United Nations A/CN.4/771/Add.3

General Assembly

Distr.: General
22 January 2025

Original: English

International Law Commission
Seventy-sixth session
Geneva, 14 April–30 May and 30 June–31 July 2025

Immunity of State officials from foreign criminal jurisdiction

Additional comments and observations received from Governments

Addendum

Contents

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 articles, 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. As of 29 April 2024, comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction had been received from 35 Governments. The comments and observations are reproduced in documents A/CN.4/771, A/CN.4/771/Add.1 and A/CN.4/771/Add.2.

2. At its seventy-fifth session, in 2024, the Commission, to afford the opportunity for more Governments to comment on the draft articles, expressed that it would appreciate receiving any further comments and observations from Governments, by 15 November 2024, concerning draft articles 7 to 18 and the draft annex of the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted on first reading at its seventy-third session, in 2022, and the commentaries thereto.[3] A message to Governments was circulated on 12 August 2024 by the Secretariat, drawing their attention to the report of the Commission, including chapter III concerning specific issues on which comments would be of particular interest to the Commission. On 17 September 2024, a message was circulated to Governments with a reminder of the deadline for submission of comments and observations. By its resolution 79/121 of 4 December 2024, the General Assembly drew the attention of Governments to the importance for the Commission of having their further comments and observations on the draft articles adopted on first reading by the Commission at its seventy-third session.

3. Three written replies, containing written comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction, were received from Colombia (26 November 2024), Germany (14 November 2024) and Israel (15 November 2024). The comments and observations are reproduced below, organized thematically as follows: general comments and observations and specific comments on the draft articles.[4]

II. Comments and observations received from Governments

A. General comments and observations

Colombia

[Original: Spanish]

In response to the request of the International Law Commission to Governments for any comments or observations they wished to make on draft articles 7 to 18 and the draft annex of the draft articles on immunity of State officials from foreign criminal jurisdiction,

[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] Report of the International Law Commission on the work of its seventy-fifth session, *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 50.

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

as adopted on first reading at its seventy-third session (2022) and the commentaries thereto, the Republic of Colombia has the honour to submit the following observations:

[…]

The State of Colombia appreciates the work carried out by the International Law Commission aimed at regulating the immunity of State officials from foreign criminal jurisdiction. However, given the complexity of the subject, Colombia believes that the Commission should not rush its analysis.

In view of the close relationship between the draft articles and universal jurisdiction, the scope of the draft articles must be limited. It would also be useful to assess whether the draft articles should be limited to addressing the immunity of foreign criminal jurisdiction in relation to offences or crimes committed within the jurisdiction of the forum State.

In particular, Colombia believes that, although the draft articles take into account existing norms in different areas of contemporary international law, they should reflect customary international law.

The draft articles are limited to immunity from foreign criminal jurisdiction and do not affect the legal regime applicable before international criminal courts. Similarly, Colombia understands that, under the draft articles, as currently drafted, immunity *ratione materiae* extends, in principle, to all State officials, regardless of the position they hold or the specific functions they perform for the State, with the exception of those State officials covered by special regimes.

Lastly, Colombia reserves the right to amend or supplement the present comments or to submit additional comments at a later date, during the opportunities made available to Governments for such purpose.

Germany

[Original: English]

With reference to the decision by the International Law Commission to afford the opportunity for more Governments to comment, Germany avails itself of the opportunity to submit the following comments and observations on the draft articles on Immunity of State officials from foreign criminal jurisdiction.

Germany wishes to present its thanks to the Special Rapporteur, Mr. Claudio Grossman Guiloff, as well as the Commission as a whole for their important work on this highly relevant topic. As stated in earlier comments and observations, Germany has always been and will always be a staunch supporter of international criminal law. Germany has been at the forefront of the development of international criminal law – being mindful of the fact that the Nuremberg trials can be considered the starting point for international criminal law as we know it today.

Germany welcomes the decision of the Commission not to rush to a second reading but rather to closely evaluate and examine the numerous comments and observations submitted by States. 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. Indeed, the Commission is one of the most respected and prestigious institutions in the field of international law. This is not least due to the impeccable care and highest standards it adheres to when making its determinations. Also, the close ties that the Commission maintains with and the privileged access that it enjoys to States are what sets it apart from other highly qualified legal expert bodies. It is, therefore, only fitting that the Commission should decide to allow for more time to consider the opinion of States. It is imperative that the right balance be struck between the need for effective criminal proceedings and the need for stability in international relations.

Israel

[Original: English]

The State of Israel appreciates the opportunity to provide further written comments on the ongoing work of the Commission on the draft articles on immunity of State officials from foreign criminal jurisdiction. In this additional submission, Israel aims to address once more several key aspects of the draft articles as they currently stand, particularly as regards immunity *ratione personae* and *ratione materiae*, in anticipation of the continuance of the second reading stage. Israel believes that this engagement is of great importance, especially in light of the substantive discussions and disagreements between States concerning central elements of the text.

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 accurately reflect the current state of customary international law on this subject 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. This ambiguity as to the legal status of such provisions may lead to misapplication of the law which may in turn lead to international friction and distort the development of international law.

Given the importance of the topic, the divergent views among States on several core issues with which the draft articles are concerned, and the important role of State practice in this context, Israel believes that the Commission should limit the outcome of this project to stating and clarifying international law as it currently stands.

Should the Commission choose, despite the significant opposition of States, to endorse in the draft articles and the commentary thereto proposals for progressive development of the law, Israel emphasizes that it is essential to do so openly and transparently. The Special Rapporteur addresses this point in his report, referencing paragraph (12) of the general commentary, which states that "reference is made to this question as appropriate in the commentaries to the draft articles, with a view to providing States with enough information in this regard and ensuring the transparency that must govern the work of the Commission". However, this question is not appropriately addressed in the current draft. Indeed, the Commission should make a clear distinction between those provisions that reflect current customary international law and those constituting progressive development.

Israel believes that, due to the sensitive nature of this topic, the Commission should abide more rigorously by its practice of reaching a consensus during the second reading stage on the draft articles in their entirety. Furthermore, the Commission should take all the necessary time to address the substantive and significant controversies, with the aim of producing a result that can be widely accepted by States. In this regard, Israel believes that comments made following the completion of the first reading stage by States should be read together with the observations they have previously presented on this topic, particularly with respect to the principled positions of States on fundamental issues that remain unresolved. Such comments provide essential context that should continue to guide the work of the Commission on this topic.

A decision by the Commission to rush the second reading stage without adequately addressing the significant concerns still raised by many States will pose a serious risk to the entire project as it will to lead to a contested outcome that would undermine international law rather than clarify and potentially develop it. In this respect, Israel welcomes the constructive approach by the Special Rapporteur in postponing the discussion of some of the draft articles, in particular draft article 7, to the Commission's session in 2025, which allows States to submit further comments.

[…]

Israel attaches great importance to ensuring that perpetrators of crimes are brought to justice and supports international efforts to combat crime and impunity effectively. At the same time, the long-standing and fundamental rules governing immunity of State officials from foreign criminal jurisdiction are firmly established in the international legal system – and for good reason. These rules were developed to protect the fundamental principles of

State sovereignty and equality; to prevent international friction and political abuse of legal proceedings; and to allow for the proper and unimpeded functioning of State officials in the performance of their duties and in the conduct of international relations. These underlying rationales remain as important and as central to international law and international relations today as they were centuries ago.

Israel values the ongoing dialogue with the International Law Commission and appreciates the efforts undertaken by the Commission thus far, including the modification of some propositions in response to State input. At the same time, Israel believes that the text adopted on first reading requires further considerable amendments in several significant respects. Given the importance of the topic and the important role of State practice with regards to the issues with which the draft articles are concerned, Israel believes the Commission should take the necessary time during the second reading stage to address the substantial controversies, reach consensus, and produce an outcome that can garner broad support from the member States.

B. Specific comments on the draft articles

1. Draft article 2 – Definitions

Colombia

[Original: Spanish]

In Colombia, article 20 of the Criminal Code stipulates that public servants, for the purposes of criminal law, are the members of public corporations and the employees and workers of the State and its local offices and services.

Colombia agrees that immunity only covers "acts performed in an official capacity", since it is precisely that link that justifies the recognition of immunity. However, the definition of "act performed in an official capacity" still merits further analysis. Analysis is required of whether the scope of this definition, in addition to military and police activities, acts related to the administration of justice and administrative acts, also includes the conduct of political acts.

It should be determined whether or not the "act performed in an official capacity" under investigation by the forum State refers to an act committed within its jurisdiction, because if such act falls outside the forum State's jurisdiction, the discussion then enters the realm of universal jurisdiction, which is an issue that still requires further development and analysis.

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

Colombia

[Original: Spanish]

Colombia wishes to emphasize that, in its view, with respect to persons enjoying immunity *ratione personae*, the general principle is that the only two cases in which Heads of State, Heads of Government and Ministers for Foreign Affairs may currently be investigated and tried for international crimes before foreign national courts are: (i) when the State they represent waives immunity; and (ii) when they no longer hold the office and criminal proceedings are opened in connection with private acts.

Israel

[Original: English]

The draft article and the commentary note that immunity *ratione personae* applies to three categories of officials – Head of State, Head of Government, and Minister for Foreign Affairs (the "*troika*"). However, Israel, along with several other States, believes that this is not a complete restatement of customary international law, as there are additional categories

of officials who enjoy such immunity. It is important to make sure that the draft article (and the commentary thereto) will not be read to suggest otherwise.

Paragraph (2) of the commentary to draft article 3 notes two main reasons for the immunity *ratione personae* of the *troika*, namely their inherent position in representing the State in its international relations and the need to enable them to travel freely to exercise their functions. Over the past decades, international relations have evolved so that high-ranking State officials other than the *troika* have become increasingly involved in international relations and international forums and frequently travel outside their national territory in order to fulfil their functions on behalf of the State. The rationales detailed above in regard to the *troika* have therefore been increasingly relevant to other high-ranking officials by virtue of their position.

Thus, if immunity *ratione personae* attaches to certain high-ranking State officials because of the character and the necessity of their functions to the maintenance of international relations and international order, it follows that such immunity should not be limited to the *troika*, but also be accorded to a limited circle of additional high-ranking State officials. Such high-ranking State officials may include, for example, Ministers of Defense, as illustrated in the commentary to draft article 13 and footnote 977.[1]

It may be recalled that several members of the Commission themselves held the view that immunity *ratione personae* should be enjoyed by high-ranking State officials other than the *troika*, as mentioned in paragraph (11) of the commentary to draft article 3.

It should also be emphasized that, in practice, decisions made by States not to pursue legal proceedings against a broader range of officials than the troika, because they consider them to enjoy immunity *ratione personae*, are not necessarily publicly available or known widely, but they nonetheless constitute important State practice in the almost 22 years that have passed since the *Arrest Warrant* judgment of the International Court of Justice.

This decision of the Court in the *Arrest Warrant* case explained that: "*in international law it is firmly established that, as also diplomatic and consular agents, 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, both civil and criminal*" (emphasis added).[2] This forceful statement was further recalled in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[3] The non-exhaustive nature of the list of officials who enjoy immunity *ratione personae* is reflected in these judgments in the use of the term "*such as*", which recognizes that the rationale for immunity is associated with the function that the State official fulfils, rather than strictly by the title of his or her office.

It is thus suggested that draft articles 3 and 4 do not limit immunity *ratione personae* to the *troika* alone but include a flexible criterion for such immunity based on the functions the official performs. This will accommodate different governmental and constitutional structures of different States.

If the Commission decides to retain the current drafting of the draft article, it should make clear in the commentary that this is not a complete or accurate reflection of customary international law, and that the provision is without prejudice to existing practice related to officials in other categories. In this context, Israel believes it would not be sufficient for the commentary to clarify that officials beyond the *troika* may enjoy immunities when conducting official visits abroad based on the rules of international law relating to special missions. Special mission immunities is a mechanism between States for providing immunity to certain individuals on an *ad hoc* basis. It is not a complete and substantive alternative to

[1] "In this connection, see the case Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53, Issue 3 (2004), p. 771."

[2] *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.

[3] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at pp. 236-237, para. 170.

the immunity *ratione personae* which those additional high-ranking officials do and should enjoy based on their senior position in government and in its conduct of foreign affairs.

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

Colombia

[Original: Spanish]

The scope of the phrase "or prior to" included draft article 4, paragraph 2, should be reviewed, as the purpose of recognizing immunity for private acts occurring prior to the term of office of Heads of State, Heads of Government and Ministers for Foreign Affairs is not clear.

With regard to acts performed in an official capacity, it is also unclear whether immunity is recognized when such acts occurred before they acquired the quality that justifies immunity.

The immunity of Heads of State from foreign criminal jurisdiction has already been recognized by courts such as the International Court of Justice. The immunity of Heads of Government and Ministers for Foreign Affairs is mentioned in the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and, implicitly, in the United Nations Convention on Jurisdictional Immunities of States and Their Property.

Colombia agrees with the assertion in the draft article that immunity *ratione personae* should be limited only to Heads of State, Heads of Government and Ministers for Foreign Affairs and should not be extended to other high-ranking officials, taking into account the fact that they are not diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961.

It is understood that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity ratione *personae ceases*. Immunity *ratione materiae*, however, might still apply.

Israel

[Original: English]

[See comment under draft article 3.]

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

Colombia

[Original: Spanish]

With regard to draft article 5, it is important to take into account where the crime qualified as an "act performed in an official capacity" took place, and to determine whether the forum State alone has standing to initiate criminal proceedings, or whether the draft article would constitute a way of codifying the institution of universal jurisdiction.

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

Colombia

[Original: Spanish]

Regarding draft article 6, paragraph 2, Colombia understands that the recognition of immunity is based on the nature of the act performed by the official, which does not change by virtue of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear.

6. 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

Colombia

[Original: Spanish]

There are precedents of cases in which national courts have denied the application of the functional immunity of foreign State agents when international crimes of a *jus cogens* nature are involved, such as the *Eichmann* case in Israel, the *Barbie* case in France and the *Kappler* and *Priebke* cases in Italy.

Colombia agrees with that assessment, given that, insofar as such crimes involve *jus cogens* norms, their investigation and prosecution cannot be refused under any circumstances.

It should be made explicitly clear that the principle of universal jurisdiction does not fall within the scope of draft article 7. To date, there is no specific provision on the application of universal jurisdiction in Colombia. There are also no precedents in which Colombia has sought to apply universal jurisdiction to violations of fundamental rights committed by foreign nationals in another territory.

Germany

[Original: English]

Germany would like to make use of this opportunity to submit further comments and observations to update the Commission on important developments in Germany's national legal system. In its written comments and observations in November 2023, Germany has already drawn the Commission's attention to a judgement by the German Federal Court of Justice (*Bundesgerichtshof*) dating from 28 January 2021 (3 StR 564/19). In that decision, the German Federal Court found that functional immunity (immunity *ratione materiae*) does not prevent a State from criminally prosecuting a foreign State official on charges of war crimes, if "the acts were committed abroad by a foreign state official of subordinate rank in the exercise of his sovereign functions".

More recently, the Federal Court of Justice further developed its jurisprudence. On 21 February 2024, the Court held that functional immunity does not apply to international crimes, *irrespective* of the status and rank of the perpetrator (AK 4/24, Order of 21 February 2024). In another decision dating from 20 March 2024 (3 StR 454/22, Order of 22 March 2024), the Court further held that functional immunity does not apply to acts the punishability of which is directly rooted in customary international law. This includes, according to the Court, crimes against humanity and war crimes, as enshrined in the provisions of the Rome Statute of the International Criminal Court and, accordingly, in the German Code of Crimes against International Law, which is Germany's national law criminalizing the core crimes contained in the Rome Statute of the International Criminal Court.

Following these decisions by the German Federal Court of Justice, the German Parliament (*Bundestag*) adopted an act codifying the principle contained in these decisions in German national law. The newly incorporated section 20, paragraph 2, sentence 2, of the German Courts Constitution Act now explicitly states that functional immunity does not prevent the extension of German criminal jurisdiction to the prosecution of international crimes as defined in the German Code of Crimes against International Law.

Finally, and to provide the Commission with a full picture of recent German jurisprudence in the field of functional immunity, the Federal Court of Justice, in its decision of 27 August 2024 (StB 54/24), confirmed what it held in previous cases: that the functional immunity of State officials does not apply to espionage and acts of secret service violence; rather, that international law recognizes the legitimate interest of the State concerned to counter such violations of its sovereignty by means of criminal law.

German law therefore clearly recognizes the existence of exceptions to the principle of functional immunity. The jurisprudence mentioned above refers to immunity *ratione materiae* only. Section 20, paragraph 20, sentence 2 of the amended German Courts Constitution Act, too, expressly speaks of immunity *ratione materiae*.

In addition, it should be noted that the exceptions as now recognized in German law apply to criminal jurisdiction only. The German practice just described should therefore not be interpreted as pertaining to the immunity of States in other contexts, e.g. and in particular, in the field of civil proceedings. Germany would therefore like to stress 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.

Finally, Germany wishes to point out that section 20, paragraph 2, sentence 2 of the amended Courts Constitution Act speaks of international crimes as defined in the German Code of Crimes against International Law – these crimes include the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Israel

[Original: English]

Israel concurs with many other States and several members of the Commission that draft article 7 and its accompanying commentary do not reflect the current state of customary international law, nor do they demonstrate any "*discernible trend*" towards this development. Furthermore, draft article 7 is not appropriate as an exercise in the progressive development of the law. Since the adoption of draft article 7, this has been confirmed time and again by domestic courts, including in the *Sassy* case in France.[1] Most recently, the European Court of Human Rights affirmed the reasoning of that decision,[2] continuing the consistent line of its case law by determining that no such exception to immunity applies when officials acted in the course of the performance of their official duties. This adds to the large body of international practice that clearly demonstrates that draft article 7 does not reflect the international law in force.

It is therefore Israel's position that this draft article should be deleted.

Paragraph (9) of the commentary to draft article 7 cites 23 judicial decisions (footnote 1012) to suggest a "discernible trend towards limiting the applicability of immunity". However, as also indicated by some members of the Commission (see paragraph (12) of the commentary) and supported by ample examples in footnote 1015, it is clear from the cases cited that national case law does not support the exceptions asserted in draft article 7 and the relevant practice shows no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction.

For example, some of these cases involve allegations of acts or omissions that occurred in the forum State[3] or with respect to officials of the forum State.[4] Others have actually upheld the officials' immunity,[5] and some cases indicate a practice contrary to

[1] *Cour de cassation, criminelle, Chambre criminelle*, 13 January 2021, Appeal No. 20-80.511, CR00042.

[2] *Sassi v. France, Benchallali v. France*, nº 35884/21 and 35886/21 § 61. The Court made clear in this case in respect of possible exceptions to immunity of foreign officials from criminal jurisdiction, including officials which are not part of the "troika" as follows: "in the present case, the applicants have not adduced any evidence from which it could be concluded, particularly in the light of the work of the ILC …, that the state of international law has developed to such an extent since 2012 that the findings made in the aforementioned cases [which upheld immunity] would no longer be valid." (translated from French).

[3] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, France, Court of Cassation, Judgment of 26 January 1984.

[4] *Special Prosecutor v. Hailemariam*, Federal High Court, Judgment of 9 October 1995, ILDC 555 (ET 1995).

[5] *Hussein*, Germany, Higher Regional Court of Cologne, Judgment of 16 May 2000, 2 Zs 1330/99; *Lozano v. Italy*, Italy, Court of Cassation, 24 July 2008; *Jones v. Saudi Arabia*, House of Lords (United Kingdom), 14 June 2006.

applying the exceptions proposed in draft article 7. In other cases, there was no indication that the question of immunity was involved.[6] Notably, in certain instances, subsequent legislation or higher court rulings have overturned these earlier decisions,[7] reinforcing the principle of immunity. In yet another case, the immunity was described as academic by the authorities of the forum State.

Other decisions cited in paragraph (9) of the commentary "concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materia*e from foreign criminal jurisdiction under customary international law if such immunity is invoked" (footnote 1015). Given that the Commission itself acknowledges that immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official (paragraph (4) of the commentary to draft article 12), cases where a State has not invoked immunity are not particularly instructive for determining State practice and *opinio juris* supporting exceptions to the long-standing and fundamental rule on immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

It should also be emphasized that in practice, decisions made by State authorities not to pursue criminal complaints and thus not to initiate criminal prosecutions, will often not be publicly available or widely known, yet they too constitute an important part of understanding State practice.

The scarcity and inconsistency of the examples provided in footnote 1012 in which immunity was denied reveal no trend towards establishing widespread and representative State practice or *opinio juris* towards limiting the applicability of immunity *ratione materiae* of foreign officials. State practice has continued to uphold the long-standing and fundamental principle of immunity of foreign officials from criminal jurisdiction. The significant lack of consensus that has accompanied this provision from the start, as highlighted by various States, confirms that draft article 7 should be seen, if at all, as an attempt to introduce new law. This is a perspective that indeed finds support among some members of the Commission as well (paragraph (12) of the commentary to draft article 7).

It is important to note that those Commission members who opposed this draft article when it was adopted provisionally by vote, reiterated that neither the law nor their legal positions had changed despite the adoption of the text on the first reading in 2022, as noted in paragraph (3) of the commentary to draft article 7. The fact that draft article 7 was adopted by the Commission by a vote rather than by consensus – in contrast to the long-standing practice of the Commission – itself reflects the problematic nature of this provision and its failure to reflect accurately the state of the law.

Part Four – Procedural provisions and safeguards

Israel

[Original: English]

Proclaiming exceptions to immunity that States have not endorsed by treaty or through widespread practice and *opinio juris* risks creating severe tensions among States whenever one State exercises criminal jurisdiction over the officials of another. In fact, immunity of State officials would be violated by the very process of examining the applicability of

[6] *Cavallo*, Spanish National High Court, Third Criminal Section, 20 December 2006; National High Court of Spain, Preliminary Proceedings 331/1999-10 (*Guatemala*).

[7] *Ferrini v. Federal Republic of Germany*, Italy, Court of Cassation, Judgment of 11 March 2004, *International Law Reports*, vol. 128, p. 658; *Pinochet*, Belgium, Court of First Instance of Brussels, Judgment of 6 November 1998 - laws in Belgium were modified in 2003 to make the exercise of universal jurisdictions in such cases more limited; *Bouterse*, Netherlands, Amsterdam Court of Appeal, Judgment of 20 November 2000; *Sharon and Yaron*, Belgium, Court of Appeal of Brussels, Judgment of 26 June 2002; *H.S.A.*, et.al. *v. S.A.*, et.al. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139); Central Investigative Court No. 4, National High Court of Spain, Summary 3/2008 (Rwanda); National High Court of Spain, Criminal Chamber, Fourth Section. Order of 9 October 2013; Proceedings 2/2008. Appeal No. 246/2013. Central Court of Investigation No. 2 (*Tibet*).

exceptions, thus greatly diminishing and even nullifying the immunity of State officials. This could be particularly grave in cases where the State official might be detained or arrested during the process of examination of whether immunity applies.

This, in turn, also creates the opening for abuse for political purposes - something which the doctrine of official immunity was intended to prevent. Such actions can damage the official's reputation, impede their ability to perform their duties, and potentially subject them to unwarranted legal processes. From an inter-State perspective, these proceedings may constitute a violation of diplomatic law and sovereign immunity, potentially straining diplomatic relations between the involved States.

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 raises. Furthermore, it should be made clear that the procedural safeguards are themselves a proposal for new law.

Without prejudice to Israel's principled position that draft article 7 should be deleted, and that the procedural safeguards themselves cannot sufficiently overcome the shortcomings of draft article 7, Israel will address several aspects of the draft articles contained in Part Four.

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

Colombia

[Original: Spanish]

With respect to draft article 9, Colombia notes that, in the event that the immunity of the official is not granted by the forum State, there are no mechanisms preventing the other State from taking retaliatory measures.

Colombia also emphasizes that inviolability is enshrined in instruments such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

It is worth noting that coercive measures in Colombia may be (i) custodial or (ii) non-custodial. With respect to custodial measures, such judicial decisions cannot be implemented if the official is within the jurisdiction of his or her own territory. However, it would be relevant to consider whether it is possible to invoke immunity in the event that the official is in a third State.

The Colombian legal system provides that the Attorney General's Office may suspend, interrupt or waive criminal prosecution in cases where the principle of prosecutorial discretion applies and, therefore, the concept of criminal immunity as defined in the draft articles does not exist. Only diplomatic immunity exists, pursuant to international treaties on the subject. The laws of Colombia would need to be amended following an analysis of whether the competent authority would be the Attorney General's Office or the Supreme Court of Justice (exercising special jurisdiction). Similarly, the role that the Ministry of Foreign Affairs, the Ministry of Justice and/or the Attorney-General's Office would play would need to be defined.

Israel

[Original: English]

Draft article 9 stipulates that the competent authorities "shall examine the question of immunity without delay." Israel contends that the text must make clear that the examination ought to be conducted at the *earliest* possible time.

The commentary should make clear that the earliest stage in which a foreign official "may be affected by the exercise of its criminal jurisdiction", is when the authorities of the forum States are made aware that a complaint was filed or when there is a demand from these authorities, in whatever form, to conduct an inquiry or investigation into allegations against a foreign official.

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

Colombia

[Original: Spanish]

The phrase “initiate criminal proceedings” in draft article 10 is very broad and interpretations of when or through what action a criminal proceeding may be initiated may vary depending on what criminal systems apply in the jurisdictions involved.

Israel

[Original: English]

The question of the point in time for notification by the authorities of the forum State to the State of the official is a critical one, as almost any step taken in respect of the official could be in itself an abrogation of the immunity of the official. In this regard, Israel believes that notification to the State of the official should be given before any action, other than immediate dismissal, is taken.

9. Draft article 11 – Invocation of immunity

Israel

[Original: English]

The view of Israel, shared also by several States and members of the Commission, is that the invocation of immunity is not a prerequisite for its application. Israel disagrees with the premise presented in draft article 11, which suggests that the forum State should consider the question of immunity only if the State of the official explicitly invokes it. Immunity, as a fundamental pillar of international law, should be respected and fully implemented, unless the State of the official expressly waives the official’s immunity in writing. Israel is concerned that presuming a lack of immunity could potentially lead to unintended consequences, inadvertently undermining the established principle of 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 can also be invoked orally.

10. Draft article 13 – Requests for information

Israel

[Original: English]

Israel welcomes the efforts of the Commission to encourage the exchange of information and mutual cooperation between States, which is the subject of draft article 13. Direct dialogue between States can ensure both the protection of the fundamental legal principle of immunity of State officials and the avoidance of potential abuse of legal proceedings, while combating possible impunity. However, Israel reiterates that, as reflected in international conventions regarding criminal matters, a State has a right to refuse to respond to a request for information if it considers that such request may affect its sovereignty, security, public order or other essential interest. Such refusal to respond must not be construed as a ground for declaring that immunity does not apply, particularly if the State makes clear that the acts in question related to official activity and asserts the immunity of the relevant officials.

11. Draft article 14 – Determination of immunity

Colombia

[Original: Spanish]

Draft article 14 raises a number of concerns for the State of Colombia. For example, in the event that the forum State recognizes the immunity of the foreign official, when does such immunity apply? While the official is in office? Until the criminal action ceases?

Furthermore, in such cases, are the competent authorities the same as those responsible for making a determination on similar issues, such as diplomatic immunity and inviolability?

With respect to paragraph 2, subparagraph (*e*), Colombia recommends assessing the utility of specifying the types of "other sources", in order to ensure the credibility and provenance of information that may be taken into account for the determination of immunity.

Israel

[Original: English]

Israel reiterates its position stated above in relation to draft article 9, that the competent authorities must examine the issue of immunity at the earliest possible time. The determination regarding the lack of immunity of a foreign official should be considered by the authorities at an appropriately high-level, and only after conducting consultations with the State of the official.

Like other States, Israel of the view that the relationship between draft article 9 and draft article 14 is unclear and that the matter should be given further consideration.

Paragraph (11) of the commentary to draft article 14 refers to various sources of information from "other authorities" or "other sources" as referred to in draft article 14, paragraph 2, subparagraphs (*d*) and (*e*). The sources listed include various potential sources of information which are not part of the official publications of the State of the official. Israel is of the view that the commentary should clarify that information from such other authorities or sources should be subject to a credibility assessment by the forum State before being taken into consideration.

[See also comment under draft article 9.]

12. Draft article 15 – Transfer of the criminal proceedings

Colombia

[Original: Spanish]

With respect to draft article 15, Colombia recommends including a provision that establishes the need for communication between the States concerned to be timely, within reasonable and foreseeable time frames, given the timespans of criminal proceedings.

Israel

[Original: English]

States with the closest and most genuine jurisdictional links to the matter at hand should have primary jurisdiction to examine the incident as they are generally best able to uphold the interests of justice. Israel believes that when the State of the official is willing to assess the case at hand in a genuine manner, and apply to it the appropriate legal framework, or has already done so, it should be the obligation of the forum State to decline to exercise its jurisdiction in favour of the jurisdiction of the State of the official. Such assessment by the State of the official may, but not must, lead to criminal proceedings. That is a determination to be made after a full and comprehensive review of the matter. The mechanism enabling the transfer of proceedings also preserves the domestic resources of both States and should encourage complainants to file their complaints to the jurisdiction with the closest jurisdictional links.

This view is also reflected in the commentary to draft article 15, paragraph 2, but should be clarified in the text of the draft article itself, as it is not easily understood from the current text. The proposed amendments to draft article 15, paragraph 2, are as follows (the suggested amendments are underlined and highlighted in bold and italics): "The forum State shall ~~consider in good faith~~ ***accept*** a request for transfer of the criminal proceedings ***by the State of the official***. ~~Such transfer shall only take place~~ if the State of the official agrees to submit the case to its competent authorities for the purpose of ***assessment of the appropriateness of*** prosecution ***in accordance with the applicable law***."

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

Colombia

[Original: Spanish]

Colombia notes that the detainee rights set out in draft article 16 are stipulated in other international instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 6) and the Vienna Convention on Consular Relations (art. 36). Both instruments have been ratified by Colombia.

In this regard, Colombia suggests that the Commission analyse the relevance of including in the draft article, or in another paragraph, a specific provision regarding the possibility of extradition from the forum State to the State of nationality of the official.

14. Draft article 17 – Consultations

Israel

[Original: English]

The text of the draft article refers to "matters relating to … immunity". Israel believes that the commentary should provide further clarification on the scope of this expression. It should specify matters regarding key considerations such as: whether complaints were filed in the jurisdiction with the closest links to the alleged offences; whether proceedings are pending elsewhere; and whether the complaint has been investigated or dismissed in another State or the State of the official.

15. Draft article 18 – Settlement of disputes

Israel

[Original: English]

In respect of draft article 18, paragraph 2, which, as noted also by other States, would be relevant only in the event that the draft articles are proposed as a basis for a future treaty, Israel supports the proposal suggested by some members of the Commission and noted in paragraph (12) of the commentary to the draft article, to include an opt-out clause concerning the jurisdiction of the International Court of Justice.