reliance upon, and reference to, civil cases is mistaken and unwelcome for at least three reasons:

a. It ignores the fundamental difference between the natures of civil and criminal matters.

b. It obviates the fact that the overwhelming majority of decisions rendered by international and national courts in the context of civil proceedings have rejected the existence of exceptions or limitations to immunity in respect of the tortious counterparts of international crimes.

c. Even if one were to accept the relevance of the practice in civil proceedings, it provides no support to the argument for additional exceptions to immunity. The only exception found in national legislation governing State immunity is the so-called territorial tort exception, the history of which relates to insurable traffic road accidents occurring in the forum State.

iii. The selection of crimes under draft article 7 is arbitrary

The United Arab Emirates objects to the list of crimes under draft article 7 on the basis that their selection was arbitrary. The second Special Rapporteur operated on the basis of her own subjective assessment that certain crimes were seemingly automatically eligible to be included in draft article 7. Having identified a first category of crimes, including "piracy, drug trafficking, human trafficking, corruption and other forms of international organized crime", the Special Rapporteur posited the existence of a second category, including "the crime of genocide, crimes against humanity, war crimes, the crime of aggression, torture, enforced disappearance and apartheid", and observed without further explanation:

[155] Concepción Escobar Hernández, Special Rapporteur, Second report on the immunity of State officials from foreign criminal jurisdiction, *Yearbook of the International Law Commission 2013*, vol. II (Part One), document A/CN.4/661, para. 24.

"Although both categories generally consist of crimes that undermine the values and interests of States and the international community, only the latter category can, strictly speaking, be considered to constitute "international crimes" or "crimes under international law" that undermine the fundamental legal values of the international community as a whole".[156]

The reasoning adopted in the commentary also exposes the Commission's lack of even-handedness in selecting international crimes. For instance, despite its inclusion in draft article 7, the Commission does not provide a citation to any judicial decision relating to immunity from jurisdiction in cases of enforced disappearance. The Commission's approach with regard to the selection of crimes under draft article 7 is simply that of a legislative body; it threatens to destabilize State relations if domestic courts were so inclined to follow it as *lex lata*.

Against this backdrop, it remains unclear to the United Arab Emirates how or why the prohibition of slavery, which has been recognized as a norm of *jus cogens* in the work of the Commission, and was included among the examples of rules creating *erga omnes* obligations by the International Court of Justice, does not meet the Commission's proposed threshold.[157] The commentary rejects the inclusion of the prohibition on slavery in the list of crimes in draft article 7, alluding to the "transnational" nature of the crime.[158] In this regard, the United Arab Emirates notes that even if, arguably, the prohibition on slavery, was a transnational crime at the time of its inception, its universal character is well-established in the modern world.

B. The reference to international criminal law and conventions dealing with other "international crimes" is inapposite

As reflected in the commentary,[159] the current formulation of draft article 7 rests also on an acritical analysis of the current status of international criminal law, and in particular the Rome Statute, and other conventions concerning "international crimes". The United Arab Emirates strongly believes that any consideration of the specific mechanism concerning immunities resulting from the Rome Statute and the relevant State parties' implementation thereof should not be considered by the draft Articles, as expressly provided for in draft article 1, paragraph 3. It should also be excluded for the simple reason that it would affect non-parties to the Rome Statute. They are irrelevant for any normative determination in respect of the existence of exceptions to immunity *ratione materiae* vis-à-vis foreign domestic courts.

With respect to international criminal law, the Commission has debated *ad nauseam* the relevance of developments in these spheres for the topic of immunities of State officials from foreign criminal jurisdiction. The United Arab Emirates wishes to stress that the two subjects are not as inter-related as the Commission suggests. As much is clear from their titles: one is concerned with *international* jurisdiction while the other is limited to *domestic* jurisdiction. International criminal courts and tribunals set up to adjudicate international crimes are the result of the *consent* of specific States or of action by the Security Council under Chapter VII of the Charter

[156] Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction, *Yearbook of the International Law Commission 2016*, vol. II (Part One), document A/CN.4/701, para. 219.

[157] *Barcelona Traction, Light and Power Company, Limited*, *Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34.

[158] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (23) of the commentary to draft article 7.

[159] Ibid., paragraphs (18)–(22) of the commentary to draft article 7.

of the United Nations to provide mechanisms for the prosecution of certain international crimes at the international level.

More specifically, the majority of the Commission imbued these debates with a focus on the International Criminal Court and the Rome Statute as implemented (or not) by the States party thereto. The fact that the commentary refers to national legislation implementing the Rome Statute in support of the purported "trend" towards limitation of *ratione materiae* immunities is indicative that such debates affected the overall formulation of draft article 7.[160]

First, the International Criminal Court is an international tribunal. The application of immunity in this context is not transposable to domestic criminal jurisdictions. Their respective natures are fundamentally distinct, the most obvious difference being that there is no question of State sovereignty before an international tribunal, where States opt to adhere to such a type of judicial system, in contrast to foreign domestic jurisdiction. As the Appeals Chamber of the International Criminal Court noted, "the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court."[161]

Second, the International Criminal Court is established by a treaty. Any right or obligation stemming from such a treaty is confined to *inter partes* relations and cannot affect non-States parties. In particular, State practice stemming from the obligations to cooperate with the Court, in the context of the Rome Statute, cannot define, still less erase, the normative framework in place between States. In this context, the United Arab Emirates notes that several comments submitted to the Commission by States parties to the Court (including Germany, Japan, France, the United Kingdom, Australia) take the view that draft article 7 does not reflect State practice or customary international law.[162] These positions further illustrate the logical disconnect between the rights and obligations stemming from the Rome Statute and those pertaining to relations between States under customary international law.

These considerations align with draft article 1, paragraph 3, which, in clarifying that the "draft articles do not affect *the rights and obligations of States Parties* under international agreements establishing international courts and tribunals" (emphasis added), recognizes their "separation and independence" from the "special legal regimes" of international criminal jurisdictions.[163] Nonetheless, this principled approach is plainly contradicted by draft article 7 and its commentary which rely on the State practice implementing those "special legal regimes" to assess the scope and

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[160] Ibid., paragraph (9) of the commentary to draft article 7, footnote 1013, referring to Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso; Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute; Ireland, International Criminal Court Act 2006; Mauritius, International Criminal Court Act 2001; South Africa, Implementation of the Rome Statute of the International Criminal Court Act.

[161] International Criminal Court, *Situation in Darfur, Prosecutor v. Omar Hassan Ahmad al-Bashir*, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019 (*Bashir* Appeal Judgment), para. 115.

[162] A/C.6/72/SR.22, para. 98 (Australia). See also A/C.6/66/SR.20, para. 43 (France); A/C.6/72/SR.23, para. 43 (France); A/C.6/71/SR.28, para. 29 (United Kingdom); A/C.6/72/SR.24, paras. 57–61 (United Kingdom); A/C.6/71/SR.29, paras. 90 (Japan) and 102 (Israel); A/C.6/72/SR.24, paras. 33 (Belarus), 64 (Islamic Republic of Iran) and 91 (Germany).

[163] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (22) of the commentary to draft article 1.

applicability of the immunities *ratione materiae* before foreign criminal jurisdictions.[164]

Further, the reference to international conventions requiring States to criminalize apartheid, torture and enforced disappearance likewise seems unhelpful and inapposite to support the existence of relevant exceptions to immunity *ratione materiae* as articulated in draft article 7.[165] The considerations that these conventions impose obligations to prevent, suppress and punish these crimes or establish systems of horizontal international cooperation and judicial assistance between States do not in themselves support the conclusion that functional immunities do not apply in domestic proceedings concerning such crimes.[166]

Despite such obligations, these treaties do not provide for the removal of immunities or even touch upon immunities at all. They also do not include any safeguards necessary to preclude the possibility that the "exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive".[167]

The silence of these instruments concerning the applicability of immunities cannot be construed to imply that States have renounced an important sovereign prerogative by default. This is especially the case given that some of these instruments were adopted at a time when there was no real debate or question concerning the scope of functional immunities.[168] Accordingly, the only conclusion is that customary international law was not affected,[169] and the issue falls to be addressed in conjunction with applicable domestic law, if any.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Accountability and the fight against impunity is a key priority for the United Kingdom, particularly in respect of the most serious international crimes. Therefore, the United Kingdom has previously welcomed the Commission's consideration of possible limitations to immunity *ratione materiae*.[170] This is particularly germane given developments in the international law relating to certain serious international crimes, including the development of universal jurisdiction or of extradite or prosecute regimes.

The United Kingdom notes that the version of paragraph 1 of draft article 7 adopted by the Commission at first reading states that "immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: *(a)* crime of genocide, *(b)* crimes against humanity, *(c)* war crimes, *(d)* crime of apartheid, *(e)* torture and *(f)* enforced disappearance"; paragraph 2 also ties the meaning of those crimes – and so the scope of the proposed exception – to specific named treaties enumerated in an annex to the draft articles.

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[164] Ibid., paragraph (9) of the commentary to draft article 7.

[165] Ibid., paragraphs (22)–(23) of the commentary to draft article 7.

[166] Ibid., paragraph (23) of the commentary to draft article 7.

[167] Ibid., paragraph (9) of the general commentary.

[168] The International Convention on the Suppression and Punishment of the Crime of Apartheid has been adopted on 30 November 1973; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been adopted on 10 December 1984.

[169] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 25, para. 59.

[170] The United Kingdom agrees with the Commission that the current state of international law allows for no exceptions to immunity *ratione personae* (other than by way of waiver).

The commentary to draft article 7 provides some helpful background on the debates and discussions surrounding this proposal, including the continued division amongst members of the Commission and the diversity of views amongst States. Nevertheless, it is not clear from the commentary the basis on which the Commission has decided to frame the provision in this way. In particular, the Commission has not articulated the criteria which it used to decide which international crimes to include and which to exclude from its proposal.

The United Kingdom notes that the treaties listed in the annex cover a wide range of criminal acts and that there is no clearly discernible norm which ties them together. Moreover, not all of those treaties have been universally adopted by States. The United Kingdom also recognises that international criminal law continues to develop, particularly through the practice of States, and that the future direction of the law continues to be actively discussed by the international community, not least in the context of the Sixth Committee's important work reviewing the Commission's draft articles on prevention and punishment of crimes against humanity. Therefore, it would have been preferable if the Commission had adopted a more targeted approach looking at the specific practice and law applicable to each of the crimes rather than making a generic proposal.

In this regard, the United Kingdom recalls the decision of its then highest court, the Appellate Committee of the House of Lords, in the *Pinochet* case; a case which related to the immunity *ratione materiae* of a former Head of State in respect of alleged torture and which has been specifically highlighted both in the Special Rapporteurs' reports and in the commentary adopted by the Commission. In that case, the House of Lords identified two specific provisions of the United Nations Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment which – as a matter of treaty law – constituted *lex specialis* for those States which had ratified the Convention and which led to their finding that immunity *ratione materiae* was not available. First, article 1 of the Convention requires that the pain or suffering contributing to the act of torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"; this suggests that the acts giving rise to the crime of torture are largely co-extensive with the acts performed in an official capacity to which Part Three of these draft articles would otherwise accord immunity *ratione materiae*. Second, article 5 of the Convention expressly obliges States Party to establish jurisdiction when an alleged offender is present in their territory and is not extradited. The effect of these obligations was such that – as a matter of treaty law – any immunity *ratione materiae* available under general international law would be displaced or "waived". The United Kingdom, however, is not aware of similar reasoning in judgments in respect of other treaties which require the criminalisation of certain conduct and the assertion of extra-territorial jurisdiction.

The United Kingdom would encourage the Commission to engage with these questions and the challenges inherent in the current text of the Commission's proposal and the methodology it used, and reflect on how best to approach this issue in future iterations of its work. The positions of States – both developments in their practice and their views on *opinio juris* – are crucial to ascertaining the current state, and understanding the possible future shape, of international law. Therefore, the United Kingdom urges the Commission carefully and comprehensively to review the full range of views expressed by States both in Sixth Committee and in the comments and observations submitted to the Secretary General on these draft articles, and ensure that those views – as well as practical examples of State practice in respect of specific crimes – are reflected in any future proposal for this draft article and its commentary.

The United Kingdom welcomes the Commission's explanation at paragraph (27) of the commentary in respect of crimes committed by a foreign official in the territory

of the forum State without that State's consent, neither to the official's presence in its territory nor to the activity carried out by the official which gave rise to the commission of the crime.

United States of America

[Original: English]

The United States' longstanding concerns with draft article 7 remain. Fundamentally, draft article 7 is not supported by widespread and consistent State practice and *opinio juris* and, as a result, it does not reflect customary international law. Although State officials may not enjoy functional immunity in certain circumstances, draft article 7 creates the false impression that the non-applicability of immunity for international crimes is sufficiently established in State practice such that it forms per se rules under customary international law – and it simply does not. The United States reiterates its belief that the Commission should work by consensus on this difficult topic given the serious issues it implicates and the importance of State practice. Such consensus has not been achieved, and the United States does not agree that the Commission chose the correct path in adopting draft article 7 despite the many serious concerns expressed.

The commentary purports to root draft article 7 in a "discernible trend" in judicial decisions of national courts and national legislation, but the text does not make clear that these examples are not equivalent to a widespread and consistent State practice and *opinio juris* and accordingly do not establish customary international law.[171] Of the examples cited in the commentary, the large majority are from European States, with little representation of other regions. State practice is especially limited in this area because there is little visibility into criminal investigations that do not result in prosecutions brought by national authorities either due to immunity or for other reasons, and case law is exceedingly sparse. In 2010, the then-Special Rapporteur concluded in his second report that it was "impossible to assert definitively that there is a trend toward the establishment of such a norm."[172] This uncertainty underscores the need for this critical issue to be revisited and reconsidered under the auspices of the new Special Rapporteur.

Moreover, certain examples of State practice included in the commentary stretch the meaning of the law beyond its proper application. To highlight one example, the commentary observes that "in rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes."[173] To support this assertion, the commentary cites to the terrorism exception of the Foreign Sovereign Immunities Act of the United States and its nexus to acts of torture and extrajudicial killing.[174] However, unlike the sovereign immunity statutes of some States, the Act addresses only the jurisdictional immunity of foreign *States* in United States courts

[171] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (9) of the commentary to draft article 7.

[172] Roman Anatolevich Kolodkin, Special Rapporteur, Second report on immunity of State officials from foreign criminal jurisdiction, *Yearbook of the International Law Commission 2010*, vol. II (Part One), document A/CN.4/631, p. 425, para. 90.

[173] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (9) of the commentary to draft article 7.

[174] Ibid., footnote 1013; 28 U.S.C. § 1605A.

in civil matters and not the functional immunity of foreign government *officials in criminal cases*.[175]

The United States has also adopted the extraterritorial criminal torture statute and War Crimes Act, consistent with United States obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Convention of 1949, respectively.[176] Neither statute addresses or explicitly abrogates the functional immunity of foreign officials. Any such prosecution in the future would be addressed by prosecutors and courts on a case – and fact-specific basis rather than by application of a categorical rule denying immunity.

The commentary also cites to implementing legislation for the Rome Statute, which is inapposite. As draft article 1 paragraph 3 provides, any rules arising from the Rome Statute only operate as among Rome Statute Parties. The lack of adequate State practice contributes directly to the lack of consensus for draft article 7, which was punctuated by the controversial split vote in 2017 that advanced the provisional adoption of draft article 7.

In addition to further consideration of the limited available State practice (and implications of otherwise unavailable State practice), Draft article 7 requires additional review with respect to the legal basis for any exceptions to functional immunity. While draft article 7 states that functional immunity will not apply to certain crimes under international law, it does not explain why. Without a clear and broadly supported rationale, the draft article lacks a persuasive explanation and justification for the inclusion and exclusion of crimes in the exception. The commentary acknowledges that the Commission has sidestepped the question of whether any of the enumerated international crimes could be performed in an official capacity within the meaning of draft article 2 *(b)* because it has identified practice and doctrine reflecting different interpretations as to whether the inapplicability of functional immunity is explained by an absence of immunity or an exception to immunity.[177] As mentioned in the United States comments to draft article 2, this divergence adds to the uncertainty about what is or is not an act taken in an official capacity and fuels confusion about the fundamental basis of the rules the draft articles purport to codify. Whatever the rationale for any purported exception to functional immunity, the United States agrees that there is no such exception to personal immunity.

The confusion surrounding what legal basis supports draft article 7 extends to additional crimes, not included in the text of the draft article but identified in the commentary. For example, the commentary states that the omission of corruption from the enumerated list of crimes does not imply that immunity would apply. The explanation provided is that the crime of corruption could not be considered an official act, though the commentary also notes the alternative view that it is the official's status that makes the crime possible.[178]

Consensus on these significant, unresolved matters is not only important to enhance the utility of the draft articles to States but also is necessary to avoid the destabilization of foreign relations. In considering whether further restrictions on immunity were "desirable," the Special Rapporteur's 2010 report recalled "the need

[175] *Samantar v. Yousuf*, 560 U.S. 305 (2010).

[176] 18 U.S.C. § 2340A and § 2441.

[177] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paras. (14)–(15) of the commentary to draft article 7.

[178] Ibid., paragraph (26) of the commentary to draft article 7.

to avoid impairing friendly international relations."[179] The draft articles should be careful with the ways in which they will touch on and propose to supplement the exercise of domestic criminal jurisdiction. The United States is deeply concerned that draft article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to draft article 7 as reflective of existing international law, which it in fact is not. The development of law in this sensitive area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology and even-handed assessment of evidence. As detailed above, draft article 7 risks creating the false impression that the Commission is codifying customary international law rather than proposing progressive development of the law, it rests on limited State practice, and it lacks a clear and broadly supported legal rationale.

Finally, none of these comments should be understood to undercut the United States' support for holding accountable those responsible for international crimes. The United States agrees that there must not be impunity for international crimes. Immunity does not mean impunity, however.[180] In the United States, and in many other States, determinations of the applicability of immunity from criminal prosecution are fact-intensive and specific to each case. Furthermore, there is the possibility of waiver or prosecution in an appropriate domestic or international court of such crimes depending upon the specific facts and circumstances. Immunity from a foreign State's criminal jurisdiction can be critical to a State's exercise of its own criminal jurisdiction over its officials and the effective administration of its system of accountability. The United States urges the Commission to give these concerns careful consideration and revisit its work on draft article 7.

Part Four – Procedural provisions and safeguards

Australia

[Original: English]

Australia recalls that, since the provisional adoption of draft article 7 by the Commission in 2017, the Commission has adopted procedural safeguards in draft articles 8 *ante*, 8, 9, 10, 11 and 12. Australia welcomes steps towards the development of procedural safeguards as an important means to protect State officials from any unsubstantiated and politically-motivated prosecutions in third States.

In the view of Australia, however, further procedural safeguards are necessary. Australia considers that, in cases of competing claims of jurisdiction, the State of nationality or the State in whose territory the criminal conduct was alleged to have occurred shall have primary responsibility over third States to investigate and prosecute any alleged serious international crimes, but must do so in a genuine and independent manner. Further, any exception or limitation to functional immunity should not displace a relevant agreement or arrangement between the forum State and the State of nationality, which gives the latter primary jurisdiction over its officials deployed overseas, in order to allow the State of nationality to conduct its own genuine investigation and prosecution.

[179] Roman Anatolevich Kolodkin, Special Rapporteur, Second report on immunity of State officials from foreign criminal jurisdiction, *Yearbook of the International Law Commission 2010*, vol. II (Part One), document A/CN.4/631, p. 425, para. 91 (quoting *AU-EU Expert Report on the Principle of Universal Jurisdiction*, No. 8672/1/09 REV 1, at para. 46 (Apr. 16, 2009) (R6 and R8)).

[180] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at p. 25, para. 60.

Brazil

[Original: English]

[See comment under draft article 9.]

Czech Republic

[Original: English]

The Czech Republic would like to express its doubts concerning certain aspects of the concept and content of Part Four of the draft articles containing "procedural provisions and safeguards". First, the Czech Republic would like to point out that, as a rule, the immunity *ratione personae* becomes relevant as soon as a foreign State official enjoying this type of immunity is affected by the exercise of criminal jurisdiction of another State. On the other hand, immunity *ratione materiae* applies only when the acts of the foreign State official performed in his official capacity (and thus covered by this type of immunity) become the subject-matter of the proceedings before foreign courts. Therefore, in the vast majority of cases, foreign State officials enjoying immunity *ratione materiae* may be fully subject to the criminal jurisdiction of foreign States without any immunity being relevant and applicable. In the opinion of the Czech Republic, this fact does not seem to be taken fully into account in the procedural draft provisions.

Therefore, the Czech Republic suggests that the draft might differentiate between the "procedural provisions and safeguards" relevant in case of the immunity *ratione personae* of State officials on the one hand, and those relevant in case of the immunity *ratione materiae* on the other hand. Alternatively, the Commission might amend relevant draft provisions of draft article 8 et seq. so that these provisions expressly refer to the fact that they become applicable only when the immunity of a State official of another State may be affected in a given case.

In general, the existing practice of States with respect to procedural aspects of the immunity of State officials from foreign criminal jurisdiction is based on national laws on criminal procedure and treaties regulating international judicial cooperation and mutual legal assistance in criminal matters. In the opinion of the Czech Republic, this is the most appropriate framework for dealing with the issue of immunities under international law, since such laws and treaties form the basis for communication and cooperation of States in criminal matters including these cases. Therefore, the Czech Republic does not expect the Commission to formulate new, additional procedural international law obligations and does not regard the treaty form as an appropriate outcome of the work on this topic. The Czech Republic suggests that the draft provisions on procedural aspects of the immunity of State officials from foreign criminal jurisdiction should rather take the non-binding form of procedural recommendations or good practices, which the States could take into account in their dealing with the issue of the immunity of State officials from foreign criminal jurisdiction.

Germany

[Original: English]

Germany welcomes the introduction of procedural safeguards. In particular, regarding any exceptions to immunity of State officials *ratione materiae* recognized under international law it is important to ensure that these are not misused by States for ulterior political purposes. The provisions and safeguards in Part Four may, in that sense, help to strike a balance between the conflicting interests underlying cases of State officials' immunities, i.e. between the interest of the forum State in prosecuting

criminal wrongs committed by a State official on the one hand and the mutual respect for sovereign equality of States on the other hand.

At the same time, to Germany the draft articles on procedural provisions and safeguards (Part Four) seem to constitute, for the most part, propositions of what the law ought to be rather than provisions firmly grounded in the practice of States. Germany however believes that the provisions provide a useful starting point for harmonizing the application of the law on immunity by States and their domestic courts. The Commission might therefore consider speaking rather of "guidelines" than "articles" in order to reflect properly the status of the provisions contained in Part Four.

Ireland

[Original: English]

Ireland finds useful many of the provisions set out in Part Four of the draft articles, both in assisting States in the application of the substantive rules set out in Parts Two and Three and also in helping to avoid possible abuse or politicisation of the exercise of criminal jurisdiction by one State over an official of another State. Nevertheless, unless the Commission intends to transmit the draft articles to States as a basis for the negotiation of a future treaty, in the view of Ireland Part Four would be more appropriately expressed as guidelines rather than draft articles.

As regards the possible addition of the crime of aggression to any list of crimes for which immunity *ratione materiae* does not apply, in the view of Ireland Part Four provides a location to address concerns relating to the political dimension of this crime. Guidance to national courts that they establish that either the United Nations Security Council or the General Assembly have determined that an act of aggression has taken place could be inserted here. Establishing that such a determination has been made would provide a strong basis for a national court to determine in turn that the crime of aggression has been committed and that immunity *ratione materiae* does not apply.

Ireland also supports the content of draft article 14 which would establish important safeguards where a State is considering prosecution for one of the crimes enumerated in draft article 7. In particular, Ireland supports draft article 14, paragraph 3, which aims to reduce the risk of politicisation and misuse of draft article 7 while also ensuring that effect can be given to that draft article and that its use in good faith is not prevented. An important element of this paragraph is the need for any determinations regarding immunity to be made by authorities at an appropriately high level.

Israel

[Original: English]

[See comment under draft article 11.]

Malaysia

[Original: English]

Application of the procedural aspect and safeguards of the draft articles in light of the significant distinction between the two types of immunity, namely immunity *ratione personae* and immunity *ratione materiae*

It is noted that there is a lack of an international framework on the procedural aspects of State or diplomatic immunity. Hence, the Commission should be commended for the efforts to develop these draft articles.

Further analysis of draft article 9 found that the provision concerns the obligation to examine the question of immunity from criminal jurisdiction when the authorities of the forum State exercise criminal jurisdiction over an official of another State.

Based on the commentary on this particular draft article, it is noted that the phrase "examination of immunity" is interpreted as "measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of an official of another State",[181] and that this "examination", "is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies".[182]

To that end, it is understood that the examination process is completed upon the determination of the immunity of a foreign State official (as provided for in draft article 14) and as such, the Commission has stated that the "examination" and "determination" of immunity are distinct categories although closely related.

It is observed that paragraph 2 of draft article 9 provides for two specific conditions that the forum State shall adhere to in examining the question of immunity, namely "before initiating criminal proceedings", and "before taking coercive measures that may affect an official of another State". In this regard, there seems to be an overlap of these two conditions in paragraph 4 of draft article 14 (Determination of Immunity) though it is noted that in the latter provision, there is an exception to the types of coercive actions that may not be taken. Thus, it is recommended for the Commission to provide further clarity in distinguishing the manner in which both these provisions are to be read.

In any event, it can be surmised from both draft articles 9 and 14, that "examination of immunity" is merely indicating the earliest possible point in time of a procedure that may affect a foreign official. One of the possible effects of this procedure is that the competent authorities must be aware that a given procedure could affect a foreign official who may enjoy protection against certain measures of criminal enforcement by virtue of his or her immunity. This will regularly include the start of the investigation on the factual basis of a claim to immunity. In addition, the authorities should be aware that they may have to proceed to notify the State of the official and be attentive to an invocation of immunity.[183]

On the other hand, "determination of immunity" may be understood to mean a final establishment of the facts concerning the pre-conditions of immunity which will then be followed by a decision of whether or not a State official enjoys the said immunity. It can also be argued that the main difference between these two procedures is the required threshold of established evidence regarding the pre-condition of immunity. As such, it must be stressed that the ability of States and their respective competent authorities to draw a distinction between the processes is crucial in view of the investigation process that would be key in proving the factual basis of a claim of immunity, particularly immunity *ratione materiae* i.e. whether a crime was committed as an act in an official capacity.

Moreover, since the core principle of these draft articles concerns the basic right to liberty of a person, time is also an important factor in ascertaining the other

[181] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), p. 245.

[182] Ibid.

[183] Isabel Walther, "The Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction – Comments on the Procedural Safeguards Provisionally Adopted in 2021", KFG Working Paper Series No. 54 (March 2022).

elements in the determination of authority such as the notification to the State of the official, invocation or waiver of immunity, and any other relevant information. In this regard, it would be useful for the Commission to further expand on the discussion considering the commentaries on draft articles 9 and 14 do not discuss at length on the said issue.

On a different note, it is also observed that the operation of draft articles 9, 11 (Invocation of Immunity), and 14 could be very much dependent on the type of immunity involved whether it is *ratione materiae* or *ratione personae.* It is argued that while the procedural provisions and safeguards under Part Four are applicable to both types of immunity by virtue of draft article 8 (which does not indicate any distinction between the two types of immunity), in practice, the relevant procedures for both these types of immunity are different.

For example, with regard to paragraph 2 *(b)* of draft article 9 on the taking of coercive measure by a forum State, the provision does not make clear that for cases in relation to *ratione personae,* the authorities must immediately determine the existence of the immunity and hence, all constraining measures against the official are prohibited.

On the contrary, the procedure will be substantially different in cases involving immunity *ratione materiae* in the sense that the authorities may proceed with the exercise of the criminal jurisdiction as long as the State of the official has not invoked such immunity. The competent authorities may not, however, take final or irreversible measures of constraint which would render the possibility of such invocation ineffective; for instance, forced public auction, destruction of property or documents, or execution of capital punishment or death penalty.[184]

This can be inferred from the commentary of the International Law Commission for draft article 14, particularly for paragraph 4 *(b)* as follows: [185]

> "However, paragraph 4 *(b)* of draft article 14 adds a new sentence stating that the fact that immunity must always be determined before coercive measures can be taken against a foreign official '*does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official'*. This clause strikes a balance between the interests of the State of the official, represented by the determination of immunity at a procedurally appropriate time, and the interests of the forum State, represented by the retention of the power to take such coercive measures as are necessary to ensure that, should the forum State subsequently be able to exercise criminal jurisdiction over the foreign official, this will not be impossible in practice. *The coercive measures that could be adopted or continued will therefore be measures of a precautionary nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities*. The retention of the power to adopt and continue such coercive measures even after immunity has been determined is justified, in particular, *by the fact that the determination may be made at an early stage of the exercise of jurisdiction and then be reversed at a later stage, especially in the judicial phase*."

It is observed that draft article 14 again does not draw a distinction between the two different types of immunity. Nevertheless, one should also refer to the applicable

[184] Ibid.

[185] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), p. 271.

principle on the invocation of immunity wherein in the seventh report (2019) of the Special Rapporteur, the following remarks were made:[186]

> "52. In short, given the elements examined so far, one can conclude that separate rules should apply in this case to immunity *ratione personae* and immunity *ratione materiae*. Thus, *while in the case of immunity* ratione personae *the immunity of State officials from foreign criminal jurisdiction should be appraised and assessed* proprio motu *by the competent authorities of the forum State, in the case of immunity ratione materiae, the authorities will only have to appraise and assess the applicability of immunity when it is invoked expressly by the State of the official.* This is the same position that had been taken by the former Special Rapporteur, Mr. Kolodkin.
>
> 53. Based on this approach, which calls for differentiated treatment between immunity *ratione personae* and immunity *ratione materiae*, one should conclude that invocation takes on special significance in the case of immunity *ratione materiae*, although this does not rule out the possibility of the State of the official – for various reasons – also invoking the immunity of its Head of State, Head of Government or Minister for Foreign Affairs from criminal jurisdiction. In any event, it is worth noting that the differentiated treatment between immunity *ratione personae* and immunity *ratione materiae* requires that the State of the official be aware of the intention of the authorities of the forum State to exercise any form of jurisdiction over one of its officials, since absent such awareness, the requirement for the State of the official to invoke immunity *ratione materiae* would become impossible to meet …"

Reference to draft article 11 on invocation of immunity is therefore unavoidable. Based on the text of draft article 11, similar to draft article 9 and draft article 14, no distinction was made to the procedure of invoking the two different types of immunity by the State of the official. Looking at the interrelation of these draft articles, it can be summarised that their application is dependent on each other and that there is a need for Commission to a provide clear and coherent explanation on the application of these procedural provisions vis-à-vis the two different types of immunity mentioned.

Mexico

[Original: Spanish]

Mexico considers the content of Part Four, entitled "Procedural provisions and safeguards", to be highly pertinent and relevant. In particular, the provisions contained in article 10 (Notification to the State of the official) could be extremely useful for interpretation and the general practice of States regarding the methods of notification or service to be used in judicial proceedings against States or State officials.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries place a high premium on adequate procedural safeguards to avoid politicization and abuse of the exercise of criminal jurisdiction with respect to foreign officials. Only by robust mechanisms based on the rule of law, will foreign officials be protected against politically motivated or otherwise illegitimate

[186] Concepción Escobar Hernández, Special Rapporteur, Seventh report on immunity of State officials from foreign criminal jurisdiction, document A/CN.4/729.

proceedings. The Nordic countries appreciate the efforts of the Commission to address the particular issue of procedural safeguards as part of its overall consideration of the procedural aspects of the draft articles and welcome the inclusion of Part Four to the draft articles.

Various procedural aspects of importance have been reflected in Part Four of the draft articles, including various procedural steps, requirements on notification and exchange of information, invocation and waiver of immunity, and cooperation between the involved States, as well as procedural rights of the official. Important in this respect are the draft rules regarding a flexible mechanism for consultations and settlement of disputes. The Nordic countries also very much welcome that the right of the State official to benefit from all fair treatment guarantees is thoroughly recognized. It is also crucial that the draft articles take into account the broad variations that exist in national legal systems, inter alia regarding the role of the judiciary and the executive and prosecutorial authorities, and endeavor to ensure that the draft articles are practicable under different circumstances.

As to draft article 8, the Nordic countries find it useful to include an introductory clause on the application of Part Four. It could be considered, however, if the term "shall be applicable in relation to any exercise of criminal jurisdiction" is sufficiently broad and accurate in the context of this article. The procedural provisions and steps of Part Four will be applicable long before the forum State will start to "exercise criminal jurisdiction". Several of the provisions of Part Four will apply already from the very moment where an instance involving an official of another State occurs. The actions prescribed in article 9 commence "when the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction". Likewise, the actions prescribed in article 10 commence "Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State". The term "to any exercise of criminal jurisdiction" does hence not encompass the initial phase of assessments and steps before the forum State determines to exercise its criminal jurisdiction. The final part of the article seems to try to expand the scope of the article somewhat, stating "including to the determination", but several steps of this part occur even before such determination. This problem is apparently discussed in the commentaries paragraphs (2)–(6) related to draft article 7, and also commented on more broadly in paragraph 7. The discussions of the commentaries may seemingly have been resolved by choosing a different term than "shall be applicable in relation to any exercise of criminal jurisdiction", and what is more important, a different term would be a more logical starting point for the rule set out in article 8. A possible wording of the term might be "be applicable in any instance that may involve the exercise" or the like. The Nordic countries would therefore welcome further deliberations on the wording of this particular term.

Saudi Arabia

[Original: Arabic]

[T]he Kingdom of Saudi Arabia supports the conditions for the exercise of jurisdiction by the forum State over the official of a foreign State that were proposed by some members and set out in the seventh report of the Special Rapporteur at the seventy-first session (A/74/10). Some of those proposals have been addressed in the draft articles. The Kingdom reaffirms that the forum State, when exercising its jurisdiction over the official of a foreign State, should:

(a) [Ensure that] the evidence that the official committed the alleged crime is absolutely conclusive;

(b) Endeavour to transfer the proceedings to the courts of the State of the official before exercising jurisdiction.

[See also comments under draft articles 9, 11 and 13]

Switzerland

[Original: French]

[See comment under draft article 10.]

United Arab Emirates

[Original: English]

Procedural provisions and safeguards do not reflect customary international law

Part Four of the draft articles on procedural provisions and safeguards is without any foundation under customary international law. There exist a number of serious flaws in Part Four, which the Commission should consider deleting or substantially revising.

As a preliminary point, the United Arab Emirates notes that the drafting of Part Four appears to have benefitted from much less attention than other parts of the draft articles. The debates within the Commission unfortunately did not focus on these issues with as much vigour as they did regarding the controversial draft article 7 though they are, precisely, supposed to counterbalance those exceptions and give assurances to States that limitations and exceptions are to be considered with extreme caution. That being said, the United Arab Emirates believes that Part Four does not cure the defects of draft article 7.

Given the opposition to draft article 7, it would have been desirable for the Commission to have devoted the same amount of scrutiny to the proposed procedural safeguards as it did limitations and exceptions to immunity. The overall impression resulting from Part Four is that it has been largely cobbled together with provisions inspired by related treaties which nonetheless do not substantially contribute to the refinement of that section. In particular, the United Arab Emirates does not find in draft Part Four any indication of careful consideration by the Commission of specific and targeted safeguards that would mitigate against abuses of a sensitive and complex provision such as draft article 7.

For instance, draft article 13 concerning "requests for information" from either the forum State or the State of the official does not serve any purpose. In practice, States share information on these issues, or they do not, and would use diplomatic channels to do so.

The United Arab Emirates submits the same comment regarding draft article 16 relating to the fair treatment of the official. One would think that, regardless of whether the individual is a foreign official potentially benefitting from immunity *ratione materiae*, any foreign citizen would be entitled to those protections and there should be no need to include them.

Consideration should be made by the Commission to substantially amend the provisions concerning examination (draft article 9) and determination (draft article 14), which introduce more ambiguity than clarity to a highly complex aspect of the immunity regime.

In particular, the wholesale application of Part Four, including draft articles 9 and 14, to cases of immunity *ratione materiae* and immunity *ratione personae*, without distinction, risks fostering substantial abuse. For example, the Commission when noting

that the forum State may apply coercive measures of a "precautionary nature" before determination of immunity pursuant to draft article 14, paragraph 4 *(b)*, does not distinguish between cases of immunity *ratione personae* and immunity *ratione materiae*.

In practice, quite different procedures will take place depending on which of the two immunities is in question. In the case of immunity *ratione personae*, the examination and determination may take place simultaneously and may not be factually distinguishable. There is little clue in the text and the commentary on this matter.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom is grateful to the Commission for the attention that it has given to making proposals for the procedural provisions and safeguards contained in Part Four. The policy rationale for some procedural provisions and safeguards regulating the issue of immunity is clear; however, it is not so clear that the provisions proposed by the Commission constitute existing rules of customary international law evidenced in extensive State practice and *opinio juris*. It is noteworthy that relevant treaties which codify special rules of international law relating to immunity do not include detailed procedural provisions beyond providing for waiver; and the commentaries accompanying the draft articles in Part Four identify few examples of positive State practice. The United Kingdom encourages the Commission to provide further information and clarity on this point.

The United Kingdom notes that general procedural provisions are likely to have significant practical implications for national authorities and encourages the Commission to take full account of the observations of States to ensure that any final version of these draft articles respects, and is capable of application across, diverse national legal systems. In the United Kingdom, for example, although the Government is responsible for the conduct of international affairs, including factual matters of recognition or status, determinations based on that factual status as to whether a person enjoys immunity, the scope and extent of that immunity or ultimately the effect of that immunity are matters of law for the courts, which are wholly independent of the Government.

United States of America

[Original: English]

With respect to Part Four, the United States notes with concern that these eleven draft articles now make up the bulk of the draft articles but neither represent a codification of customary international law nor reflect progressive development of the law. They are recommendations for new rules. The United States questions the utility of this approach where there is scant State practice and other, more developed areas of immunity law, such as diplomatic immunity, do not contain analogous procedural provisions. The Commission and former Special Rapporteur have acknowledged that these procedural safeguards were belatedly included to address concerns over the highly controversial draft article 7,[187] which only serves to underscore the lack of an adequate grounding for these new provisions.

[187] See Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (35) of the commentary to draft article 2, paragraph (2) of the commentary to draft article 7; Concepción Escobar Hernández, Special Rapporteur, Seventh report on immunity of State officials from foreign criminal jurisdiction, document A/CN.4/729, para. 104.

The United States would prefer to avoid drawing conclusions concerning procedural obligations that do not yet reflect a consistent pattern of State practice. State practice is especially limited in this area because there is little visibility into criminal investigations that do not result in prosecutions brought by national authorities either due to immunity or for other reasons, and case law is exceedingly sparse. Rather than focus on specific domestic procedures, which might vary significantly according to the criminal law of each State, it may be prudent to consider any relevant international standards and the need for a State to apply principles of immunity consistently across the various organs of its government. This approach would also decrease the risk of interference with existing State processes.

The United States reiterates its belief that the Commission should thoroughly review Parts One through Three in light of all of the concerns raised during the course of the previous Special Rapporteur's work as well as by these comments and the comments of other States. A deeper review on the contours and underlying rationales for Parts One through Three, with an emphasis on clarity and consensus, should be the first priority of the Commission when it resumes its work on this project. The need or desirability of retaining some of Part Four would be better assessed after that review. The Commission may consider moving Part Four to a separate annex that could serve as a resource for States without unnecessarily broadening the scope of the draft articles from the international law of personal and functional immunity of State officials from criminal jurisdiction. In the spirit of engagement with the project, however, the United States offers the following reflections on the eleven draft articles that make up Part Four.

8. Draft article 8 – Application of Part Four

France

[Original: French]

France believes that the text of draft article 8 could be refined. It notes that the Commission has adopted a general formulation in order to include, within the scope of Part Four, the exceptions provided for in draft article 7. However, this more general formulation makes the text of the draft article cumbersome and difficult to understand.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands is of the view that the wording of draft article 8 should be further delimited. It should be made clear in this draft article that the procedural rules and safeguards in Part Four of the draft articles do not apply when a current or former State official who enjoys functional immunity is suspected of committing a crime in a private capacity. As it stands, draft article 8 gives the impression that Part Four applies to all exercises of jurisdiction over crimes committed by foreign State officials, current and former.

Malaysia

[Original: English]

[See comment under Part Four.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment under Part Four.]

Russian Federation

[Original: Russian]

This draft article does not give rise to any fundamental concerns, although from the technical point of view it seems excessively "heavy".

The concept "forum State" is used for the first time in the draft article. Russia invites the Commission to further assess the appropriateness of this term, including in view of the fact that the question of immunity arises long before a criminal case actually reaches the forum, i.e. the courts (see, for example, paragraph (5) of the commentary to draft article 11). In this draft article specifically, the word "forum" could be deleted altogether without any loss of meaning.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom recalls its earlier comments in paragraph (8) of these observations and questions whether it is sufficiently clear what measures would constitute "any exercise of criminal jurisdiction by the forum State". The commentary suggests that it is a broad reference to "different steps that may be taken by the forum State to determine, where appropriate, the criminal responsibility of an individual". It is acknowledged that the reference needs to be sufficiently general to account for differences in practice between States' various legal systems and traditions; however, if Part Four is to apply to "**any** exercise" (emphasis added), the scope of application needs to be precise. In particular, it is not clear whether the Commission intends for the procedural provisions and safeguards to apply only where the person whose immunity is in question is also the suspect whose criminal responsibility is to be determined, or whether the exercise of criminal jurisdiction could include other measures such as witness testimony.

The United Kingdom also questions whether exactly the same procedural provisions and safeguards would be appropriate for examining and determining questions of both personal immunity and functional immunity. For example, the United Kingdom notes that invocation of immunity *ratione materiae* by a foreign State is likely to carry weight in determining whether the act was performed in an official capacity; however, the scope and application of immunity *ratione personae* is such that invocation by the State of the official is, in practice, unnecessary.

United States of America

[Original: English]

The commentary indicates that draft article 8 is meant to apply the procedural rules to all prior draft articles, including draft article 7. This seems to be potentially in tension with draft article 7, the text and commentary of which purport to reflect the inapplicability of functional immunity in prosecutions for crimes under international law. Draft article 8, taken together with craft article 14, suggest there is some fact-specific analysis that would be relevant to each case. The commentary would be strengthened by additional explanation of how draft article 7 and Part Four relate.

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

Brazil

[Original: English]

Brazil commends the Commission for including safeguards in Part Four of the draft articles. As reflected in article 9, it is essential that the question of immunity be examined by the forum State without delay, and necessarily before initiating criminal proceedings or taking coercive measures against an official of another State. It is also important that the "competent authorities" mentioned in article 9 are broadly understood, considering the domestic constitutional principle of the separation of powers.

France

[Original: French]

In practice, the implementation of paragraph 1 of draft article 9 could create two difficulties that France would like to bring to the Commission's attention.

First, the content of the obligation to "examine" the question of immunity is imprecise. In its commentary, the Commission indicates only that the examination of immunity is a "preparatory act", without specifying exactly what it entails (para. (1)). This creates uncertainty as to the measures that State authorities actually need to take in order to comply with the obligation. The Commission could, in the commentary, provide relevant examples and state that the obligation is one of means and not of result.

Second, there is nothing to indicate whether the obligation to "examine the question of immunity without delay" exists prior to the invocation, by the other State, of the immunity of its official. France wonders why there is no commentary on that matter in the draft articles, given that, in his third report on the topic, Special Rapporteur Kolodkin stated that:

> "In its judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice ... indicated that the burden of invoking immunity falls to the State which wants to shield its official from foreign criminal jurisdiction. If it fails to do so, then *the State exercising jurisdiction is not obligated to consider the issue of immunity proprio motu, and, consequently, it may proceed with the criminal prosecution*."[188]

France notes that there appears to be a contradiction between the above-mentioned points, which, in its view, reflect the state of international law, and draft article 9, paragraphs 1 and 2 (a). In that respect, France wishes to stress that there must be a possibility of considering the question of immunities as part of the examination of a case, that is, once proceedings have been initiated. More generally, since the identity, status and number of defendants and their involvement may change throughout the criminal investigation process, there is no particular procedural stage at which it would be possible to systematically rule on immunity from jurisdiction.

Moreover, France believes that draft article 9, paragraph 2 (b), confuses the concepts of immunity from jurisdiction, immunity from measures of execution and inviolability. The Commission's commentary also does not resolve the ambiguity. According to the commentary, "while immunity from jurisdiction and inviolability

[188] A/CN.4/646, paras. 16 and 17 (emphasis added).

are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various treaties" (para. (13)).

The fact that concepts are mentioned in different articles of the same treaty cannot serve as a basis for attributing to them a common or similar meaning. Moreover, when the treaties cited refer to these different forms of immunity, it is precisely in order to distinguish between them. Immunity from jurisdiction cannot be confused with inviolability, which is similar to, but cannot be confused with, immunity from measures of execution. The use of the term "inviolability" as a synonym for the expression "immunity from measures of execution" risks weakening the enhanced protection afforded to those who enjoy inviolability.

Kingdom of the Netherlands

[Original: English]

In respect of this draft article, the Kingdom of the Netherlands would make the following observations. First, a clearer distinction should be made between the question of what constitutes the exercise of jurisdiction and the question of when immunities should be considered. The work of the Commission is solely concerned with the exercise of criminal jurisdiction. This excludes the exercise of other forms of jurisdiction, such as administrative jurisdiction, but does include the activities of other criminal justice authorities, such as public prosecutors and the police. These authorities may be confronted by the issue of whether immunity is applicable, as this can arise at any stage of an investigation, indictment and prosecution. Their analysis of this issue may result in a case not going to trial. It follows that the acts of all these different authorities constitute an exercise of jurisdiction. Within the Dutch legal system, the courts are obliged to review the issue of immunity *ex proprio motu* and the Kingdom does not ask a foreign State to claim immunity in order for immunity to apply. Ultimately this a matter for the courts to decide. Nonetheless, questions concerning whether someone qualifies as a State official, whether the act complained of was performed in the official capacity of the person concerned and, in particular, who should determine this, are very hard to answer. Second, the Kingdom endorses the importance of distinguishing between immunity and inviolability. The Kingdom considers that a person who is entitled to immunity *ratione materiae* does not enjoy inviolability. After all, immunity applies to the functioning of a State official and the question of whether the acts of this official are subject to criminal jurisdiction. The immunity does not apply to the person as such.

Malaysia

[Original: English]

[See comment under Part Four.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment under Part Four.]

Russian Federation

[Original: Russian]

The Russian Federation supports this draft article. In particular, the wording "when … an official … may be affected by the exercise of … criminal jurisdiction" merits support: it places an obligation on the State exercising jurisdiction to examine

the question of immunity at an early stage and does not limit the obligation to situations in which there is an intention to apply some kind of coercive measures to the foreign official. It seems that, for practical purposes, early examination of the question of immunity is in the interests of both the State exercising jurisdiction and the State of the official. It is this approach that avoids the unnecessary diplomatic friction that occurs when the question of immunity arises at an advanced stage of a criminal case.

However, the draft article, while referring to the "examination" of the question of immunity, contains no provisions on the consequences of such examination. As a result, there remains a lack of clarity as to the difference between the "examination" of the question of immunity under draft article 9 and the "determination" of immunity under draft article 14, including whether the two procedures occur together (the "examination" serving as the basis for the "determination") or whether they can occur separately from each other. Thus the relationship between the "examination" and the "determination" of immunity, on the one hand, and the procedures under draft articles 10 to 13, on the other, also remains unclear: should the procedures under draft articles 10 to 13 take place at some point between "examination" and "determination", or are other options possible? Perhaps the best solution would be to combine draft articles 9 and 14 in a single draft article.

With regard to draft article 9, paragraph 2, the use of the expression "initiating criminal proceedings" in subparagraph (a) should be further considered, and, in general, the Commission should clarify what procedural stage is meant. Judging by the commentary (paragraph (10)), it is the referral of the case to court, the commencement of the judicial stage of proceedings. From the point of view of the Code of Criminal Procedure of the Russian Federation, this stage could correspond to one of the following stages of criminal proceedings: drafting of the indictment by the investigator, approval of the indictment by the procurator, or referral of the criminal case to court (at this point, according to the terminology of the Code of Criminal Procedure, "criminal proceedings" move from the stage of "pretrial proceedings" to the stage of "judicial proceedings").

However, the proposed wording "initiating criminal proceedings" could too easily be understood as synonymous with "instituting criminal proceedings" (see the phrase "institution of criminal proceedings" in paragraph (6) of the commentary, which in the Spanish text is rendered as "*incoación de una causa penal*"). The two English formulations are so close that they have been translated into Russian in the same way, although draft article 9, paragraph 2 (a), refers to a stage at which the question of immunity must be examined, whereas paragraph (6) of the commentary refers to a stage at which this is not required. Terminological clarity is needed here.

Saudi Arabia

[Original: Arabic]

[T]he Kingdom of Saudi Arabia welcomes the wording of draft article 9, entitled "Examination of immunity by the forum State", because it takes into account the jurisdiction of the legal system of the forum State in certain countries, while stressing that, in all cases, no criminal proceedings shall be initiated or coercive measures shall be taken before the question of immunity has been examined. Draft article 14 is an extension of draft article 9, of which the former provides that no criminal or coercive measures shall be taken until a determination has been made in respect of immunity. The Kingdom considers that the immunity of State officials is a matter of public order. Accordingly, the competent authorities of the forum State may examine the issue of their own initiative, even if the State of the official has not made a request for it to do so.

Singapore

[Original: English]

Singapore is not opposed to the general rule in paragraph 1 that the competent authorities of the forum State shall "'examine the question of immunity without delay' when they 'become aware that an official of another State may be affected by the exercise of its criminal jurisdiction'".[189] However, there are practical on-the-ground realities that need to be taken into account in seeking to strike an appropriate balance between the forum State's exercise of sovereignty in criminal matters and certain procedural guarantees arising from the immunity of foreign State officials; the latter should not impair the former. For example, there may be situations where a State official may behave in a manner which may pose an imminent threat to the safety of members of the public, or may pose a danger to himself or herself. The competent authorities of a forum State may be required to act swiftly in such situations.

In view of the above, paragraph 2 (b) of draft article 9, which provides that "the competent authorities of the forum State *shall always examine the question of immunity before taking coercive measures* that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law" (emphasis added), is too restrictive and fails to provide adequate acknowledgment of the practical realities and challenges faced by competent authorities particularly in the circumstances when they may be required to take coercive measures in the exercise of criminal jurisdiction. Singapore suggests that paragraph 2(b) of draft article 9 be amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively. One possibility could be to add a qualifier such as "as far as practicable".

Further, there may be instances where there is no indication to the competent authorities at all that a subject may be an official of another State, such that the competent authorities do not become aware that issues of immunity may be implicated. In such instances, paragraph 1 makes clear that there would necessarily be no obligation to examine the question of immunity. Similarly, paragraph 2 of draft article 9 and the accompanying commentary clarifies that the obligation to examine the question of immunity, and to do so without delay, continues to be subject to the precedent condition of being aware that issues of immunity may be implicated, even in the context of paragraph 2 of draft article 9. Singapore wishes to express its appreciation to the Commission's efforts in making these points clear in the draft articles, as well as in the commentary.[190]

United Arab Emirates

[Original: English]

[See comment under Part Four.]

[189] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (3) of commentary to draft article 9.

[190] Paragraph (8) of commentary to draft article 9 states that "the words 'without prejudice' are used to emphasize that the general rule [in paragraph 1] applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2."

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that the wording of paragraph 1 of this draft article is fairly imprecise, not least the phrase "become aware". Although the United Kingdom appreciates the reason why the Commission uses a generic plural reference to the "competent authorities of the forum State" in paragraph 1, the United Kingdom highlights that the processes and division of responsibility within a forum State may be complex spanning judicial, executive and independent law enforcement or prosecutorial bodies; and, in particular, different bodies may be responsible for the various steps identified by the Commission such as examination, notification and determination. Therefore, it may not be evident at what point a ***competent*** authority (emphasis added) has become aware.

Therefore, it would be preferable if the obligation to consider immunity *ratione materiae* were triggered where, one, the competent authorities of the forum State were considering exercising criminal jurisdiction in respect of an individual; two, it was made clear by that individual, or by the State whom they were purporting to represent, that they claimed the status of a State official; and, three, the proposed exercise of criminal jurisdiction would, if the claim to that status were made out, engage or impinge on the immunity owed in respect of the individual by virtue of that status.

The United Kingdom strongly agrees with the Commission's explanation at paragraph (6) of the commentary that "the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied". In many cases, the competent authorities of a State will need to carry out scoping exercises and the initial collection of evidence before it is possible to determine whether to progress with a full investigation, and the possibility that persons relevant to the investigation may have immunity of some form should not prevent that, provided that no measures are taken which would impinge on the person's immunity. In light of the importance of this principle, the United Kingdom encourages the Commission to consider whether it should be included in the draft articles themselves.

The United Kingdom questions the rationale for including both a general and a specific rule in paragraphs 1 and 2, given that the underlying principle for both is the same, namely that a forum State should not take coercive measures against a person having immunity, absent a specific waiver of that immunity, and so the question of immunity must be examined before such coercive measures are undertaken. The United Kingdom is grateful for the Commission's explanation at paragraph (10) of the commentary as to the meaning of "before initiating criminal proceedings", however it is respectfully suggested that the ordinary and natural meaning of the term may be broader, including the formal commencement of an investigation into a suspect, and so could lead to confusion.

The United Kingdom notes that the phrase "may be affected by" the exercise of criminal jurisdiction is imprecise. Moreover, the explanation at paragraph (6) of the commentary that it should be read as "if it hinders or prevents the exercise of the functions of that person" is inconsistent with the subsistence of immunity *ratione materiae* in perpetuity: the person subject to the exercise of foreign criminal jurisdiction may be a former State official whose functions have long since ceased. It is also noteworthy that some measures, even though coercive in nature, may not hinder or prevent the exercise of an official's functions in practice.

In [the first paragraph of the comment of the United Kingdom under draft article 1] it was noted that the draft articles do not explore the question of inviolability. Therefore, the United Kingdom would be grateful if the Commission could explain its intention in linking at paragraph 2 (b) of draft article 9 the question of immunity with measures that may affect an official's inviolability.

In light of these observations, the United Kingdom encourages the Commission to revisit this draft article and its commentary to see whether it may be possible to bring further clarity and precision, while respecting the operational practices of States.

United States of America

[Original: English]

The purpose of this article, and its relationship to draft article 14 is unclear. To the extent this draft article provides forum States with more flexibility in determining when and how to consider immunity in light of their domestic criminal process, it is preferable to draft article 14. In any event, there appears to be a tension between the two provisions and their application that needs to be considered.

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

Brazil

[Original: English]

Brazil also welcomes article 10, on the need to notify the State of the official before the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State.

France

[Original: French]

As a preliminary point, France notes that the obligation of notification by the forum State provided for in draft article 10 constitutes the progressive development of international law, rather than its codification.

Furthermore, as mentioned in its comments in relation to draft article 9, France has doubts about the relationship between the obligation of notification and the question of the invocation of immunity by the State of the official. France believes that the failure of the State of the official to respond to such notification prior to the initiation of criminal proceedings should not have the effect of preventing that State from invoking the official's immunity at a later stage in the proceedings.

More fundamentally, France wonders what effect such notification might have on the proper conduct of criminal proceedings, as well as on the confidentiality of an ongoing investigation.

First, pursuant to article 11 of the French Code of Criminal Procedure, "except where otherwise provided by law and without prejudice to the rights of the defence, the procedure during the preliminary investigation and the judicial investigation shall be secret". It follows that, if a law so provided, a notification to the State of the official could be in compliance with the principle of confidentiality, a fortiori if the only information contained therein was the identity of the official and the authority competent to exercise jurisdiction. Meanwhile, it is not clear what information should be included in the notification as "grounds for the exercise of … jurisdiction", and it would be helpful if the Commission could provide clarification in that regard.

Second, so as not to obstruct investigations, such notification may be made only once the defendant has been informed that an investigation is being conducted concerning him or her. It may therefore be made only at the stage of judicial investigation, if applicable, or, to a more limited extent, in the context of a preliminary investigation already at an advanced stage.

Third, the timing of such notification in the context of legal proceedings is an issue, particularly in view of the importance of cooperation and mutual legal assistance with the State of the official. In that respect, the question arises of whether such notification is possible in respect of States with which diplomatic relations and mutual legal assistance have broken down.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands is not in favour of including a notification obligation in the draft articles, since there is no such obligation for the forum State and no basis for providing a description of the procedure to be followed or details to be provided in the event that criminal proceedings are initiated or coercive measures are taken that may affect an official of another State.

Mexico

[Original: Spanish]

[See comment under Part Four.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Article 10 requires the competent authorities of the forum State to notify the State of the official before taking coercive measures that may affect an official of another State. Considering that the nature of coercive measures in certain circumstances may be particularly urgent, for instance where such measures are needed to prevent imminent threats to life, the Nordic countries would like to request the Commission to assess if there is a need to include an exception to the requirement of notification for urgent needs for coercive measures.

[See also comment under Part Four.]

Russian Federation

[Original: Russian]

The Russian Federation agrees with the main thrust of this draft article, but believes that it needs further discussion.

In paragraph 1 of the draft article, the expression “initiate criminal proceedings” is apparently used in the same sense as in draft article 9, that is, referring to the commencement of the judicial stage of criminal proceedings. Russia suggests that the Commission further consider whether the State exercising jurisdiction is indeed required to notify the State of the official only at this stage of the proceedings. It would be more logical to provide that such an obligation arises at the same time as the obligation to “examine” the question of immunity within the meaning of draft article 9, paragraph 1, namely “when the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction”.

Singapore

[Original: English]

According to draft article 10, paragraph 1, "[b]efore the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance."

In this regard, Singapore shares the same concerns under draft article 10, paragraph 1 as those articulated under draft article 9, and would suggest that draft article 10, paragraph 1, be similarly amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively, for example through the addition of a qualifier such as "as far as practicable".

Singapore notes the absence of the phrase "[w]hen the competent authorities of the forum State become aware" and the "without prejudice" language in draft article 10 that are found in draft article 9. As with draft article 9, language should be included in draft article 10, or to apply to draft article 10, to exclude situations where there are no indications, and the competent authorities are unaware, that issues of immunity may be implicated.

[See also comment under draft article 9.]

Switzerland

[Original: French]

Switzerland welcomes the inclusion of procedural safeguards in the draft articles. Such guarantees are necessary to avoid politicization and abuses in the exercise of criminal jurisdiction over State officials.

Switzerland points out that draft article 10 provides that the forum State must notify the State of the official before initiating criminal proceedings or taking coercive measures against the official. The purpose of this provision is to allow the State of the official to protect its interests by invoking or waiving the immunity of its official. Although Switzerland recognizes the importance of the notification within the general framework of procedural safeguards, it is concerned about the possible undesirable effects of such prior notification on the exercise of criminal jurisdiction by the forum State. In particular, such notification could give rise to the possibility of collusion, with the undesirable effect of evidence being destroyed or witnesses being influenced before the police and/or the public prosecutor's office intervene. Switzerland is of the view that requiring that notification be made "promptly", as provided for in article 42 of the Vienna Convention on Consular Relations, would help to reduce these possible undesirable effects.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom supports the rationale set out by the Commission in paragraph (2) of its commentary; however, draft article 10 is more broadly drawn than required by that rationale. For example, given that the definition of State official in draft article 2 includes former officials, it could be argued that paragraph 1 requires the forum State to notify the foreign State of proposed measures against a former official even in respect of private acts carried out by that official for which immunity is not available, including where those acts were performed after the termination of the person's official functions. The United Kingdom considers that mandatory

notification in such a scenario would be an unacceptable constraint on the forum State's exercise of jurisdiction.

The United Kingdom also emphasises that there may be other circumstances where notification prior to the exercise of a coercive measure, such as issuing an arrest warrant, could compromise the investigation or lead to the suspect evading justice. This would be unacceptable in cases such as when the suspect is a State official, but it is clear that their acts were not within scope of immunity *ratione materiae* as set out in draft article 6.

The United Kingdom recognises that any notification should contain sufficient information for the State of the official to consider whether to invoke[191] or waive immunity. However, the United Kingdom does not believe that it is necessary to require such information to list the competent authorities within the forum State that may be responsible for the exercise of jurisdiction. It is likely that a wide range of judicial, executive, investigative and prosecutorial authorities may be involved with responsibility for different elements of the exercise of jurisdiction, and a mandatory requirement to provide a foreign State with a full explanation of those national processes and responsibilities would be disproportionate. There is also a risk that such a requirement could lead to delay or disputes between the parties, if the State of the official insists on receiving that information before taking any requested action, such as a decision to waive immunity.

United States of America

[Original: English]

Draft article 10 is without support in State practice and could significantly impede efforts by States to investigate serious crimes. There may be circumstances where notification to a foreign government is appropriate, but there may also be circumstances where imposing a requirement to notify another State "before the competent authorities of the forum State initiate criminal proceedings" could pose a significant risk that the individual being investigated could become aware of the investigation and compromise it, including by permitting the official to destroy evidence, warn partners in crime, or flee from the forum State's reach. Certain investigative steps can often be taken without implicating the immunity of an official and could even be useful in ascertaining whether immunity is implicated. This is particularly the case with respect to the most serious crimes that may involve the complicity of States or targets that could seek to corrupt relevant officials. The provision also risks encroaching on the sovereignty of States to investigate crimes within their jurisdiction. The concerns with draft article 10 are exacerbated by the fact that draft article 14, paragraph 2 *(a)*, purports to make draft article 10 notification a factor that States may consider in making immunity determinations, which is entirely without grounding in State practice. As a result, this provision could very likely have a severe detrimental effect on the investigation of crimes that cross international borders.

Finally, issues of immunity are typically outside the scope of cooperation or mutual legal assistance treaties, are not contemplated by the treaties' procedures, and are not within the competence of authorities that administer such treaties. Consequently, the United States does not believe that it is appropriate for notification of immunity to be through the procedures established in cooperation or mutual legal assistance treaties. Consequently, the United States would recommend ending paragraph 3 after "States concerned." The same concern and recommended edit extend to parallel provisions in draft articles 11 through 13.

[191] See comment of the United Kingdom under draft article 11.

11. Draft article 11 – Invocation of immunity

Austria

[Original: English]

As to draft article 11 on invocation of immunity, it should be added that in the interest of all parties concerned the invocation should be made as early as possible.

France

[Original: French]

France is unsure of the need for the phrase "*immunity should be invoked as soon as possible*" (emphasis added). Indeed, the Commission expressly states, on the one hand, that nothing "preclude[s] the State from invoking immunity at any other time" (para. (8) of the commentary) and, on the other hand, that it is in the interest of the State to invoke immunity as soon as possible.

Furthermore, France has taken note of paragraph (8) of the commentary, according to which the invocation of immunity will be lawful "regardless of the moment when it is made". However, the question remains whether there might be a limit beyond which States could no longer invoke the immunity of their officials, such as when criminal proceedings are at a very advanced stage. This issue could be usefully resolved by the Commission.

France has taken note of paragraph (3) of the commentary, according to which "it is … for the State itself, and not for its officials, to invoke immunity and to take all decisions relating to its possible invocation". The question arises of whether an official could invoke immunity himself or herself while waiting for his or her State to receive notification through the mechanisms provided for in draft article 10. In fact, paragraph 1 of draft article 10 – which prevents the forum State from taking measures against an official before notifying his or her State – presupposes that the official himself or herself can directly assert the existence of immunity.

Finally, State practice shows that a written invocation of an individual's immunity is not necessary in order for the authorities of the forum State to determine and apply immunity where appropriate. Indeed, the provisions of paragraph 2 of draft article 11 appear to constitute progressive development rather than codification, which should be mentioned in the commentary.

Israel

[Original: English]

Israel begins by noting that the procedural safeguards proposed in Part Four of the draft articles do not, and cannot, sufficiently overcome the myriad of difficulties that draft article 7 might give rise to.

To mention but some its concerns, Israel rejects the underlying assumption expressed in draft article 11, that only if the State of the official invokes immunity, then the question of immunity should be considered. Israel shares the view expressed by other States, and several members of the Commission, according to which the invocation of immunity by the State of the official is not a prerequisite for its application, because immunity applies as a matter of international law unless the State of the official suggests otherwise, or waives immunity (expressly and in writing), or until a clear determination of its absence is made. Any presumption of a lack of immunity would doubtless be open to abuse and serve as a means to circumvent the immunity of State officials. In addition, Israel is of the view that the requirement proposed in draft article 11, paragraph 2, of

invocation of immunity in written form only, does not reflect international practice in this regard, as immunity may also be invoked orally.

Kingdom of the Netherlands

[Original: English]

It would be helpful if the Commission were to provide explicitly in the commentary to draft article 11 that the forum State is obliged to examine *proprio motu* the issue of immunity. However, it is not desirable to impose requirements regarding the invocation of immunity, and the *ex proprio motu* examination of the issue of immunity should take place at the earliest possible stage.

Malaysia

[Original: English]

[See comment under Part Four.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

In certain instances, as mentioned above, coercive measures may be initiated urgently. In such instances time may not allow for the invocation of immunity under article 11 to be done by the State of the official. Immunity against coercive measures as prescribed in the draft articles has similarities to the inviolability under diplomatic law, and in State practice related to such inviolability, it is not unusual for the diplomatic agent to invoke the inviolability directly before the agents of the receiving States, instead of having such invocation made by the sending State. Although, as described in the commentaries paragraph 3, the right to invoke immunity in general rests with the State of the official, the Nordic countries would like to request the Commission to assess if there is a need to include in the article 11, paragraph 1, an exception allowing for the official to invoke the immunity in urgent instances.

[See also comment under draft article 10.]

Russian Federation

[Original: Russian]

The Russian Federation supports the rule that immunity is invoked by the State. This reflects the nature of immunity, which is precisely for the benefit of the State and not the individual official.

In addition, it seems appropriate to provide explicitly in the draft articles that the official himself or herself is not entitled to "invoke" immunity (see paragraph (3) of the commentary). On the other hand, the draft articles should include a provision on how a possible declaration of immunity by an official should be treated (see A/CN.4/729, para. 55). It would probably be wrong to deny the legal consequences of such a declaration entirely (see A/CN.4/646, para. 15). Such a declaration by an official could be, for example, a reason to examine the question of immunity under draft article 9 and/or a reason to inform the State of the official under draft article 10. Moreover, it would be advisable for a State exercising jurisdiction confronted with such a declaration by a foreign official to refrain from acts that might irreversibly violate immunity.

The Commission's decision, set out in paragraph (4) of the commentary, not to identify which authorities are competent to invoke immunity is unconvincing. In certain practical circumstances, this may be important. For more on this, see below in the context of the waiver of immunity under draft article 12.

Other procedural elements that merit further consideration include the temporal element. On the one hand, draft article 11, paragraph 1, suggests that States invoke immunity "as soon as possible". On the other hand, according to paragraph (8) of the commentary, this does not preclude the invocation of immunity at any other time. It appears that such an approach actually allows the State of the official to wait for a long time (including when it has already been notified of the exercise of jurisdiction by a foreign State in respect of the official) and to take a decision to invoke immunity only at a late stage of criminal proceedings, including on the basis of the progress of the proceedings and the expected outcome. One would think such a tactic would be improper. There is reason to believe that, if the State of the official did not invoke immunity in a situation in which it had all the necessary prerequisites for doing so and had been duly notified, that fact might be decisive for concluding that the official did not have immunity. This issue needs further analysis in the general context of the relationship between the legal consequences of notification under draft article 10, invocation or non-invocation of immunity under draft article 11, and waiver or non-waiver of immunity under draft article 12.

The temporal element is also related to the question of whether the State of the official may claim the official's immunity in respect of a particular act even before another State has attempted to exercise jurisdiction over the official. This probably cannot be ruled out completely. However, the legal consequences of such a claim should be examined: for example, the State exercising jurisdiction in such a situation should make a presumption of immunity but should be able to further assess the existence of grounds for immunity and/or request confirmation of immunity from the State of the official.

Lastly, the main question is: is it necessary to invoke immunity? In other words, are there circumstances in which the forum State is obliged to respect immunity even if it is not invoked? There is reason to believe so (the Commission confirms this in paragraph (10) of the commentary to draft article 14). One example is situations in which the grounds for immunity are obvious but the State of the official clearly had no way of knowing of another State's intention to exercise jurisdiction. This should be provided for in the draft articles.

[See also commentary under draft article 12.]

Saudi Arabia

[Original: Arabic]

[D]raft article 11 provides that a State may invoke the immunity of its official based on the fact that immunity emanates from the principle of State sovereignty. The State may therefore invoke it if it wishes to do so. However, the Kingdom believes that immunity should presumed, on the basis of the principle of State sovereignty and customary international law, and that the court of the forum State must act on that basis when making a determination in respect of the official's immunity. Accordingly, the wording of draft article 11, on invocation of immunity, should be reviewed. It is sufficient to indicate that the State may waive immunity, if it so desires, as stated in article 12. This should be amended wherever it appears in the draft articles.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom acknowledges the practical benefits of invocation as a means whereby a foreign State can assert the immunity of its official and whereby the forum State can take account of any information provided by the State of the official for the purpose of determining immunity – including whether a particular act was performed in an official capacity. However, the United Kingdom underscores that invocation is not a legal requirement for the activation of immunity: any immunity subsists as a rule of law

and must be respected and be given effect by the competent authorities of the forum State regardless, especially in the case of immunity *ratione personae*.

The United Kingdom would be grateful if the Commission could clarify why it has provided that paragraph 2 identifying the required contents of an invocation should be mandatory, when the invocation itself is not obligatory. The United Kingdom would also be grateful if the Commission could explain the State practice on which it bases the requirement that invocation of immunity must be in writing. The United Kingdom does not believe that – given each could be effected through diplomatic channels – there should be a substantive difference between the form of notification in draft article 10 and the form of invocation in draft article 11. The United Kingdom further notes that in its caselaw the International Court of Justice has not criticised as procedurally invalid the oral invocation of immunity.[192]

United States of America

[Original: English]

The United States is generally in agreement that a State, and only a State, may invoke the immunity of its official, and should do so in writing. The United States notes that the commentary makes clear that a State is encouraged to invoke the immunity of its official "as soon as possible," but has the power to do so "at any other time." [193] The United States questions, however, the utility or enforceability of dictating internal domestic processes, such as in paragraph 4.

[See also comment under draft article 10.]

12. Draft article 12 – Waiver of immunity

Austria

[Original: English]

In draft article 12 on waiver of immunity, Austria proposes to insert a clause reminding forum States of their right to request a waiver of immunity. The simplest way would be reformulating paragraph 1 of draft article 12 to read: "The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official either *proprio motu* or upon request by the forum State."

Brazil

[Original: English]

Immunity of State officials from foreign criminal jurisdiction does not depend on invocation. A waiver of immunities of State officials may never be presumed. Brazil highlights that waivers of immunity must always be express and in writing, as set out in article 12, paragraph 2, which codifies existing customary law.

A waiver of immunity of State officials from foreign criminal jurisdiction may not be deduced from international treaties. The International Court of Justice has confirmed that international conventions on the prevention and punishment of serious crimes with provisions on the obligation to prosecute or extradite do not affect

[192] See for example the oral invocation of immunity in respect of immovable property by the Ambassador of Equatorial Guinea, cited in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at pp. 303–304, para. 25.

[193] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraph (8) of the commentary to draft article 11.

immunities before the forum State (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at pp. 24–25, para. 59).

Article 27 of the Rome Statute provides another clear example, inasmuch as it contains no express waiver of immunities. It is placed in Part 3 of the Statute, on general principles of criminal law, and reflects the so-called Nuremberg principles, in particular, principle III. It cannot be assumed that the absence of immunity of State officials before the International Criminal Court entails a waiver of immunity before the criminal jurisdiction of other States.

This is confirmed by article 98, placed in Part 9, on "International Cooperation and Judicial Assistance", aimed at precluding the International Criminal Court from requesting a cooperation incompatible with immunities of State officials vis-à-vis criminal domestic jurisdictions. According to article 98, paragraph 1, the Court may only request this kind of cooperation if it can first obtain the waiver of immunity.

Furthermore, the Commission should include in article 12, paragraph 2, that a waiver should be "on a case-by-case basis", as it may not be presumed that a universal or unconditional waiver of immunities for all State officials can be granted through a single act of a State.

Brazil encourages the Commission to further consider article 12, paragraph 5, as a waiver of immunity may not be considered irrevocable. It may be revoked in some circumstances, such as when new facts not previously known come to light after the immunity has been waived.

France

[Original: French]

France believes that it should be more explicitly stated that only the State can waive the immunity of its official. This is, in fact, clear from paragraph (4) of the commentary to draft article 12, according to which "only [the State of the official] can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials".

France therefore proposes the following wording for paragraph 1 of draft article 12: "The immunity of a State official from foreign criminal jurisdiction may be waived only by the State of the official."

In addition, the principle that a waiver of immunity is irrevocable appears to reflect the state of international law. France takes note of the disagreements among some members of the Commission on this question, which are detailed in the commentary (paras. (14)–(18)). However, it believes that the possibility of a revocable waiver should be considered only with great caution, as it would raise very serious difficulties in terms of legal certainty. Indeed, as the Commission states in its commentary, the rule that a waiver of immunity is irrevocable manifests the principle of good faith that is essential to international relations and "addresses the need to respect legal certainty" (para. (15)).

Islamic Republic of Iran

[Original: English]

The Islamic Republic of Iran, once again expresses its dissent with paragraph 4 of draft article 11 regarding the procedural requirements of the waiver of immunity and is of the conviction that the waiver of immunity as a procedural rule is the exclusive right of sovereign States which shall be declared by the State concerned in a manner that manifests the will of that State to waive the immunity of its official.

Therefore, the State of the concerned official has an exclusive authority to invoke and waive the immunity of its officials, and the waiver should be not only clear and expressed, but also should mention the official whose immunity is being waived. In relation to paragraph 4 of draft article 11, the Islamic Republic of Iran cannot concur with the Special Rapporteur about a general obligation deducted from a treaty on a substantial matter related to individual responsibility that can be deemed as an express waiver.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands has reservations about adopting as a strict rule the principle that a waiver of immunity is irrevocable. Such a waiver could be revocable in very exceptional circumstances, such as a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction over the State official. In addition, the commentary to this draft article should include consideration of the distinction between immunity from jurisdiction and immunity from execution.

Russian Federation

[Original: Russian]

As with draft article 11, the Russian Federation supports the main thrust of draft article 12.

However, like invocation of immunity, in relation to waiver it is necessary to consider what the legal consequences of a "waiver" of immunity declared by the official himself or herself are. Such a "waiver" may take various forms: the official may state, for example, that he or she is "ready to stand trial to defend his or her good name" or "was acting in his or her private capacity and accepts full responsibility"; an official may voluntarily surrender to the authorities of the State exercising jurisdiction, irrespective of the objections of his or her State. It is necessary to consider, and indicate at least in the commentary to draft article 12, what action the State exercising jurisdiction might take in such a situation. At a minimum, it appears that in this case immunity cannot be applied without an express declaration by the State of the official that immunity is being invoked.

In addition, as with invocation of immunity, it is necessary to consider which authorities are entitled to waive immunity. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations do not specify such authorities, and in the commentaries to the respective draft articles, the Commission indicated that a waiver of immunity should, as a rule, be declared by the head of the diplomatic mission or consular post concerned (see A/77/10, footnote 1082). In the case of these Conventions, such an approach is logical, since they refer to the immunities of embassy and consular staff, that is, subordinates of the ambassador and the consul general. The draft articles under consideration, on the other hand, deal with a very broad range of officials. Therefore, the Commission's decision not to identify, at least in general terms, which authorities are entitled to declare a waiver of immunity (paragraph (5) of the commentary) is unconvincing. It is easy to imagine disagreements between the various authorities of the State of the official on the question of waiving immunity (for example, the attorney general or the supreme court may consider it right to waive immunity, whereas the Ministry of Foreign Affairs or the State authority in which the official serves may be against it; another possibility is disagreement between branches of government or between political forces after a change of power, especially if it has occurred in an unconstitutional manner).

The following minimum requirements should apply here:

– When doubts arise as to the authority of the body declaring the waiver of immunity (including when conflicting notifications in that regard are received by the State exercising jurisdiction), it must be assumed that immunity has not been waived;

– A notification from one of the individuals authorized to represent a State in international relations (the "troika"), or from the ambassador of the State of the official in the State exercising jurisdiction, carries more weight than a notification from any other representative;

– In particular, if a representative of the State of the official provided notification of a waiver of immunity and then a member of the troika or the ambassador stated that the first representative had not been authorized to do so, it should be assumed that immunity had not been waived.

In this context, the appropriateness of the provision in draft article 12, paragraph 3, on the use of "other means of communication" besides diplomatic channels to communicate a waiver of immunity also merits further consideration.

With regard to draft article 12, paragraph 2, Russia supports the rule that waiver must be "express". However, it seems appropriate to further consider the situation in which invocation of immunity is called for (for example, a foreign State seeks to exercise jurisdiction over a widely known act of a widely known official) but the State clearly (albeit tacitly, through inaction) refrains from invoking immunity. Does such conduct have legal consequences? Should it be considered a waiver of immunity, and how does this relate to the requirement that a waiver be in writing? Does such conduct affect the possibility of invoking immunity at later stages of proceedings (see above in the context of draft article 11)?

Paragraph (11) of the commentary to draft article 12 contains the valid assertion that a waiver may be partial. This should be established directly in the text of the draft article. Moreover, Russia believes that a waiver may be "partial" not only with reference to substance (i.e. in respect of certain acts of the official but not others), but also with respect to procedure. For example, the State of the official may waive immunity in respect of the official's appearance in court, but not in respect of his or her detention.

[See also commentary under draft article 11.]

Saudi Arabia

[Original: Arabic]

[See comment under draft article 11.]

Singapore

[Original: English]

Paragraph 5 of draft article 12 provides that a waiver of immunity is irrevocable. Singapore agrees that a waiver of immunity should not be revoked lightly based on principles of legal certainty and good faith.

However, as acknowledged by certain members of the Commission, there may be situations where a revocation of waiver of immunity may be warranted, such as the surfacing of new facts previously unknown, or the occurrence of exceptional

circumstances such as a change in government or legal systems which may compromise the guarantee of the right to a fair trial in the forum State.[194]

It is important that the draft articles not undermine the ability of a State to reassess the issuance and revocation of a waiver of immunity on a case-by-case basis, taking into account the specific circumstances. As such, Singapore is of the view that paragraph 5 should be removed.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom underscores that the right or ability of a State to waive the immunity of its officials is fundamental to the procedural nature of immunity and is an effective means to ensure that there is no substantive impunity for alleged wrongdoing. Nevertheless, it is important to also acknowledge that, absent specific agreement, there is no legal obligation on a State to waive immunity.

Given the far-reaching consequences of waiver and the need for certainty, the United Kingdom agrees with the Commission that a specific waiver of immunity should be express and in writing. The United Kingdom, though, questions why the Commission did not find it necessary to make a reference in the draft articles to the content of the waiver: although it could be argued that the requirement for a waiver to be "express" requires the State of the official first to specify the acts to which the waiver applies (and those to which it does not) and second to indicate to which measures by the forum State the waiver applies, it might be clearer to stipulate that expressly in the draft articles. It is not uncommon for States not to waive immunity completely from the outset, but to provide specific and limited waivers at each stage of the criminal process from investigation through arraignment, trial and then sentencing (where relevant).

The United Kingdom notes the rationale provided in paragraph (8) of the commentary as to why the Commission did not retain paragraph 4 of the draft article originally proposed by Special Rapporteur Escobar Hernández in her seventh report. Nevertheless, the United Kingdom wishes to emphasise that not only may a State make a general waiver, but that such a waiver may be made by way of treaty, exchange of notes etc. as a matter of general policy, rather than in response to a specific case.

The United Kingdom has taken note of the debate summarised in paragraphs (14) to (18) of the commentary and recalls its comments at Sixth Committee in 2021.[195] There is a dearth of State practice in this area; yet, at the same time, the United Kingdom cautions against making an assumption that, just because States do not regularly revoke waivers of immunity, there must be an absolute rule against such revocations. The possible exceptions identified by members of the Commission – such as a change of government or legal system which calls into question whether the basic rules of due process will be followed for the individual in respect of whom immunity was waived – are by their very nature wholly exceptional. The United Kingdom believes that in such exceptional circumstances, it should be possible for a State to revoke its waiver of immunity where that is the only way to ensure respect for the fundamental rights of its official. It goes without saying that any such revocation of waiver must not be made arbitrarily.

The United Kingdom notes the argument at paragraph (17) of the commentary that "doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in

[194] Ibid., paragraph (15) of commentary to draft article 12.

[195] Available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_uk_2.pdf.

respect of facts not covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles". The United Kingdom does not believe that the emergence of new facts by itself is sufficient to nullify the effect of a waiver: it is important, both for reasons of legal certainty and good faith, that the effect of a waiver, which is to submit a person to the criminal jurisdiction of a foreign State, cannot be altered arbitrarily. Moreover, it would introduce significant uncertainty if an express waiver of immunity in respect of a criminal process were to be implicitly qualified by conditions, whether relating to due process or other matters, the effect of which would be to nullify the waiver if the conditions are not – in the unilateral opinion of just one of the parties – satisfied.

United States of America

[Original: English]

The United States is generally in agreement that a State may waive the immunity of its official and would add language to clarify that "only" the State of the official may do so. The United States is further in agreement that such waiver should be express and in writing and is irrevocable. The United States would add that a State may waive immunity either proprio motu or upon request by the forum State.

Waiver of immunity also provides an approach for addressing the crimes in draft article 7, as States that wish to do so, could pre-emptively waive immunity for their officials with respect to specified international crimes.

[See also comment under draft article 10.]

13. Draft article 13 – Requests for information

France

[Original: French]

At the outset, France wishes to point out that draft article 13 constitutes progressive development rather than codification. It also wishes to highlight the significant impact that the application of such a provision could have in practice, in particular on bilateral relations.

Under paragraphs 1 and 2 of draft article 13, a State may request information from another State "in order to decide" whether it is appropriate to apply, invoke or waive immunity. In its commentary, the Commission states that:

> "The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity)." (para. (3))

France wonders whether the phrase "in order to decide" is appropriate: as well as being of a general nature, it is not defined and is applied to concepts that are defined. Therefore, these two paragraphs could be simplified, as follows:

> "1. The forum State may request from the State of the official any information that it considers relevant to the application of immunity.
>
> "2. The State of the official may request from the forum State any information that it considers relevant to the invocation or the waiver of immunity."

France is unsure of the added value of paragraph 4 of draft article 13, especially as the Commission itself, in its commentary, states that the paragraph "refers to the general obligation of States to act in good faith in their relations with third parties".

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands would observe that it is not in favour of a draft article of this kind, which describes a possibility and also suggests that the forum State would be obliged to obtain information from the State of the official. In view of streamlining the draft articles, this draft article could be deleted.

Malaysia

[Original: English]

Application of draft article 13 (Request for information) in relation to the immunity of State officials from foreign criminal jurisdiction

Malaysia notes that draft article 13 provides for certain requests for information between the forum State and the State of the official, which should be viewed as part of the process that a State must follow in order to exercise its right to immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity).

The draft article recognises the fundamental principle that any request for information must be considered in good faith. In this regard, the request for information mechanism can be seen as necessary and useful to ensure the appropriate application/invocation of immunity with a view to strengthening cooperation between the States concerned.

However, it is noted that this particular draft article may benefit from having a provision that concerns a situation where insufficient information is provided by the State. For instance, there could be a provision that stipulates grounds or criteria that States should follow in assessing requests for information as enshrined in various international cooperation and mutual legal assistance instruments while ensuring that they do not amount to violations of the immunity of State officials and its safeguards.

Additionally, taking into consideration the potential sensitivities of information that may be requested and/or exchanged between the States on the application or invocation of immunity, elements of confidentiality ought to be included in this draft article as well to safeguard the interests of the States. For example, there could be a binding obligation on the requesting State to ensure the confidentiality of information that is provided by the requested State. In this regard, it must be emphasised that confidentiality of information is a crucial provision in many existing international agreements and treaties and thus is something that should be given particular consideration.

Further, the Commission also highlighted that the requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as concerns of sovereignty, public order, security, and essential public interest. It is also highlighted that the draft article itself is silent on the ability of the requested State to assess whether to formulate conditions as part of the process of "considering in good faith" a request for information that could facilitate the transmission of such information.

Russian Federation

[Original: Russian]

Draft article 13 does not give rise to any observations.

Saudi Arabia

[Original: Arabic]

[T]he forum State must be obligated to request the State of the official to provide it with information related to article 13. Doing so should not be left to the discretion of the forum State or be something that is a matter of choice, as in the current text of the article, in particular given that such information is among the matters that are considered by the competent authority when making a determination in respect of immunity under article 14 of the draft articles.

United Arab Emirates

[Original: English]

[See comment under Part Four.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees that it may be useful in certain situations for there to be an exchange of information between the forum State and the State of the official (or vice-versa) in order for those States to take the decisions envisaged under Part Four of these draft articles such as relating to the examination, invocation, determination or waiver of immunity. However, such an exchange of information should not be mandatory and may not be required in practice. The contact between the forum State and the State of the official may also not be confined to requests for information, but could, for example, include a request to waive immunity.

It is right that a requested State should consider any request for information in good faith (particularly where there is no obligation to respond to that request), but it is also important that a requesting State should act in good faith when requesting information: any such request should be limited to information which is reasonably required in order to take those decisions envisaged by Part Four and requests should not be used as a procedural tactic to extend timelines. It also needs to be acknowledged that there may be limits on the extent of information which can be shared by either party, particularly in respect of personal data or national security.

United States of America

[Original: English]

This draft article reads as largely a suggestion (“may request”) rather than an obligation and as such does not raise the same concerns regarding the creation of new obligations unfounded in established State practice. At the same time, it is unclear what such a provision adds to the draft articles as States may always request and share information at their discretion about any matter.

[See also comment under draft article 10.]

14. Draft article 14 – Determination of immunity

Austria

[Original: English]

The procedural provisions and safeguards should also provide for the right of representatives of the State of the official to be present in the relevant judicial proceedings of the forum State. For this purpose, additions should be introduced into both draft article 14 on determination of immunity and draft article 16 on fair treatment of the State official, which address different stages of the proceedings. These clauses could read: "In any of these proceedings, a representative of the State of the official shall be entitled to be present."

France

[Original: French]

As a general point, given that draft article 14 is, according to the Commission, a "key provision" of the draft articles (para. (1) of the commentary), France wonders why there is no definition of the term "determination". In the commentary, the Commission states that "'determination' means the decision on whether or not immunity applies in a particular case" (para. (1)) and is distinct from "examination", "which refers only to the initial consideration of this question" (para. (2)). These points could be specified directly in a provision of the text.

France has three comments on paragraph 2 of draft article 14, which are set out below. As a preliminary remark, the wording of the provision could be streamlined.

First, there is a lack of clarity as to the nature of the provisions in the paragraph: are they sine qua nons for the determination of immunity that are supposed to reflect an obligation under international law, or are they merely recommendations?

In the commentary, the Commission seems to contradict itself on this point. On the one hand, it states that "the criteria listed in paragraph 2 are not prerequisites for the determination of immunity, but elements of guidance which are offered to the competent authorities" (para. (10)) and that they relate, essentially, to "powers of the State of the official ... or to optional instruments" (para. (9)).

On the other hand, however, according to the Commission, paragraph 2 sets out the general criteria "*to be* taken into account by the … authorities of the forum State in determining immunity" (para. (7)) (emphasis added), and paragraph 2 (a) includes an express reference to draft article 10, which "imposes an obligation on the forum State" (para. (9)).

Second, paragraph 2 refers to other provisions of the draft articles and is, in fact, repetitive. Subparagraphs (a) to (d) of paragraph 2 of draft article 14 refer to draft articles 10 to 13. These referrals seem superfluous, given that paragraph 1 of draft article 14 states that the determination of an official's immunity shall be made "in conformity with the applicable rules of international law".

Third, while paragraph 2 (e) of draft article 14 does not refer to any other provision in the text, it would seem more appropriate to mention it earlier in the draft articles. Under the paragraph, the authorities of the forum State shall determine immunity in the light of "any other relevant information from other sources". This provision is important, as it reflects the practice of States not to rely solely on the information provided by the State of the official. Nevertheless, it reflects a practice that is applied from the time of examination of immunity and is by no means limited to the time of determination of immunity.

In addition, France considers that, because of its ambiguity, paragraph 3 (a) of draft article 14 should be reworded, if not deleted. Under the paragraph, "the authorities making the determination shall be at an appropriately high level". However, the meaning of this phrase is not clarified in the commentary.

First, with regard to the "authorities" concerned, France notes the lack of a distinction between the judicial, legislative and executive branches of government. In this connection, it wishes to recall that, in France, ultimately only the judiciary has the power to "determine" the immunity that an official of a foreign State may enjoy in a given case.

Furthermore, with regard to the "level" of the authorities, the Commission first states its view that the crimes that may have been committed, "owing to their characteristics and specific nature, require assessment by specially qualified State authorities with a special level of competence" (para. (15)). Then, setting aside the criterion of competence, it reiterates that these authorities "should have sufficiently high-level decision-making power" (para. (15)). Lastly, it points out that the required level of power is not necessarily a "hierarchically superior" level (para. (16)). In that respect, France notes that the English formulation "at an appropriately high level" is no clearer than the French wording.

Moreover, the criterion of an "appropriately high" level does not appear elsewhere in the text. France is concerned about this apparent contradiction: authorities at "an appropriately high level" would be required to decide on an exception to immunity, but not to examine or determine immunity.

Paragraph 4 of draft article 14 reproduces almost verbatim the provisions of draft article 9 on the examination of immunity, which the Commission acknowledges with a reference in its commentary (para. (33)). France wonders whether two separate provisions are needed: in any event, the authorities of a State must examine and determine immunity before initiating criminal proceedings and before taking coercive measures. In that respect, France refers to its comments on draft article 9.

The comments made in relation to draft article 9 concerning the apparent confusion between immunity from jurisdiction, immunity from measures of execution and inviolability are also applicable to paragraph 4 (b) of draft article 14.

Paragraph 4 (b) of draft article 14 provides that "this subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". As stated in the commentary, this provision is aimed at authorizing "coercive" or "precautionary" measures, for example, "any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities" (para. (34)).

The use of the term "continuance" implies that some of these measures would be in place prior to the determination of an official's immunity, which seems paradoxical.

Germany

[Original: English]

Germany welcomes the fact that the determination as to whether immunity applies shall be made by authorities at an appropriately high level. It should be ensured that decisions are made by a domestic authority experienced in matters of international law. Often, only high-level authorities within the domestic administration will be able to assess the far-reaching implications of cases involving

the immunity of foreign State officials. Also, the fact that a decision is made by a high-level authority may signal to the State of the official that the forum State is aware of the specific ramifications of the case for the sovereignty of the State of the official and may hence be perceived by the latter as a confidence-building measure.

Ireland

[Original: English]

[See comment under Part Four.]

Kingdom of the Netherlands

[Original: English]

In respect of draft article 14, the Kingdom of the Netherlands would note that a court need not blindly rely on an invocation of immunity by a foreign State official. The court may conclude that the invocation of immunity by a foreign State official is unjustified and/or an abuse of law. Ultimately, it is a matter of trust: an invocation of immunity made in good faith must be taken seriously and accorded sufficient weight. At the same time, criminal proceedings instituted in good faith against a foreign State official should not be obstructed and dismissed as politically motivated without good reason.

Malaysia

[Original: English]

[See comment under Part Four.]

Mexico

[Original: Spanish]

With regard to article 14 (Determination of immunity), paragraph 3 (a), which provides that when the forum State is considering the application of draft article 7 in making the determination of immunity, the authorities making the determination shall be at an appropriately high level, Mexico considers that the interpretation provided in the commentary is confusing.

According to the commentary, this criterion was included taking into account the seriousness of the crimes alleged to have been committed by the official. Mexico agrees with this approach. However, the statement that "appropriately high level" does not necessarily mean "hierarchically superior", given the different organizational systems of States, results in a lack of clarity that could undermine the usefulness and necessity of the criterion, or even the entire paragraph.

In this regard, Mexico recommends that the question of how the "appropriately high level" should be determined be addressed. Failing that, it should be clarified that hierarchical superiority may be an element in the determination of the level of authority but should not be considered the sole or determining criterion.

With regard to article 14, paragraph 4 (b), Mexico considers the wording of the last sentence, "This subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official", to be imprecise.

As recognized in the commentary, the absence of the measures provided for in this part of the article would not, in practice, prevent the initiation of criminal proceedings against an official. It would complicate or delay the process, but that does not mean that proceedings would be impossible or could not be conducted in absentia.

In this regard, it would be preferable to remove the last sentence of the subparagraph, since rather than clarifying matters, it is imprecise and unnecessary. Alternatively, in order to provide greater precision, the article could include an indicative, non-exhaustive, list of measures that may be adopted or maintained by the forum State.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries welcome the draft article 14, paragraph 3, holding that it establishes an important link between procedural aspects and the exceptions to immunity of draft article 7. As previously expressed on several occasions, the Nordic countries support draft article 7 and do see merit in the view that procedural guarantees and safeguards could address some of the concerns that have been expressed regarding draft article 7. The purpose of article 14, paragraph 3, is to balance the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith, and the Nordic countries find that the wording of the paragraph succeeds in fulfilling this purpose. The Nordic countries, therefore, as stated earlier, support the particular procedural safeguards described in draft article 14, paragraph 3.

Russian Federation

[Original: Russian]

Paragraphs 1 and 2

The considerations set out above in the context of draft article 9 apply to this draft article: the relationship between "examination" and "determination" of immunity needs to be clarified, and perhaps draft articles 9 and 14 should be combined in a single draft article.

With regard to the "determination" of immunity, draft article 14 gives the impression that the authorities of the State exercising jurisdiction have the last word on the determination of immunity. Moreover, from the current wording, it would seem as if any decision of that State, if made on the basis of all the available information, is invariably legitimate.

In other words, the draft article is based on the assumption that the competent authority of the State exercising jurisdiction decides whether immunity exists or not. However, that is incorrect. Immunity is determined by international law and depends on the status of the official and the nature of his or her act. The competent authority of the State exercising jurisdiction merely records that status, the nature of the act and the position of the State of the official. It should not be granted an independent right, for example, to assess, in place of the State of the official, whether the act was performed in an official capacity.

In paragraph (1) of the commentary to draft article 14, the Commission characterizes the draft article as "one of the most fundamental procedural safeguards". However, in fact, by allowing the State exercising jurisdiction to "determine" immunity and by formulating, in draft article 14, paragraph 2, the criteria (factors) to be taken into account in such "determination", the Commission creates conditions for the non-application of immunity in violation of international law. In fact, the competent authority of the State exercising jurisdiction is provided with a set of arguments (essentially pretexts) justifying the non-application of immunity. Yet it is clear that the existence or absence of immunity cannot depend on the existence

or absence of sufficient information on the part of the State exercising jurisdiction, the existence or absence of notification under draft article 10 or other such factors.

In view of the foregoing, the Russian Federation considers it necessary to make it clear in draft article 14 that the rules on the "determination" of immunity provided for in the draft article are purely procedural and, moreover, recommendatory in nature. This applies both to the "determination" itself (it is by nature a statement of fact rather than a decision) and to the factors that are to be taken into account under draft article 14, paragraph 2. It is necessary to distinguish between, on the one hand, the existence/absence of immunity as an objective reality arising under international law from the status of the official and the nature of the act performed by him or her and, on the other hand, the application/non-application of immunity by the competent authorities of the State exercising jurisdiction as a procedural decision taken in the light of the available information. In addition, it would be appropriate to include a provision stating that the decision on whether or not to apply immunity may be reviewed at subsequent stages of the process, if new information is received.

If "determination" of the absence of immunity by the State exercising jurisdiction contravenes applicable rules of international law, this constitutes a wrongful act of the State and entails international legal responsibility. This needs to be established at least in the commentary to the draft article.

Paragraph 3

The fundamental position of Russia that draft article 7 should be deleted extends to draft article 14, paragraph 3. A number of specific observations on this paragraph are made above in the context of draft article 7.

Paragraph 4

The last sentence of paragraph 4 (b) significantly undermines the meaning of immunity. In effect, it legitimizes the arrest of an individual who potentially enjoys immunity, pending final clarification of whether or not he or she enjoys immunity. Such an approach opens the door to the abuse of the exercise of jurisdiction in order to exert pressure on a foreign official or on his or her State.

It seems that this provision should, at a minimum, be limited to situations in which the competent authorities have prima facie compelling grounds to presume that an individual does not enjoy immunity, as well as to cases in which coercive measures are necessary to supress a violent crime.

The considerations set out above in the context of draft article 9 apply to the stages of proceedings referred to in paragraph 4 (a) and (b).

Paragraph 5

This provision also needs further analysis, taking into account the fact that the State exercising jurisdiction should not be granted the independent right to decide whether an individual enjoys immunity. It is formulated in such a way as to suggest that the State of the official or the official himself or herself, faced with a decision that he or she does not have immunity, is forced to seek the reversal of that decision in the courts of the State exercising jurisdiction. Yet that procedure itself would mean submission to the jurisdiction of that State. However, the relationship between two States in respect of whether or not an official of one of those States has immunity from the jurisdiction of the other State should remain in the inter-State realm.

It would seem more appropriate for this provision to be limited to a general statement that it is for the State exercising jurisdiction to decide in its procedural laws whether and how such decisions may be appealed. This does not negate the

understanding that, if a decision of a higher court is contrary to international law, it constitutes a wrongful act of a State.

[See also comment under draft article 7.]

Saudi Arabia

[Original: Arabic]

[See comments under draft articles 9 and 13.]

Singapore

[Original: English]

Singapore takes comfort from how the Commission, in using the term "appropriately high level" in paragraph 3 *(a)* of draft article 14, had the intention of according a degree of flexibility to member States as "the determination of which 'authorities [are] at an appropriately high level' will depend on each State's legal system", while also noting that these cases "require assessment by specially qualified State authorities with a special level of competence".[196]

With respect to paragraph 4 of draft article 14, Singapore has similar observations to those which Singapore has made in respect of draft articles 9 and 10. Specifically Singapore suggests that paragraph 4 be amended to: (i) provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively; and (ii) exclude situations where there are no indications, and the competent authorities are unaware, that issues of immunity may be implicated.

[See also comments under draft articles 9 and 10.]

United Arab Emirates

[Original: English]

[See comment under Part Four.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees that paragraph 1 of this draft article reflects existing international law: it is for the competent authorities of the forum State to determine both whether a foreign official has immunity and the extent of that immunity in accordance with the national law and procedures of that State and in conformity with applicable rules of international law.

Although the United Kingdom recognises that in some cases the information highlighted at subparagraphs (a) to (e) of paragraph 2 may be relevant to the decision by the competent authorities of the forum State, it does not believe that consideration of all that information should be obligatory in every case where the question of immunity is under examination. First, there will be cases where some of the information is not pertinent or necessary. In this regard, it is noteworthy that the Commission does not consider that the provision of information, even when requested under draft article 13, is obligatory, nor that the invocation of immunity under draft article 11 is a prerequisite to give effect to that immunity. Second, there may also be cases where the information is irrelevant to the decision at hand: for example, it would

[196] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly*, *Seventy-seventh Session*, *Supplement No. 10* (A/77/10), paragraphs (15) and (16) of commentary to draft article 14.

not necessarily be appropriate for a competent authority to take into account the procedural question whether the forum State has made a notification to the State of the official when determining the substantive question whether a foreign official has immunity *ratione personae* under law.

The United Kingdom appreciates the Commission's explanation at paragraph (13) of the commentary that paragraph 3 of draft article 14 is a proposal for new law to "ensure a proper balance between the interests of the forum State and those of the State of the official". However, there remain fundamental tensions in the Commission's proposal which need to be resolved.

First, paragraph (15) of the commentary explains that the requirement for the authorities making the determination of immunity to be "at an appropriately high level" combines requirements for both expertise and seniority: the authorities should be "specially qualified", have a "special level of competence" and also enjoy "sufficiently high-level decision-making power". It is noted that the appropriate balance between these factors may lie differently in different systems.

Second, the United Kingdom welcomes the requirement to determine the question of immunity at a "high level". This should ensure that the decision-maker will have received the necessary information and advice from relevant competent authorities across the national system and elsewhere, and will have sufficient authority within that national system to take a final decision. Nevertheless, it would be helpful if the Commission could clarify in the commentary that such a "high level" decision-maker should not imply the politicisation of a decision which is ultimately a question of law. The Commission is right to point out that the exercise of criminal jurisdiction over a foreign official may have a significant impact on relations between the forum State and the State of the official, however that impact is not relevant to the determination of immunity.

Third, immunity is a question that should be considered as a preliminary matter. However, the Commission's proposal that the competent authorities should "assure themselves that there are substantial grounds to believe that the official committed any of the crimes" would require the competent authorities to investigate and consider matters of substance. This is unlikely to be appropriate in principle and is likely to encounter significant barriers in practice, not least that the competent authority responsible for determining immunity may not be the competent authority responsible for such an investigation and that it may simply not be possible to gather sufficient evidence to meet the threshold of "substantial grounds to believe" without exercising coercive measures against the suspect, including carrying out interviews or collecting electronic and documentary evidence. It is notable that the precedent of article 61, paragraph 7, of the Rome Statute cited by the Commission is a judicial process to confirm charges and commit a defendant to trial on those charges after the completion of the substantive investigation and involves a hearing where the defendant or their legal representative has a right to participate. That is not a suitable parallel to a procedural decision by a competent authority which is required to take place before coercive measures may be taken.

Fourth, it must be emphasised that whether a person has immunity in respect of the exercise of criminal jurisdiction by the forum State is a procedural question of law. The fact that a third State also wishes to assert its jurisdiction may be relevant to whether the forum State ultimately wishes to proceed in exercising its jurisdiction or to defer to that third State, but is not relevant to the question of immunity under the law of the forum State. There may also be occasions of international cooperation between the forum State and the third State which require the exercise of criminal jurisdiction by both, for example the arrest of a suspect by the forum State and subsequent extradition to the third State to stand trial. In each of these cases, the

determination of immunity is a procedural question which must be resolved before the execution of coercive measures.

The United Kingdom notes that paragraph 4 of this draft article is similar to paragraph 2 of draft article 9; therefore, it invites the Commission to consider its observations [under draft article 9] above in respect of both provisions.

Moreover, the United Kingdom would be grateful if the Commission could provide further explanation in respect of the new sentence added to paragraph 4(b) of draft article 14 – "does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". If it has been determined that the official enjoys immunity from jurisdiction, then it should not be legally possible for the forum State to exercise that jurisdiction by taking coercive measures against the official. The purported justification provided at paragraph (34) of the commentary that coercive measures could still be taken against a person with immunity because the determination of that immunity could be reversed at a later stage contradicts the very purpose of immunity which is to prevent the exercise of jurisdiction and is inconsistent with the procedural provisions and safeguards set out elsewhere in Part Four.

United States of America

[Original: English]

Draft article 14 raises but does not resolve several of the previously stated concerns of the United States about the lack of adequate State practice and a unified legal rationale for the bounds of foreign official immunity. For instance, paragraph 3 *(b)* (i) provides for some measure of a fact-specific inquiry into the underlying allegations. In this sense, draft article 14 underscores that functional immunity determinations are fact-specific inquiries, but does not explain why such inquiries are appropriate in the case of draft article 7 enumerated crimes but not other crimes that may also implicate functional immunity. Paragraph 4 *(a)* continues a recurring issue in the draft articles of mandating a consideration of immunity when a forum State may not have sufficient information to be aware that immunity may be applicable or its criminal process is such that early stages of it may be engaged without compromising any such immunity. Paragraph 4 *(b)* raises the intersection of personal immunity and inviolability, but the commentary would benefit from additional explanation of how the inviolability of those individuals who enjoy personal immunity arises and adds to their immunity protections, for example, with arrest.

[See also comments under draft articles 9 and 10.]

15. Draft article 15 – Transfer of the criminal proceedings

Austria

[Original: English]

In the view of Austria, the procedure for the transfer of the criminal proceedings laid down in draft article 15 must be understood as being without prejudice to applicable treaties on judicial cooperation or extradition.

France

[Original: French]

France has no comments on draft article 15, except to state that it could provide for an obligation on the State of the official to keep the forum State informed of developments in proceedings once they have been transferred.

Israel

[Original: English]

With regard to draft article 15, concerning the transfer of the criminal proceedings, Israel is of the view that States with the closest and most genuine jurisdictional links to the matter at hand should have primary jurisdiction as they are generally best able to uphold the interests of justice. In this vein, Israel believes that when the State of the official is willing to assess the case and to apply to it the appropriate legal framework, it should be the obligation of the forum State to decline exercise its jurisdiction in favor of the jurisdiction of the State of the official. This would be in conformity with the established customary rule on subsidiarity. While this view is mentioned in the commentary, it should find expression in the text of the draft article, as it is not easily understood from the current text.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands would prefer this draft article to be deleted. Draft article 15 encourages States to adopt the procedure set out in the draft article when transferring criminal proceedings from the forum State to the State of the official. Both the consideration of whether criminal proceedings should be transferred and the procedure to be followed should be assessed on a case-by-case basis taking into account the international obligations of the States involved.

Russian Federation

[Original: Russian]

The requirement in draft article 15, paragraph 2 – that the State of the official must agree to prosecute the official in order for the proceedings to be transferred to that State – seems excessive. It would seem more proportionate and appropriate to require the consent of the State of the official to a legal assessment of the official's act in terms of whether or not there are grounds for prosecution. This logic is generally reflected in paragraph (12) of the commentary, according to which the transfer of proceedings does not mean that the State of the official is obliged to prosecute the official. The current wording of paragraph 2, however, gives the impression that the refusal by the State of the official to prosecute the official legitimizes the exercise of jurisdiction by the forum State, that is, equates to a waiver of immunity.

In general, it is unclear how draft article 15 relates to standard treaties on legal assistance. It might be better to limit the provision to a brief article to the effect that the present draft articles do not preclude the implementation of treaties on legal assistance that provide for the possibility of transferring criminal cases.

The considerations on coercive measures set out above in the context of draft article 14, paragraph 4 (b), apply to paragraph 3.

[See also comment under draft article 14.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom wishes to underline its commitment to tackling impunity in all its forms. It remains of the view that it is usually best to investigate and prosecute suspected crimes in the place where the alleged activities took place and where the victims and evidence will likely be located; it also emphasises the primacy

that should be accorded to a State's investigation of alleged crimes by its own service personnel.

The United Kingdom queries whether it is appropriate to include a single standalone provision relating to international cooperation and mutual legal assistance in draft articles relating to immunity from national jurisdiction. This is partly a question of principle: if a foreign official enjoys immunity from the exercise of jurisdiction by the forum State and that immunity has not been waived by the State of the official, then there can be no proceedings to transfer. It is also a question of practicality: the United Kingdom would encourage the Commission to consider whether it would be more appropriate to instead signal the possibility of using existing mechanisms as between the forum State and the State of the official to allow for the transfer of proceedings where appropriate. In particular, this would ensure that any such arrangements are supported by appropriate procedural provisions and safeguards; it would also mean that there are avenues for the State of the official to request from the forum State further mutual legal assistance, for example the sharing of evidence or the deposition of witnesses, which is likely to be required to undertake a prosecution outside of the forum State.

The United Kingdom notes the explanation at paragraph (6) of the commentary as to why the Commission decided to retain the phrase "offer to transfer". However, it queries whether that terminology is appropriate for a process that must be agreed by both States and would normally be motivated by the interests and proper administration of justice.

It is welcome that the Commission has acknowledged at paragraph 5 of this draft article that the forum State may have other binding obligations under international law which may affect the possibility to transfer proceedings to the State of the official.

United States of America

[Original: English]

Paragraph 1 provides that a forum State may offer to transfer the proceedings to the State of the official. This draft article is silent, however, with respect to a decision by the forum State to transfer proceedings to a third State or international court or tribunal. While this issue is discussed in the commentary, express language that the draft article is without prejudice to this option would clarify the existing ambiguity.

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

Austria

[Original: English]

[See comment under draft article 14.]

France

[Original: French]

France does not have any comments with respect to draft article 16.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands notes that the procedural rights of the suspect as contained in this draft article are separate from the issue of immunity and are out of place in the context of this topic.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment under Part Four.]

Russian Federation

[Original: Russian]

It is hard to argue with the content of this draft article, but the appropriateness of its placement in the draft text is questionable. To a large extent, it reproduces obligations already incumbent on the State exercising jurisdiction on the basis of international rules on human rights and consular relations. It is not clear why they should be reproduced in the draft articles under consideration, especially on a selective basis.

For example, if it is specifically enshrined in draft article 16 that an official is entitled to a fair trial, it gives the impression that there should be a "fairer" trial for an official than for an "ordinary person". On the other hand, given this approach, it is unclear why the draft article does not directly stipulate that the use of torture, discrimination on ethnic grounds, etc., against an official are impermissible.

It seems that the draft article should generally indicate that the draft articles are without prejudice to the obligations of States in the field of human rights and consular relations. Apart from that, it would be possible to limit the draft article to those provisions that specifically govern the relevant relations involving officials:

– The right to communicate with a representative of the official's own State (so that the State of the official is made aware of the situation and can promptly claim immunity);

– The right of the State of the official to provide consular-like support, even if the official is not its national.

United Arab Emirates

[Original: English]

[See comment under Part Four.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Fair treatment, including a fair trial and full protection of fundamental rights, is the basic right of any person subject to the exercise of criminal jurisdiction; it is not limited to the exercise of criminal jurisdiction against a foreign official nor is it dependent on a determination of immunity. Therefore, the United Kingdom questions whether it is necessary to include paragraph 1 of this provision in the draft articles.

Paragraph (7) of the commentary explains that in paragraph 2 of draft article 16 the Commission is making a proposal for new law – "establishes a new right". However, it is not clear from the commentary why the Commission has framed the right in the way that it has nor how it envisages that the right will function as a safeguard in the context of Part Four of the draft articles. The United Kingdom would welcome further clarity from the Commission on that and would highlight the following issues which arise from the current text.

First, the Commission is proposing that the right to communicate and be visited should be conferred on the official rather than on the State of the official. This is contrary to the precedent cited in the Vienna Convention on Consular Relations, and appears inconsistent with the Commission's description of those proposed rights as a safeguard to balance the interests of the forum State and the State of the official.

Second, the provision applies to all State officials – which in accordance with draft article 2 would encompass both current and former officials – and applies irrespective of the timing or nature of the acts for which the official has been detained. This blanket provision appears to go further than what would be strictly required in respect of a safeguard relating to the examination or invocation of immunity.

Third, the right of the official to communicate with a representative of their State (outwith any consular assistance) is limited by paragraph 2 to where the official has been incarcerated. It is acknowledged that this is one of the "most extreme" scenarios in which criminal jurisdiction may be exercised by the forum State against the official, but if the purpose of the communication between the official and the State of the official is not just to ensure the welfare and fair treatment of the official, but also to enable the State of the official to gain a better understanding of the situation and so take an informed decision as to whether to invoke or to waive immunity, then there is no rationale to limit that right solely to periods of incarceration, particularly if practicalities or bail conditions would otherwise prevent communication.

Fourth, it is not clear whom the Commission considers may fall within the description of "nearest appropriate representative of the State of the official". There is considerable ambiguity in the phrase, not least who it is envisaged should determine the "appropriateness" of the representative and whether the geographical proximity of one representative would preclude the assertion of the right by another representative. The Commission may also wish to consider how this provision might operate – particularly the right to be visited – in a scenario where the forum State may have accorded recognition to the State of the official but has not yet established, or has previously broken off, diplomatic or consular relations.

Fifth, the Commission has argued that rights relating to consular access and assistance are covered by paragraph 1. It would be useful if the Commission could clarify the extent to which it considers there is overlap between that and the proposed new rights in paragraph 2, and how it envisages the provisions might interact.

Finally, it is noted that paragraph 3 of this draft article is inspired by article 36 of the Vienna Convention on Consular Relations. However, that provision has a clearly stated purpose, namely "with a view to facilitating the exercise of consular functions relating to nationals of the sending State". Paragraph 2 enumerates proposed rights but does not set out the purpose of those rights. Therefore, it is not clear how paragraph 3 could be operationalised in practice without the yardstick of a purpose against which the States concerned could measure the application of relevant laws and regulations.

United States of America

[Original: English]

The United States questions the necessity, relevance, or value of this provision to the project on immunity. Once a determination is made that immunity does not apply in the case at hand, and any appeals are completed, the reach of the immunity doctrine would end and other, established areas of law would cover the fair treatment of the State official. Moreover, by setting forth some fair trial guarantees and other human rights-related protections but not others in paragraph 2, this draft article could

be construed as establishing a hierarchy of defendant protections and/or minimizing the importance and applicability of those that are enumerated.

The United States believes that the incorporation of the individual "right" to consular access in paragraph 2 of draft article 16 is misplaced. The rights of consular notification and access described in article 36 of the Vienna Convention on Consular Relations belong to States, not individuals. As such, they are not enforceable by private individuals. The term "shall be entitled" in draft article 16 could likewise suggest an individually enforceable right where none exists. The language should be altered to adhere closely to the precise formulation used in article 36, or the draft article should simply incorporate article 36 by reference without attempting to paraphrase or rewrite it.

17. Draft article 17 – Consultations

France

[Original: French]

France does not have any comments with respect to draft article 17.

Kingdom of the Netherlands

[Original: English]

The Kingdom of the Netherlands would prefer the deletion of this draft article. States are under no obligation to consult each other, but are naturally obliged to respect the immunity of officials of the other State. Moreover, this draft article is hard to reconcile with draft article 18.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment under draft article 18.]

Russian Federation

[Original: Russian]

The Russian Federation has no observations on draft article 17.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Consultations remain a useful and flexible mechanism by which States can discuss matters of mutual importance. However, the United Kingdom queries whether it is appropriate or necessary to make consultations in the context of these draft articles obligatory – "the Commission decided to use the word 'shall' to denote the obligatory nature of the consultations" – particularly where the Commission has provided for other discretionary mechanisms, such as requests for information in draft article 13, which are designed to facilitate the exchange of information where that is considered necessary to decisions on the examination, invocation, determination or waiver of immunity.

United States of America

[Original: English]

The United States observes that this provision, like article 13 relating to the sharing of information, relates to the common practice that States consult as appropriate on matters of mutual concern. Such consultations should be at the discretion of both States, however, and purporting to mandate them when one of the States does not wish to pursue them is counterproductive. A State may want to demand consultation, but at the same time, it may be wary of other States drawing it into consultations that it views as unfounded or unproductive. While the qualifier "as appropriate" would seem to preserve the long-standing discretion of States to engage in consultations, the commentary makes clear that consultation is "obligatory," and the phrase "as appropriate" allows for limited flexibility to account for unique circumstances such as diplomatic relations. The United States observes that there is no basis for obligatory consultation in customary international law. In the event that the draft articles take the form of a treaty, the United States recommends that the draft article say "should" rather than "shall."

18. Draft article 18 – Settlement of disputes

Austria

[Original: English]

Austria welcomes the insertion of draft article 18 on the settlement of disputes. However, once the draft articles will be turned into a convention, it will have to provide for time limits regarding any dispute settlement in relation to pending criminal proceedings. This convention will also have to address the need and the criteria for a suspension of the relevant national proceedings during an ongoing international dispute settlement.

Brazil

[Original: English]

[I]t is not clear whether a dispute resolution clause would be appropriate or desirable in the outcome of the work of the Commission. If included, such a clause should be general in nature, without the use of compulsory language.

France

[Original: French]

In its commentary, the Commission acknowledges that "the practice generally followed by the Commission to date has been not to include dispute settlement provisions in its draft articles" (para. (2)). In the draft articles under consideration, however, the Commission considered it preferable to include such a provision in order to "encourage States to express their views in this regard" (para. (3)).

France considers that this issue cannot be resolved in the abstract. The inclusion of such a clause depends on the final form of the draft articles. However, as the Commission states in its commentary, it "has not yet decided whether to recommend to the General Assembly that the present draft articles be used as a basis for the negotiation of a treaty" (para. (3)).

France believes that the question of whether to include a dispute settlement clause in the draft articles should be addressed at a later stage in the Commission's work.

Germany

[Original: English]

Regarding draft article 18 Germany wishes to point out that, under German law, there is no provision that would allow a court to leave the legal assessment as to whether the requirements for immunity are given in a specific case to an intergovernmental mediation process *after* an indictment has been filed before the courts in criminal proceedings and then to take the results of any such process into account in these proceedings.

Furthermore, Germany wishes to point out that the jurisdiction of the International Court of Justice – or any other Court – may not be founded on customary international law. Rather, there is no obligation under general international law to submit a matter to the International Court of Justice. To give effect to draft article 18 would therefore require that the articles be transformed into a treaty that is then ratified by States.

Islamic Republic of Iran

[Original: English]

[T]he Islamic Republic of Iran reiterates its firm position that a dispute settlement clause would only be relevant if the draft Articles were intended to become a treaty. While the Commission has yet to decide on the final product of the topic, Member States' views are vital for its final work in this respect. Accordingly, due to the sensitivity of the nature of immunity as the direct consequence of the principle of Sovereignty, the Islamic Republic of Iran suggests the Commission to proceed cautiously. In case the current new framework of dealing with immunity of State officials fails to receive endorsement among Member States, it would be likely to endanger inter-State relations and even the very objective of ending impunity for the most serious crimes of concern to the international community as a whole.

Israel

[Original: English]

With regard to draft article 18, paragraph 2, which may be relevant only in the event that the draft articles are proposed as a basis for a future treaty, Israel suggests the addition of an opt-out clause as suggested by some members of the International Law Commission and noted in paragraph (12) to the commentary of this draft article.

Kingdom of the Netherlands

[Original: English]

If the draft articles result in a treaty text, the Kingdom, in keeping with current policy, will work to ensure the inclusion of a clause providing for binding dispute resolution.

[See also comment under draft article 17.]

Malaysia

[Original: English]

Proposal to suspend national proceedings pending an international dispute settlement in draft article 18

It is noted that draft article 18 as adopted by the Commission on first reading does not include the final paragraph originally proposed by the Special Rapporteur, under which, "[i]f the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling".

While some members of the Commission took the view that an obligation to suspend criminal proceedings after submitting the dispute to a binding means of settlement could constitute a useful procedural safeguard, reference to such an obligation was excluded because it was not possible to find precedents, either in existing treaties or in international jurisprudence, to support this provision.

Moreover, the Commission is of the view the suspension of criminal proceedings in these circumstances could encounter serious difficulties in some State legal systems. Therefore, draft article 18 does not cover this issue, and the possible suspension of domestic proceedings will depend on any relevant agreement between the parties or, where applicable, any provisional measures ordered by the International Court of Justice or other organs having jurisdiction under paragraph 2.

In this regard, Malaysia wishes to emphasise that there should be an acceptance that the suspension of national proceedings, which is pending an international dispute settlement on this matter, would be particularly deferential to the State of the official.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

As stated previously, the Nordic countries hold that the procedural mechanisms proposed in the draft articles should be seen as a whole, balancing the interests of the forum State and the State of the official. In this regard the Nordic countries welcome draft articles 17 on consultations and 18 on settlement of disputes and consider these two provisions to provide a final procedural safeguard. The Nordic countries therefore support their inclusion. The Nordic countries also support the wording of these articles, and in particular paragraph 2 of article 18.

Russian Federation

[Original: Russian]

The Russian Federation believes that consideration of this draft article is premature. It will make sense only if a decision is taken to develop a convention on the immunity of officials.

Singapore

[Original: English]

Singapore is of the view that the compulsory dispute settlement mechanism as set out in draft article 18, paragraph 2 is not suitable for resolving issues relating to the immunity of State officials. Differences for such issues are most appropriately resolved through consultations between the two States involved.

The preference of Singapore is to remove paragraph 2 from draft article 18. Considering the bilateral contexts in which issues of immunity of State officials most often arise, it is important not to restrict the options for peaceful means of settling disputes.

Even if the Commission sees the need to address circumstances in which a resolution cannot be reached under paragraph 1, the mode of dispute settlement adopted subsequently should be determined by mutual agreement between the State of the official and the forum State. In this regard, the Commission could consider amending paragraph 2 to read as follows:

> "(2) If a mutually acceptable solution cannot be reached within a reasonable time, the forum State and the State of the official may refer the dispute to the International Court of Justice or to any other means of settlement entailing a binding decision by mutual agreement."

If the current formulation of paragraph 2 is to remain, Singapore would recommend that an additional provision on unilateral derogation be included. The Commission has included a similar provision in draft article 15, paragraph 3 of the draft articles on prevention and punishment of crimes against humanity:

> "A State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration."

United Arab Emirates

[Original: English]

[T]he settlement of disputes provision contains two flaws:

i. First, compulsory dispute resolution of the sort described in paragraph 1 is clearly not supported by customary international law, and a dispute settlement clause could only be relevant if the draft articles were intended to become a convention.

ii. Second, the United Arab Emirates notes that dispute settlement clauses are distinct in kind from others procedural safeguards. It recommends that, if retained, the Commission consider the placement of draft article 18 in a separate Part Five.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes paragraph (3) of the commentary and underlines its view that a provision providing for the compulsory adjudication of disputes by the International Court of Justice would only be appropriate in a treaty to be negotiated and agreed by States and cannot be considered to be codification of international law.

Furthermore, the United Kingdom encourages the Commission to reflect on what disputes between the forum State and the State of the official should properly be amenable to adjudication by the International Court of Justice. For example, paragraph 3 *(b)* (i) of draft article 14 currently requires the competent authorities of the forum State to make a criminal-style determination as to whether there are substantial grounds to believe that the official committed the relevant crime.

United States of America

[Original: English]

The United States observes that there is no basis for a settlement provision in customary international law. This dispute resolution language is only relevant if these draft articles take the form of a treaty, and in such case subject to any reservation by the forum State or the State of the official. Moreover, it is not clear why the present draft articles would include such a final clause, which is unrelated to the topic of immunity, and not other final clauses.