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**International Law Commission**
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**First report on immunity of State officials from foreign  
criminal jurisdiction, by Claudio Grossman Guiloff,  
Special Rapporteur\*\***

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## I. Introduction

1. In 2007, at its fifty-ninth session, the International Law Commission included the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.<sup>1</sup> At the same session, the Commission requested the Secretariat prepare a background study on the topic, which was made available to the Commission at its sixtieth session in 2008.<sup>2</sup>

2. The Special Rapporteur Mr. Kolodkin submitted three reports. The Commission received and considered the preliminary report at its sixtieth session in 2008 and the second and third reports at its sixty-third session in 2011.<sup>3</sup>

3. In 2012, at its sixty-fourth session, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.<sup>4</sup>

4. The Commission received and considered the preliminary report of the Special Rapporteur Ms. Escobar Hernández at the sixty-fourth session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, her seventh report during the seventy-first session (2019), and her eighth report during the seventy-second session (2021).<sup>5</sup> On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth, fifth, and seventh reports, the Commission had provisionally adopted 13 draft articles and commentaries thereto by the conclusion of its seventy-second session (2021).<sup>6</sup>

5. At its seventy-third session in 2022, the Commission adopted, on first reading, a set of 18 draft articles on immunity of State officials from foreign criminal jurisdiction, including an annex, together with commentaries thereto.<sup>7</sup> In accordance with articles 16 to 21 of its statute, the Commission transmitted the draft articles, 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.<sup>8</sup> 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

<sup>1</sup> At its 2940th meeting, on 20 July 2007 (*Yearbook ... 2007*, vol. II (Part Two), para. 376), the General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Yearbook ... 2006*, vol. II (Part Two), para. 257).

<sup>2</sup> *Yearbook ... 2007*, vol. II (Part Two), para. 386. For the memorandum prepared by the Secretariat, see *Yearbook ... 2008*, vol. II (Part One) (Addendum 2), document A/CN.4/596.

<sup>3</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601; *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631; *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646.

<sup>4</sup> See *Yearbook ... 2011*, vol. II (Part Two), para. 266.

<sup>5</sup> A/CN.4/654; A/CN.4/661; A/CN.4/673; A/CN.4/686; A/CN.4/701; A/CN.4/722; A/CN.4/729; A/CN.4/739.

<sup>6</sup> Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10)*.

<sup>7</sup> *Ibid.*, *Seventy-seventh Session, Supplement No. 10 (A/77/10)*, paras. 64–65.

<sup>8</sup> *Ibid.*, para. 66.

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. The General Assembly further noted in 2023 the importance of State comments on the draft articles, requesting that States submit such comments ahead of the second reading of the draft articles.<sup>9</sup>

6. In May 2023, the Commission appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission. The Commission expressed its deep appreciation for the outstanding contributions of the previous Special Rapporteurs, Mr. Kolodkin and Ms. Escobar Hernández, which enabled the Commission to bring to a successful conclusion its first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction.

7. Most of the written comments submitted by Governments were received by the Commission before the December 2023 deadline, and translations of those comments were completed in January 2024. Some written observations were submitted later than expected, and translations of those comments are still forthcoming as of the date of the present report. Accordingly, discussion of the present report is scheduled for July 2024, to permit due consideration of all the State comments received.

## II. Purpose and approach of the report

8. In keeping with the normal practice of the Commission on second reading, the purpose of the current report is to make proposals for the modification of the draft articles and commentaries, where necessary. Any modifications shall be based on the comments made by States, as well as new developments in international law since the adoption of the draft articles on first reading. At the time of the finalization of the present report, 38 written observations had been received.<sup>10</sup>

9. Written comments and observations regarding the draft articles and their commentaries were to be sent to the Secretariat by 1 December 2023. The following States submitted comments: Australia (20 December 2023), Austria (4 December 2023), Brazil (1 December 2023), the Czech Republic (11 December 2023), Estonia (1 December 2023), France (28 December 2023), Germany (1 December 2023), the Islamic Republic of Iran (30 November 2023), Ireland (5 January 2024), Israel (1 December 2023), Japan (27 November 2023), Latvia (5 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), the Kingdom of the Netherlands (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).

10. Additionally, after the first reading of the draft articles was approved by the Commission, the following States made comments in the Sixth Committee in 2023: Argentina, Austria, Belarus, Brazil, Chile, Colombia, Cote d'Ivoire, Cuba, the Czech

<sup>9</sup> General Assembly resolution 78/108 adopted on 7 December 2023, para. 6.

<sup>10</sup> The comments and observations received from States are available on the website of the International Law Commission ([https://legal.un.org/ilc/guide/4\\_2.shtml](https://legal.un.org/ilc/guide/4_2.shtml)).

Republic, El Salvador, Estonia, France, Germany, Greece, India, Ireland, the Islamic Republic of Iran, Italy, Jordan, Malaysia, Mexico, Peru, Portugal, Romania, Saudi Arabia, Sierra Leone, Singapore, Slovenia, and Spain.<sup>11</sup>

11. The written comments received by States were promptly sent to the Special Rapporteur by the Secretariat, generally a few days after reception in their original language. Translations – in English only – were sent to the Special Rapporteur on 29 December (Mexico) and 2 January (Luxembourg, Morocco, Switzerland). The Special Rapporteur was informed that the translations of the comments of the Russian Federation and France would be sent “late in January”. The translation in English of the text of the comments made by the Russian Federation was received on 18 January. No translation has yet been sent of the French text as of 10 March 2024, the date of this report.

12. Several States submitted their comments close to or after the deadline, and the fact that translations could not be immediately available, made it impossible to submit a report that could be considered in the first part of the seventy-fifth session of the Commission. The Special Rapporteur was informed by the Secretariat that for his report to be considered in the first part of the session, the report needed to be submitted by 15 January 2024. This was due to the need to translate the report into all the official United Nations languages. For the report to be considered in July, during the second part of the session, it needed to be submitted by 15 March 2024. As a result, the Commission will only be able to address this topic during the second part, both in plenary and in the Drafting Committee. Given the limited time available and the need to carefully consider responses by States (see further in section III below), the present report will only cover the text of draft articles 1 to 6. Accordingly, States’ comments regarding draft articles 7 to 18 will be presented and considered in 2025. It is important to note this also responds to the views of a number of States that called upon the Commission to prioritize thoroughness and consensus and suggested that the Commission take the necessary time to properly digest and consider States’ comments.

13. The Special Rapporteur would like to emphasize that the comments of States are treated equally, and each of them is carefully considered. However, the function of the Commission on second reading is not merely to automatically adopt the views of States, particularly in cases where there are significant divergences in the comments received. Rather, the Commission’s goal on second reading is to carefully assess whether a need exists to modify the draft articles and their commentaries based on the observations received, as well as any new developments that the Commission was not able to consider on first reading.

14. The present report addresses comments and suggested amendments to draft articles 1 to 6, submitted by States after the draft articles were adopted on first reading. The present report begins by describing the comments and observations made by States under each draft article. These comments and observations are then analysed by the Special Rapporteur. The Special Rapporteur then proposes amendments to the draft articles and their commentaries, as necessary.

15. Comments made prior to the Commission’s completion of the first reading in 2022 and at earlier meetings of the Sixth Committee are not addressed as such in the present report for two reasons. First, those comments by States have already been referred to in the previous reports of the Special Rapporteurs on the topic. Second, and more importantly, those comments were not based on the complete text of the

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<sup>11</sup> This report will indicate, in the footnotes, the States that have commented on the respective topics in the Sixth Committee. For the full statements made at the seventy-third session in the Sixth Committee, see [www.un.org/en/ga/sixth/77/ilc.shtml](http://www.un.org/en/ga/sixth/77/ilc.shtml).

draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission at its seventy-third session in 2022.

### III. Comments and observations received from States

#### A. General comments<sup>12</sup>

##### 1. State responses to the draft articles and commentaries thereto

16. Almost every State that commented on the draft articles and commentaries thereto appreciated the extensive work of the Commission and the significant progress on this topic that has been achieved since 2007.<sup>13</sup>

17. For example, Mexico considered the text of the draft articles to be adequate and “relevant for the development and codification of international law regarding the criminal immunity of officials of foreign States”.<sup>14</sup> The Czech Republic commended the Special Rapporteur and the Commission for clarifying the definition and scope of the immunity of State officials *ratione personae* and *ratione materiae*.<sup>15</sup>

18. The United Kingdom commented that the topic “continues to offer an opportunity for the Commission to provide valuable clarification on a matter of real practical concern for both States and individuals”.<sup>16</sup> Norway, on behalf of the Nordic countries, stressed that the work of the Commission on the topic represents a significant step towards a common understanding of the international legal norms applicable to the immunity of State officials from foreign criminal jurisdiction.<sup>17</sup>

19. Several States highlighted that the rationale behind immunity was promoting friendly relations among States, the stability of international relations, the promotion of peaceful settlement of international disputes, and/or sovereign equality.<sup>18</sup> Almost every State noted that immunity is based on the principle of the sovereign equality of

<sup>12</sup> The present section presents a summary by category of the written comments submitted by States. The full versions of the comments submitted by Governments can be found on the website of the Commission at [https://legal.un.org/ilc/guide/4\\_2.shtml#govcoms](https://legal.un.org/ilc/guide/4_2.shtml#govcoms). The comments received by the Commission by 30 January 2024 are also reproduced in A/CN.4/771.

<sup>13</sup> During the consideration of the annual report of the Commission in the Sixth Committee, the following delegations expressed general support for the continued work of the Commission: Argentina, Armenia, Austria, Australia, Belarus, Brazil, Cameroon, Chile, Colombia, Cote d’Ivoire, Cuba, Czech Republic, El Salvador, Estonia, France, Germany, Greece, India, the Islamic Republic of Iran, Ireland, Italy, Jordan, Malaysia, Mexico, Peru, Portugal, Romania, the Russian Federation, Saudi Arabia, Sierra Leone, Singapore, Slovenia, Slovakia, Spain, Viet Nam, the United Kingdom of Great Britain and Northern Ireland. Australia, Brazil, China, France, Germany, India, Italy, Israel, the Russian Federation, and the United States of America observed that several articles required further analysis on second reading; Argentina, Algeria, Brazil, Belarus, Colombia, Cuba, Cameroon, El Salvador, France, India, the Islamic Republic of Iran, Israel, Philippines, Romania, the Russian Federation, Saudi Arabia, Slovenia, South Africa, Thailand and Viet Nam stated the need to strike a balance between the principles of sovereign equality and accountability while maintaining international peace and security (A/CN.4/755, para. 95).

<sup>14</sup> Mexico (A/CN.4/771). In the Sixth Committee, Australia, Brazil, Egypt, France, India, the Islamic Republic of Iran, Israel, Saudi Arabia, the United Kingdom of Great Britain and Northern Ireland and the United States of America also requested that the draft articles clearly indicate when they constituted an exercise of codification or progressive development of international law (A/CN.4/755, para. 97).

<sup>15</sup> Czech Republic (A/CN.4/771).

<sup>16</sup> United Kingdom of Great Britain and Northern Ireland (A/CN.4/771).

<sup>17</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>18</sup> Brazil, Germany, the Islamic Republic of Iran, Ireland, Israel, Morocco, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Saudi Arabia, Switzerland, the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

States and accountability for the most serious crimes under international law.<sup>19</sup> Morocco, for example, understood the basic purpose of the immunity of State officials from foreign criminal jurisdiction as “ensur[ing] that State officials have the capacity to act on behalf of their States when exercising their official functions”.<sup>20</sup>

20. In their comments, Germany and Norway (on behalf of the Nordic countries) recognized the need to strike a balance between the interests of the forum State and that of the State of the official. This is said to follow the principle of sovereign equality of all States and the need to facilitate the maintenance of stable international relations.<sup>21</sup> This point was also emphasized by State delegations in discussions held in the Sixth Committee of the General Assembly during its seventy-seventh session.<sup>22</sup> Additionally, in its comments to the report adopted in first reading by the Commission, Switzerland highlighted that the Commission’s work on this topic helps to ensure “a balance between combating impunity and upholding the principle of the sovereign equality of States”.<sup>23</sup> While Austria commended the “balanced approach of the draft articles containing important procedural safeguards”,<sup>24</sup> Liechtenstein recognized the work of the Commission in the “overall fight against impunity for the core international crimes” evident throughout the draft articles.<sup>25</sup> Luxembourg further noted the fundamental importance of the draft articles for the prosecution of crimes under international law, as they dealt with the relationship between such crimes and immunity from foreign prosecution.<sup>26</sup>

21. Germany noted that the Nürnberg trials were the foundation of the development of modern international criminal law.<sup>27</sup> Poland similarly mentioned trials before Polish courts, some held even before the International Military Tribunal, which involved responsibility for crimes against peace.<sup>28</sup>

22. Some States confirmed that the draft articles represented a reflection of customary norms. The statement of Norway (on behalf of the Nordic countries), for example, reads as follows:

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

<sup>19</sup> Germany, Islamic Republic of Iran, Ireland and Israel, Morocco, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Russian Federation, Saudi Arabia, Switzerland, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>20</sup> Morocco (*ibid.*).

<sup>21</sup> Germany (*ibid.*); Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>22</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session (A/CN.4/755, para. 95). In the Sixth Committee, France, Germany and India noted that immunity should not exempt its beneficiaries from all criminal responsibility and that it was not granted for personal benefit but to protect the rights and interests of the State (*ibid.*, para. 96).

<sup>23</sup> Switzerland (A/CN.4/771).

<sup>24</sup> Austria (*ibid.*).

<sup>25</sup> Liechtenstein (*ibid.*).

<sup>26</sup> Luxembourg (*ibid.*).

<sup>27</sup> Germany (*ibid.*).

<sup>28</sup> Poland (*ibid.*); see also Switzerland (*ibid.*).

of State officials from foreign criminal jurisdiction, as reflected *inter alia* in article 7 of the draft articles.<sup>29</sup>

23. Most States concluded that at least some of the provisions included in the draft articles reflected customary international law. For instance, the Nordic countries concluded 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”.<sup>30</sup> Other States held similar views, including the Czech Republic, Mexico and Panama.<sup>31</sup>

24. To the contrary, other States, such as Singapore, underlined the role of the draft articles on the progressive development of international law.<sup>32</sup> Some States pointed out that specific provisions of the draft articles are not supported by widespread and consistent State practice and *opinio juris*, so they do not reflect customary international law.<sup>33</sup>

25. Several States expressed concern that the draft articles adopted on first reading contain both elements of progressive development and codification of customary law, without clearly distinguishing between the two categories.<sup>34</sup>

26. Moreover, Israel, Malaysia, the United Arab Emirates, and the United Kingdom considered that the draft articles contain elements of new law going beyond progressive development. In the view of the United Arab Emirates, a proposal of progressive development needed to be based on an emerging or developing rule, at least as a foundation.<sup>35</sup>

27. Both Ireland and the United Kingdom suggested that the Commission should prepare two separate outcomes as a result of its consideration of this topic. While Ireland suggested that a set of draft articles should describe the scope and content of immunities and a set of guidelines should propose appropriate procedures and safeguards, the United Kingdom suggested one product reflecting a set of existing customary rules and another focusing on areas of progressive development.<sup>36</sup>

28. A number of States, including France, the Kingdom of the Netherlands, the United Kingdom and the United States considered that the Commission should not rush to develop the draft articles, bearing in mind that, in their view, *inter alia*, the draft articles did not seem to be fully supported by State practice and there was a need to reach consensus. Israel recommended taking a multi-year approach to completing

<sup>29</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), (*ibid.*). Several States mentioned the need to include the crime of aggression in draft article 7. As only draft articles 1 to 6 are considered in the present report, the Special Rapporteur will address those comments when assessing the substantive work for articles 7 to 18 in 2025.

<sup>30</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>31</sup> Czech Republic, Mexico and, Panama (*ibid.*). In contrast, other States, including Israel, Japan and the Kingdom of the Netherlands expressed the view that the draft articles as currently drafted do not fully reflect customary international law (*ibid.*).

<sup>32</sup> Singapore (*ibid.*).

<sup>33</sup> United States of America (*ibid.*); see also United Arab Emirates (*ibid.*).

<sup>34</sup> Australia, France, Ireland, Israel, Japan, the Kingdom of the Netherlands, Singapore, the United Arab Emirates, and the United Kingdom of Great Britain and Northern Ireland (*ibid.*). In the Sixth Committee, Australia, Brazil, Israel, the Russian Federation, and the United States of America urged the Commission to proceed cautiously with a view to reaching a consensual outcome, particularly if it were to propose recommendations for progressive development of international law (A/CN.4/755, para. 98).

<sup>35</sup> United Arab Emirates (A/CN.4/771); see also Israel, Malaysia, and the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>36</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

a second reading of the draft articles, as done with the articles on responsibility of States for internationally wrongful acts.<sup>37</sup>

29. In the same vein, Japan encouraged the Commission to “take the time to carefully and soundly consider the draft articles”.<sup>38</sup> Similarly, the Russian Federation stressed that the quality of the final product was far more important than the speed with which it is completed.<sup>39</sup>

30. Several States, including the Nordic countries, proposed further codification of the draft articles in the form of an international treaty.<sup>40</sup> Furthermore, Mexico noted in its comments the need for States to have a binding legal instrument that regulates immunity from foreign criminal jurisdiction.<sup>41</sup>

31. Other States, such as the Kingdom of the Netherlands, considered that if the draft articles were intended to form the basis for a convention, they should codify customary international law.<sup>42</sup> The United Kingdom stated that, if the Commission maintained the current structure of its work on the topic, which contained proposals for codification and progressive development, the appropriate outcome of the work should be draft articles that could form the basis for a negotiated convention.<sup>43</sup> Alternatively, it encouraged the Commission to consider more broadly whether other structures would be preferable.<sup>44</sup> The United States also recommended that before a decision on the final outcome was taken, the Commission start afresh on areas of disagreement and work towards consensus.<sup>45</sup> As another possible option, Ireland suggested dividing the draft articles into two instruments, one being a set of draft articles and the second being a set of guidelines.<sup>46</sup> Other States, including the Russian Federation and the United Arab Emirates, were of the opinion that the draft articles could not serve as the basis of an international convention.<sup>47</sup>

32. France also addressed the question concerning the final outcome that the current project should take. It expressed the view that the discussion of that issue should not be postponed, as the final outcome would necessarily guide the way in which the Commission would proceed with its work.<sup>48</sup>

## 2. Recommendations of the Special Rapporteur concerning the general comments from States

33. The Special Rapporteur examines and responds to the general comments received from States below, as well as in the following sections on each draft article, as appropriate.

34. As to the rationale for the legal basis for immunity *ratione personae* and immunity *ratione materiae*, the Special Rapporteur will reaffirm the principles

<sup>37</sup> Israel (*ibid.*). The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77; see also General Assembly resolution 56/83 of 12 December 2001, annex.

<sup>38</sup> Japan (A/CN.4/771).

<sup>39</sup> Russian Federation (*ibid.*).

<sup>40</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden); see also Mexico and United Arab Emirates (*ibid.*).

<sup>41</sup> Mexico (*ibid.*).

<sup>42</sup> The Kingdom of the Netherlands cautioned that the draft articles adopted on first reading did not respond fully to the fundamental questions raised by the topic and needed further modification to be of practical value to States (*ibid.*).

<sup>43</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>44</sup> *Ibid.*

<sup>45</sup> United States of America (A/CN.4/771).

<sup>46</sup> Ireland (*ibid.*).

<sup>47</sup> Russian Federation and United Arab Emirates (*ibid.*).

<sup>48</sup> France (*ibid.*).

mentioned by numerous States in their comments, such as the principle of sovereign equality of States, which are included in paragraphs (5) and (6) of the general commentary to the draft articles.<sup>49</sup>

35. On the need to strike a balance between the different issues at stake, including accountability and the protection of sovereign equality, the Special Rapporteur notes that, as draft articles 7 to 18 will be considered at the seventy-sixth session of the Commission, there will be ample opportunity to further address the issue. Thus, the Special Rapporteur will consider those comments when assessing the substantive work for those draft articles.

36. As to the comments provided by States concerning distinguishing between customary norms and progressive development, the Special Rapporteur recalls that this issue is explicitly addressed in paragraph (12) of the general commentary to the draft articles adopted on first reading, which states 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. 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.<sup>50</sup>

37. On the matter of the time needed to conclude the work on the topic, as raised by several States, the Special Rapporteur notes that only draft articles 1 to 6 will be considered at the present session, for the reasons mentioned in paragraph 12 above. This approach offers more time to achieve the goal of successfully completing the work on the topic and allowing for careful and sound consideration of all aspects.

38. Concerning the final outcome of the topic, the Special Rapporteur notes that in paragraph (13) of the general commentary to the draft articles, adopted in first reading by the Commission, two possible recommendations for the General Assembly were made; namely, to commend the draft articles to the attention of States in general or to use them as the basis to negotiate a treaty on the topic.<sup>51</sup> The Special Rapporteur considers that the project as a whole should result in an outcome consistent with these options and invites the Commission to consider this issue.

39. Other issues raised by States that more specifically pertain to draft articles 1 to 6 will be considered further in the present report as each draft article is analysed in turn below.

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<sup>49</sup> Paras. (5) and (6) of the general commentary to draft articles, as adopted on first reading, 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. 69.

<sup>50</sup> Para. (12), *ibid.*

<sup>51</sup> Para. (13), *ibid.*

## B. Comments and observations regarding the individual draft articles as adopted by the Commission on first reading

### Part One Introduction

#### Article 1 Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
  2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.
  3. The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.
40. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>52</sup>

#### 1. Comments and observations by States

41. Draft article 1 refers to the scope of the project, namely that it applies only to foreign criminal jurisdiction; that it does not impact the rights and obligations of States Parties under international agreements; and that it covers all State officials, unless a special legal regime applies.
42. Written submissions specifically addressing draft article 1 were presented by 16 States: Austria, Brazil, Czech Republic, France, Ireland, Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden), the Russian Federation, the United Arab Emirates, Switzerland, the United Kingdom, and the United States.<sup>53</sup> Most States that commented directly on that draft article voiced general support.<sup>54</sup>
43. Only a few States directly address draft article 1, paragraph 1. Norway, submitting comments on behalf of the Nordic countries, noted that the paragraph adequately defines the scope of the draft articles.<sup>55</sup> The United Kingdom also welcomed the scope of the draft articles as set out in that paragraph.<sup>56</sup>
44. France, the Kingdom of the Netherlands, the Russian Federation, the United Kingdom, and the United States of America requested further clarification on the distinction between criminal immunity and inviolability in relation to the draft articles. France suggested including a definition of immunity in the commentary to

<sup>52</sup> A/77/10, pp. 198–203.

<sup>53</sup> A/CN.4/771.

<sup>54</sup> The Czech Republic stated in its general comments that draft articles 1 to 6 reflected customary law (*ibid.*). The Russian Federation provided extensive comments and opposed paragraph 3 of the draft article 1 in its current wording (*ibid.*). In the Sixth Committee, the United Kingdom of Great Britain and Northern Ireland, Portugal, Romania, Estonia, Greece, Slovakia, South Africa, Sierra Leone, and El Salvador equally welcomed the clarification provided by the commentary to the draft articles (A/CN.4/755, para. 95).

<sup>55</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/CN.4/771).

<sup>56</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

achieve this.<sup>57</sup> As clarified in paragraph (5) of the commentary to draft article 1 adopted on first reading, the Commission did not consider it necessary to define what immunity and criminal jurisdiction mean, following its extensive practice in other projects where it has dealt with immunity from criminal jurisdiction. The Commission stated “[f]ollowing its practice in other projects in which it has dealt with immunity from criminal jurisdiction, [it] has not considered it necessary to define what immunity and criminal jurisdiction mean.”<sup>58</sup>

45. The Russian Federation noted that the draft articles could more clearly distinguish between criminal jurisdiction and other types of jurisdiction, citing the case of “administrative offences” in its national law that entail comparable procedures and penalties to those used in criminal proceedings.<sup>59</sup> The Russian Federation also requested a clearer definition of immunity and further recommended that the Commission include a separate article establishing what forms of the exercise of criminal jurisdiction are affected by immunity.

46. In its general comments, Germany also noted that the draft articles “should generally not be interpreted as carrying implications for other immunities such as, in particular, those of States in civil proceedings, etc.”.<sup>60</sup> It further noted that it is important to distinguish “between the immunity of States from foreign civil proceedings and the immunity of State officials from foreign criminal jurisdiction”.<sup>61</sup>

47. A few States also submitted comments directly on draft article 1, paragraph 2. Both Ireland and Norway (on behalf of the Nordic countries) voiced support for the paragraph.<sup>62</sup> The Russian Federation noted that it was its understanding that it was well established in international law that combatants who commit war crimes do not enjoy immunity from the jurisdiction of the adversary State in relation to war crimes, but noted the issue warrants further study in the context of “State officials” as defined in draft article 2.<sup>63</sup>

48. The United Kingdom of Great Britain and Northern Ireland noted that, while the position of family members of Heads of State generally falls outside this topic, more direct clarification would be welcomed.<sup>64</sup> It also noted that the examples of special rules provided in the paragraph do not form an exhaustive list of the relevant *lex specialis*, and particularly that treatment of military personnel who are not subject to specific agreements will be impacted in the same way as other officials under these draft articles.<sup>65</sup>

49. More States directly commented on draft article 1, paragraph 3. Austria, Ireland, Norway (on behalf of the Nordic countries), Switzerland, the United Kingdom, and the United States welcomed the inclusion of the clause in draft article 1. In its comments, Austria requested further clarification as to whether the mention of international courts and tribunals in the paragraph also encompassed hybrid or internationalized criminal courts and tribunals, including those created by Security Council resolutions or under domestic law as a result of initiatives originating from

<sup>57</sup> France (*ibid.*).

<sup>58</sup> Para. (5) of the commentary to draft article 1 of the draft articles, as adopted on first reading, 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. 69.

<sup>59</sup> Russian Federation (*A/CN.4/771*).

<sup>60</sup> Germany (*ibid.*).

<sup>61</sup> *Ibid.*

<sup>62</sup> Ireland and Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>63</sup> Russian Federation (*ibid.*).

<sup>64</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>65</sup> *Ibid.*

universal or regional international organizations.<sup>66</sup> Ireland suggested that for greater legal certainty, the paragraph be amended to also refer 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)”.<sup>67</sup> Switzerland made similar reference to international courts created by Security Council resolutions, and further suggested deleting the phrase “as between the parties to those agreements”, noting that the use of the phrase could inadvertently provide a basis for calling into question the jurisdiction and functioning of the International Criminal Court.<sup>68</sup>

50. Norway (on behalf of the Nordic countries) supported inclusion of the paragraph, noting that it preserved the validity of the separate legal regimes mentioned.<sup>69</sup> The United Kingdom also noted the importance of preserving the progress made in tackling impunity for international crimes, but noted the wording of the paragraph could be further clarified.<sup>70</sup> Brazil agreed with the paragraph’s distinction between the draft articles and the legal regimes applicable to international criminal tribunals.<sup>71</sup>

51. The United States suggested broader language to clearly indicate the pertinence of agreements relating to international criminal courts, such as the Agreement on the Privileges and Immunities of the International Criminal Court.<sup>72</sup>

52. France also agreed with the need to limit the scope of the present draft articles to the immunity of State officials from the jurisdiction of another State. However, it expressed reservations with the wording of the provision, as it considered that the current reference to international agreements in paragraph 3 may limit the effect of this without prejudice clause by leaving out other international criminal jurisdictions. Accordingly, it suggested framing the clause in a different way; excluding all international criminal jurisdictions from the scope of application of the draft articles.<sup>73</sup>

53. Some States agreed with the premise of the paragraph, but for various reasons questioned its necessity and utility as part of the draft article. The Russian Federation noted its opposition to including in the draft articles reference to separate rules relating to international criminal jurisdiction.<sup>74</sup> The Kingdom of the Netherlands called for the paragraph to be deleted altogether since issues of immunity before international courts and tribunals was strictly a matter for the contracting parties.<sup>75</sup>

## 2. Recommendations of the Special Rapporteur

54. On the basis of the written comments submitted by States, the Special Rapporteur formulates the following proposals.

<sup>66</sup> Austria (*ibid.*).

<sup>67</sup> Ireland (*ibid.*).

<sup>68</sup> Switzerland (*ibid.*). In the Sixth Committee, the Russian Federation expressed concern over the use of the term “international agreements” (A/CN.4/755, para. 99).

<sup>69</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden) (A/CN.4/771).

<sup>70</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>71</sup> Brazil (*ibid.*).

<sup>72</sup> United States of America (*ibid.*). In the Sixth Committee, the States of Austria, Romania, and Hungary questioned if further clarification was needed as to what courts were contemplated by this draft article.

<sup>73</sup> France (A/CN.4/771).

<sup>74</sup> Russian Federation (*ibid.*).

<sup>75</sup> Kingdom of the Netherlands (*ibid.*).

55. The Special Rapporteur views favourably the need to further clarify the distinction between the exercise of criminal jurisdiction and inviolability, and intends to expand appropriately on the topic in the commentaries.

56. The Special Rapporteur also supports the view raised by some States that the text of paragraph 3 and the commentary thereto could be clearer. Accordingly, the Special Rapporteur proposes amending the paragraph as stated below. The commentaries will reflect this change as well and also address the pertinence of including reference to the Agreement on the Privileges and Immunities of the International Criminal Court.

57. Accordingly, the Special Rapporteur proposes the following new formulation of draft article 1:

### **Article 1**

#### **Scope of the present draft articles**

1. *The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.*
2. *The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organisations and military forces of a State.*
3. *The present draft articles do not affect the rights and obligations of States under:*
  - (a) *treaties establishing international criminal courts and tribunals as between the parties to those agreements; or*
  - (b) *binding resolutions establishing international criminal courts and tribunals.*

### **Article 2**

#### **Definitions**

For the purposes of the present draft articles:

- (a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
- (b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

58. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>76</sup>

## **1. Comments and observations by States**

59. The draft article defines “State official” and an “act performed in an official capacity”. The definition of “State official” establishes that this term only applies to individuals. There are two bases on which individuals can be considered State officials under subparagraph (a): representation of the State or exercising State functions. The definition and commentary clarify that immunity is granted for the benefit of the State; that whether an individual is considered a “State official” is determined on a case-by-case basis; and that the draft article covers current and

<sup>76</sup> A/77/10, pp. 204–214.

former officials.<sup>77</sup> The second definition, namely an “act performed in an official capacity”, clarifies that a direct connection must exist between the act and the exercise of State functions and powers. In accordance with the commentary to this article, this connection protects the principle of sovereign equality of States.<sup>78</sup> Attribution to the State is an essential component of the draft article. Private acts, only benefiting the individual and which cannot be attributed to the State, are not covered. The definition refers to acts as well as omissions.

60. Fifteen States submitted written comments specifically on draft article 2: Austria, Brazil, Czech Republic, France, Ireland, Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden), the Russian Federation, the United Arab Emirates, the United Kingdom, and the United States. In general, there is broad support for the definitions.

61. A few States commented on the first definition relating to “State officials”. Austria, France and the Russian Federation requested more clarification on issues relating to the nationality of the official in cases where the official may be the national of a State and serve as a State official for a different State.<sup>79</sup>

62. Issues of word choice were raised by some States. France questioned the translation of “State officials” in French as “*représentants de l’Etat*” and provided reasons why it preferred “*agents*”:<sup>80</sup> inter alia, that “*représentants*” did not necessarily include everyone exercising State functions and would seem to exclude *de facto* representatives of the State, a possibility that was not excluded in the commentaries to the draft articles.<sup>81</sup> The Russian Federation also suggested revising the French translation of that term.<sup>82</sup> Conversely, Ireland noted that it supported the choice to use “State official” as opposed to other terms considered, such as “State organs”.<sup>83</sup>

63. Some States considered whether further clarification or lists of who could be a “State official” in the definition would be advisable. For instance, while finding the definition generally acceptable, the Russian Federation supported closer alignment between paragraph (a) of draft article 2 and article 4 of the articles on responsibility of States for internationally wrongful acts, to remove possible doubts as to whether a State official enjoyed immunity from foreign criminal jurisdiction.<sup>84</sup> Conversely, the United Kingdom agreed 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.<sup>85</sup> Additionally, while acknowledging that the categorizations by sending States may be difficult to generalize, the United States of America noted that the commentaries should attempt to resolve how forum States should assess that threshold concept when determining the applicability of immunity.<sup>86</sup>

64. The Russian Federation also raised the issue of who is covered under military personnel, specifically distinguishing between combatants and military officials, as

<sup>77</sup> Paras. (8) and (20) of the commentary to draft article 2, *ibid.*, para. 69.

<sup>78</sup> Para. (23), *ibid.*

<sup>79</sup> Austria, France and the Russian Federation (A/CN.4/771). The comments of Austria before the Sixth Committee echoed their preference for more clarification of “State officials” (A/CN.4/755, para. 100).

<sup>80</sup> France (A/CN.4/771).

<sup>81</sup> *Ibid.*

<sup>82</sup> Russian Federation (*ibid.*).

<sup>83</sup> Ireland (*ibid.*).

<sup>84</sup> Russian Federation (*ibid.*).

<sup>85</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*, general comments).

<sup>86</sup> United States of America (*ibid.*).

well as the issue of immunity of individuals for decisions of collective bodies, such as a parliament.<sup>87</sup>

65. The United States of America suggested articulating the scope immunity *ratione materiae* in draft article 6 instead, since the reference in subparagraph (a) to “current and former officials” might create confusion.<sup>88</sup>

66. A number of States also commented directly on the definition in subparagraph (b) of the text adopted by the Commission in first reading. Most States were generally in favour of the definition but offered minor amendments or requested further clarification.

67. Austria and the Russian Federation commented on the expression “exercise of State authority” in subparagraph (b). Austria requested that the Commission further clarify which acts are covered by the expression and suggested more closely aligning the definition contained in subparagraph (b) with the articles on responsibility of States for internationally wrongful acts, which references exercising “elements of governmental authority”.<sup>89</sup> The Russian Federation, on the other hand, supported the proposed formulation because it found it to be consistent with the reference to “exercising elements of governmental authority” from the articles on responsibility of States for internationally wrongful acts.<sup>90</sup>

68. The Russian Federation, the United Kingdom and the United States commented on the issue of *ultra vires* acts. The Russian Federation questioned the assertion in the commentaries that acts performed by officials purely in their own interest, in excess of their authority, or in contravention of instructions are not considered acts performed in an official capacity and therefore not covered by immunity.<sup>91</sup> The United Kingdom also suggested the Commission be more specific regarding what acts in an official capacity are within the scope of immunity *ratione materiae*, including more clarification on *ultra vires* acts.<sup>92</sup> In its comments, the United States noted that the definition of an official act could be narrower than the definition of a State official *because* an official may act *ultra vires*. In such a case, the United States of America noted the act would not be regarded as an official act, yet could still be attributable to the State.<sup>93</sup>

69. The Czech Republic, the Russian Federation and the United Arab Emirates also questioned the link between attribution and official capacity. The Czech Republic suggested the Commission clarify the relationship of immunity *ratione materiae* of State officials from foreign criminal jurisdiction and the responsibility of States for internationally wrongful acts.<sup>94</sup> The United Arab Emirates and the United States of America specifically commented on the Commission’s limited guidance on the scope of official acts, particularly in cases where the acts in question may be unlawful.<sup>95</sup>

70. In addition to comments received on the two definitions listed in draft article 2, some States proposed adding more definitions to the draft article. Brazil requested that a definition of foreign criminal jurisdiction be added.<sup>96</sup> Norway (on behalf of the

<sup>87</sup> Russian Federation (*ibid.*).

<sup>88</sup> United States of America (*ibid.*).

<sup>89</sup> Austria (*ibid.*). In the Sixth Committee Belarus and Austria favoured more clarification on the scope of the “act performed in an official capacity” (A/CN.4/755, para. 100)

<sup>90</sup> Russian Federation (A/CN.4/771).

<sup>91</sup> *Ibid.*

<sup>92</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>93</sup> United States of America (*ibid.*).

<sup>94</sup> Czech Republic (*ibid.*).

<sup>95</sup> United Arab Emirates and United States of America (*ibid.*).

<sup>96</sup> Brazil (*ibid.*).

Nordic countries) also called for a definition of criminal jurisdiction.<sup>97</sup> The Russian Federation reiterated its preference for including a definition of immunity.<sup>98</sup> Austria suggested including a specific definition of the term “State of the official”.<sup>99</sup>

71. Alternatively, Norway suggested defining the terms explained in draft article 2 in draft articles 5 and 6 instead as they mainly relate to immunity *ratione materiae* and not to immunity *ratione personae*.<sup>100</sup>

## 2. Recommendations of the Special Rapporteur

72. Taking into account the State comments, the Special Rapporteur proposes the following.

73. Regarding the issues raised concerning the nationality of a State official, the Special Rapporteur agrees that the determining factor is whether the elements of “State official” and “act in an official capacity” are met. In this sense, immunity benefits the State for which the official is serving.

74. A second issue involves the translation of “State official” into French, as raised by France and supported by the Russian Federation. The Special Rapporteur considers persuasive the arguments provided by France and the Russian Federation and recommends accordingly to make the change suggested. Concerning the other official languages of the United Nations, the Special Rapporteur notes that the Commission has not received additional comments regarding how these terms have been translated.

75. Concerning the suggestion to include a list of State officials in the definition, in light of the variety of terms used in national contexts, the Special Rapporteur notes that a non-exhaustive list is included in paragraph (9) of the commentary to draft article 2, although further examples may be provided. Additionally, the Special Rapporteur suggests that the commentary may provide further clarification in relation to the regime applicable to military personnel stationed abroad, which is usually governed by status-of-forces agreements. It is relevant to note that, as the Commission had mentioned in paragraph (5) of the commentary of draft article 2, there is no general definition of State official in international law. As noted by the United States, the Commission explained in the commentary that this definition is autonomous and must be understood as for the purposes of the draft articles.

76. Regarding the suggestion by some States to include further definitions in this draft article, including for “criminal jurisdiction” and “immunity”, the Special Rapporteur recalls the explanation of this issue referenced in paragraph 44 above of the present report. The Commission has discussed this matter at length in the past, considering a wide variety of terminology and State practice, and therefore it decided to include the following explanation in the commentary to draft article 9:

For the general rule, the Commission has used the expression “exercise of ... criminal jurisdiction”, which it considered preferable to “criminal proceeding”, an expression that was considered too narrow. The term “exercise of ... criminal jurisdiction” is also used in draft articles 3, 5, 7, 8, 10, 14 and 16. For the purposes of draft article 9, “exercise of ... criminal jurisdiction” should be understood to mean such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not

<sup>97</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>98</sup> Russian Federation (*ibid.*).

<sup>99</sup> Austria (*ibid.*).

<sup>100</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.<sup>101</sup>

77. Concerning the suggestion by the United States of America to move the phrase “and refers to both current and former State officials” to draft article 6, the Special Rapporteur recommends the Commission consider this possibility.

78. Concerning the issues raised by some States of the relationship between attribution and the immunity of State officials, including *ultra vires* acts, the Special Rapporteur is of the view that this issue is addressed in the commentaries. The Special Rapporteur notes that the Commission attempted to explain this issue in paragraphs (32)–(34) of the commentary to draft article 2. The Special Rapporteur will suggest further explanation of the considerations presented by the Commission in the commentaries.

79. In this context, it is also important to recall that, in its articles on responsibility of States for internationally wrongful acts, the Commission stressed that it established those rules in the context and for the specific purposes of State responsibility. Consequently, their application to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully, as explained in paragraph (25) of the commentary to draft article 2.<sup>102</sup>

80. Considering that most of the States that submitted specific comments agree with the content of draft article 2, the Special Rapporteur concludes that no modification is needed. However, the commentaries will address the topics raised by States as explained in the preceding paragraphs. Accordingly, the text of the draft article would remain as follows:

**Article 2**  
**Definitions**

*For the purposes of the present draft articles:*

(a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

(b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

**Part Two**  
**Immunity *ratione personae***

**Article 3**  
**Persons enjoying immunity *ratione personae***

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

81. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>103</sup>

<sup>101</sup> Para. (5) of the commentary to draft article 9 of the draft articles, as adopted on first reading, 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. 69.

<sup>102</sup> Para. (25) of the commentary to draft article 2, *ibid.*

<sup>103</sup> *A/77/10*, pp. 214–222.

## 1. Comments and observations by States

82. Draft article 3 explains that immunity *ratione personae* is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs.

83. Sixteen States submitted written comments on draft article 3: Brazil, Czech Republic, France, Ireland, the Islamic Republic of Iran, Israel, the Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden), the Russian Federation, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

84. In their comments, no State doubted the applicability of immunity *ratione personae* to what is known as “the troika” (Head of State, Head of Government, and Minister of Foreign Affairs). All States that submitted comments agreed that the provision of draft article 3 reflects customary international law.<sup>104</sup>

85. All States that commented on draft article 3 supported immunity *ratione personae* for the troika, reiterating that the immunity of its members is well established under customary international law. The Islamic Republic of Iran underlined in its comments that this is a key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State.<sup>105</sup>

86. Additionally, a number of States supported the idea that immunity *ratione personae* is limited to the troika.<sup>106</sup>

87. The United States of America concluded that “[t]he 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 did 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.<sup>107</sup>

88. Similarly, in their response, France referenced a 2015 ruling of its Cour de cassation where it denied immunity to a second vice-president, as the role was not that of a Head of State, Government, or Foreign Minister.<sup>108</sup>

89. Additionally, Ireland agreed that such immunities are limited to the troika and do not extend to any other office holder.<sup>109</sup>

90. While generally supportive of the draft article, some other States expressed the view that the category of State officials enjoying immunity *ratione personae* should not be limited to the troika.<sup>110</sup>

91. The Kingdom of the Netherlands expressed support for the traditional understanding of the troika, but recognized that other State officials, like official mission members, may also have this immunity in certain cases.<sup>111</sup>

92. The United Kingdom noted that it is unclear whether immunity *ratione personae* may extend to other high-ranking officials beyond the troika. Their written observation cites that “[s]everal cases in the domestic courts of the United Kingdom have shown the courts’ willingness to recognise the personal immunity of other senior

<sup>104</sup> In the Sixth Committee, the States of Brazil, the Czech Republic, and Belarus concur that this reflects customary international law (A/CN.4/755, para. 101).

<sup>105</sup> Islamic Republic of Iran (A/CN.4/771).

<sup>106</sup> France, Ireland and United States of America (*ibid.*).

<sup>107</sup> United States of America (*ibid.*).

<sup>108</sup> France (*ibid.*).

<sup>109</sup> Ireland (*ibid.*).

<sup>110</sup> Israel, Kingdom of the Netherlands, Russian Federation, and United Arab Emirates (*ibid.*).

<sup>111</sup> Kingdom of the Netherlands (*ibid.*).

officials such as a Defence or Trade Minister”.<sup>112</sup> The State encouraged the Commission “to explore this area further and – as with the definitions in Part One – to consider whether it might be productive to identify criteria rather than taking a purely enumerative approach”. The State further noted that the *Arrest Warrant* case left open whether this immunity could apply to other officials.<sup>113</sup>

93. Israel reasoned that the rationale for granting this immunity to the listed officials could also apply to other officials, such as Ministers for Defence and recalled paragraph 11 of the Commission’s commentary to draft article 3, noting “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”.<sup>114</sup>

94. The Russian Federation asserted similar points and suggested that the Commission revisit the question of whether other officials holding high-level positions comparable to the troika might also enjoy absolute immunity. The Russian Federation proposes an extension of this immunity to a number of figures, as well as flexibility in defining “troika”, accommodating different government structures.<sup>115</sup>

95. The United Arab Emirates is of the view that immunity *ratione personae* should extend beyond the troika, with a specific consideration of *de facto* leaders; individuals who hold defined roles in the constitutional structure of a State, such as a crown prince or an heir apparent, or newly elected leaders in the interim period before formally taking office.<sup>116</sup>

## 2. Recommendations of the Special Rapporteur

96. The Special Rapporteur notes that the overwhelming majority of States that have responded to this topic supported the text of draft article 3. The Special Rapporteur does not propose any modification of the text of draft article 3 adopted on first reading.

97. The Special Rapporteur considers, in light of the comments submitted, that the commentary to draft article 2 could address the issue of *de facto* Heads of Government.

98. Furthermore, the Special Rapporteur considers that no legal grounds have been provided to justify inclusion of other persons, i.e. crown princes, elected heads of government who have not assumed office, vice-presidents, etc., in the category of persons entitled to immunity *ratione personae*. Nevertheless, by virtue of draft article 1, paragraph 2, this is without prejudice to the immunity those officials may enjoy in their official visits under the legal regime applicable to special missions.<sup>117</sup>

99. Moreover, as mentioned in paragraph (15) of the Commission’s commentary to draft article 3:

<sup>112</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>113</sup> *Ibid.*

<sup>114</sup> Israel (*ibid.*). In addition to the commentaries provided by Israel and the Russian Federation, these States also expressed a similar sentiment in the Sixth Committee, namely that the category of State officials who enjoy immunity *ratione personae* is, in fact, broader and goes beyond the “troika” to encompass other high-level officials. Israel specifically requested that the Commission state that such a narrow scope does not reflect customary international law (A/CN.4/755, para. 101).

<sup>115</sup> Russian Federation (A/CN.4/771).

<sup>116</sup> United Arab Emirates (*ibid.*).

<sup>117</sup> Para. (15) of the commentary to draft article 3 of the draft articles, as adopted on first reading, 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. 69.

In view of the foregoing, the Commission considers that “other high-ranking officials” do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.<sup>118</sup>

100. Accordingly, the text of draft article 3 should be maintained as it currently stands.

### **Article 3**

#### ***Persons enjoying immunity ratione personae***

*Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.*

### **Article 4**

#### **Scope of immunity ratione personae**

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

101. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>119</sup>

## **1. Comments and observations by States**

102. Draft article 4 builds upon draft article 3 by elaborating on three aspects of immunity *ratione personae*. First, the temporal component, namely the duration of immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs lasts only while they are in office; second, the scope of immunity *ratione personae* covers all of their acts, both private or official, and whether performed before or during their term of office; and third, its relationship with immunity *ratione materiae* once they leave office.

103. Specific comments related to this draft article were presented by 15 states: Brazil, the Czech Republic, France, Ireland, the Islamic Republic of Iran, the Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), the Russian Federation, Switzerland, the United Kingdom and the United States.

104. States generally supported draft article 4 as a reflection of *lex lata* and some offered suggestions concerning how the legal principles involved were expressed in the text.

105. Brazil, Ireland, Norway (on behalf of the Nordic countries) and the United States of America noted in their comments that draft article 4 is consistent with

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, pp. 222–225.

customary international law. For instance, Brazil concluded that this is especially true when reading articles 3 and 4 together, as the substantive and temporal elements of immunity *ratione personae* mentioned are consistent with customary international law.<sup>120</sup> The Nordic countries shared this position and “fully support the substance as detailed in these two draft articles”.<sup>121</sup> Similarly, Ireland was satisfied that the present text of draft article 4, as well as draft article 3, “reflect customary international law ... and agree[d] that such immunities are limited to this troika”.<sup>122</sup> The United Kingdom also agree[d] that “paragraphs 1 and 2 of this draft article [4]... reflect the *lex lata*”.<sup>123</sup>

106. While fundamentally supporting this draft article, some States made suggestions regarding terminology used, reorganization of the provision, and the provision of further clarification in the commentary. For instance, the Russian Federation, noted that it considered draft article 4 “does not give rise to any objection”, on the understanding that the commentaries to the draft articles receive necessary editorial clarifications.<sup>124</sup>

107. The United States of America and the Russian Federation offered specific comments on draft article 4, paragraph 1.

108. The United States of America, for its part, considered that draft article 4, paragraph 1, “correctly reflects customary international law”.<sup>125</sup>

109. Without raising objection to the draft article generally, the Russian Federation questioned the phrase “term of office”, used in paragraphs 1 and 2 of the draft article, stating that it implies a set period of time, which is not applicable to all officials and suggested focusing on the fact of being in office instead. This is because whether an official’s “term of office” has ended could be the subject of dispute in some circumstances, as well as because monarchs and Ministers for Foreign Affairs, among others, have no predetermined “term of office”.<sup>126</sup>

110. The Kingdom of the Netherlands, the Russian Federation and the United States commented directly on draft article 4, paragraph 2.<sup>127</sup>

111. Agreeing with the substance of the paragraph, the Kingdom of the Netherlands stated 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 ... This immunity *ratione personae* ... ends when the term of office of these officials ends.”<sup>128</sup> Similarly, the United States of America agreed that immunity *ratione personae* covers all acts, as expressed in draft article 4, paragraph 2.<sup>129</sup>

112. As noted above with regard to paragraph 1 of the draft article, and again without taking objection to the draft article in general, the Russian Federation suggested referring to “the fact of being in office” rather than “term of office.”<sup>130</sup>

<sup>120</sup> Brazil (A/CN.4/771).

<sup>121</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>122</sup> Ireland (*ibid.*).

<sup>123</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>124</sup> Russian Federation (*ibid.*).

<sup>125</sup> United States of America (*ibid.*).

<sup>126</sup> Russian Federation (*ibid.*).

<sup>127</sup> *Ibid.* In the Sixth Committee, Armenia, China, Israel, and the Russian Federation, requested further analysis regarding draft article 4, paragraph 2 (A/CN.4/755, para. 101).

<sup>128</sup> Kingdom of the Netherlands (A/CN.4/771).

<sup>129</sup> United States of America (*ibid.*).

<sup>130</sup> Russian Federation (*ibid.*).

113. Ten States directly commented on draft article 4, paragraph 3. Generally, these States supported the paragraph while also suggesting ways its meaning could be further elaborated on and clarified in the commentary, as well as specific reformulations of the paragraph itself that could contribute to the overall clarity of the draft article.

114. The United Kingdom of Great Britain and Northern Ireland “agrees with the Commission that paragraph 3 should be structured as a ‘without prejudice’ provision” and that:

[i]mmunity *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.<sup>131</sup>

115. Additionally, the Russian Federation suggested that the Commission should elaborate more on the “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*.”<sup>132</sup>

116. Relatedly, the United States recommends clarifications in the commentary, namely proposing 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*.”<sup>133</sup>

117. The United States further noted that draft article 4, paragraph 3 refers to the “rules of international law” and this reference to customary international law should be clarified in the commentary. The United States alternatively suggested simplifying the paragraph to read “[t]he cessation of immunity *ratione personae* is without prejudice to the application of immunity *ratione materiae*.”<sup>134</sup>

118. Regarding the French translation of draft article 4, paragraph 3, France proposed that the term “*cessation*”, should be preferred over the term “*extinction*” used in the French translation.<sup>135</sup>

119. Finally, Switzerland notes that draft article 4 and draft article 6, paragraph 3 “specify the link between immunity *ratione personae* and immunity *ratione materiae*”, suggesting that “this issue could be addressed in a single paragraph”.<sup>136</sup>

120. Regarding the overall structure of draft article 4, Norway (on behalf of the Nordic countries) suggested reordering the paragraphs so that paragraphs 1 and 3, which both relate to the temporal aspects of immunity *ratione personae*, follow paragraph 2 relating to the substantive aspects. Alternatively, Norway suggests merging draft articles 3 and 4 by incorporating draft article 4, paragraph 2 into draft article 3, followed by the remaining two paragraphs of draft article 4.<sup>137</sup>

<sup>131</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>132</sup> Russian Federation (*ibid.*).

<sup>133</sup> United States of America (*ibid.*).

<sup>134</sup> *Ibid.*

<sup>135</sup> France (*ibid.*).

<sup>136</sup> Switzerland (*ibid.*).

<sup>137</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

## 2. Recommendations of the Special Rapporteur

121. Concerning the reasons put forward for replacing the expression “term of office” with “the fact of being in office,” the Special Rapporteur considers that they may be addressed in the commentary without changing the text to the draft article, but will not oppose a modification of the language employed in paragraph if the Commission so decides.

122. The Special Rapporteur also agrees with the suggestion presented by France concerning the revision to the French text.

123. The Special Rapporteur further agrees with the proposed modification to paragraph 3 of draft article 4, to stress that it is a without prejudice provision. Accordingly, the third paragraph would read as follows:

3. *The cessation of immunity ratione personae is without prejudice to the application of ~~the rules of international law concerning~~ immunity ratione materiae.*

124. The Special Rapporteur also agrees with the comments by States related to the need to include a reference to the interaction between immunity *ratione personae* and inviolability. As mentioned in the section of the present report relating to draft article 1, this issue will be addressed in the commentaries.

125. Concerning the proposal to reorder the paragraphs within draft article 4, to merge draft articles 3 and 4 into a single article, and to consider the relationship between the three paragraphs of draft article 4 and the paragraphs of draft article 6, the Special Rapporteur is open to suggestions that may simplify the text, without having an impact on the content. The Special Rapporteur proposes that this matter be addressed in the Drafting Committee.

126. At this point, the Special Rapporteur recommends the following text for draft article 4. These changes will also be reflected in the commentaries, which will be revised accordingly.

### *Article 4*

#### *Scope of immunity ratione personae*

1. *Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae only during their term of office.*

2. *Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.*

3. *The cessation of immunity ratione personae is without prejudice to the application of ~~the rules of international law concerning~~ immunity ratione materiae.*

## **Part Three**

### **Immunity *ratione materiae***

#### **Article 5**

##### **Persons enjoying immunity *ratione materiae***

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

127. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>138</sup>

## 1. Comments and observations by States

128. Draft article 5 defines the scope of persons who enjoy immunity *ratione materiae*. For this purpose, it uses the expression “State official” already defined in draft article 2, subparagraph (a), which encompasses both current and former officials. Draft article 5 requires that these State officials must be “acting as such” in order to be covered by immunity.

129. Sixteen States submitted observations relating to draft article 5: Austria, Brazil, Czech Republic, France, Ireland, Islamic Republic of Iran, the Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Romania, the Russian Federation, the United Kingdom and the United States. None of them disagreed with its substantive content and several mentioned that it adequately reflected customary international law, in that immunity *ratione materiae* subsists after the individual in question ceases to be a State official.<sup>139</sup> However, some States questioned the adequacy of the expression “acting as such” as well as whether the provision was necessary.

130. Austria expressed the view that the expression “acting as such” is too broad and could be understood as including activities which exceed the competences of the official in the forum State.<sup>140</sup>

131. Ireland considered that draft article 5 should be read together with article 6, and that it should therefore be amended by introducing the phrase “in accordance with draft article 6” at the end of the current text.<sup>141</sup>

132. While the Nordic countries agreed with the substantive rules set out in draft articles 5 and 6, they invited the Commission to further consider the relationship between this draft article and draft article 2. After mentioning that the definitions contained in the latter could be moved to the provisions defining the scope of application of immunity *ratione materiae*, they questioned whether it was necessary to have two separate articles addressing the personal and substantive scope of this kind of immunity. Accordingly, they suggested that draft articles 5 and 6 should be merged in a single article.<sup>142</sup>

133. The Russian Federation agreed with the combined reading of draft articles 5 and 6. However, it considered that by introducing the words “acting as such,” draft article 5 seems to subject the applicability of immunity *ratione materiae* to a new substantive criterion, in addition to the requirement that an act be performed in an official capacity. It mentioned that in practice no difference exists between the two concepts, as it is not possible to conceive that an act performed in official capacity may fall outside the criterion set out in draft article 5. Accordingly, it suggested that the standard covering acts performed in official capacity should only be included in draft article 6. Therefore, it invited the Commission to reconsider whether draft article 5 is actually necessary.<sup>143</sup>

<sup>138</sup> A/77/10, pp. 226–227.

<sup>139</sup> In the Sixth Committee, Brazil and the Czech Republic also suggested draft articles 5 and 6 reflected customary international law (A/CN.4/755, para. 102).

<sup>140</sup> Austria (A/CN.4/771). This was also reflected in the comments of Austria before the Sixth Committee (A/CN.4/755, para. 102).

<sup>141</sup> Ireland (A/CN.4/771).

<sup>142</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/CN.4/771).

<sup>143</sup> Russian Federation (*ibid.*).

134. The United Kingdom emphasized “the functional nature of the immunity *ratione materiae* described in draft article 5, which is limited to ‘State officials acting as such’”.<sup>144</sup>

135. Finally, the United States found the text of draft article 5 to be confusing, questioning the inclusion of the phrase “acting as such”. It mentioned that this phrase is not appropriate in the context of an article that defines the personal scope of immunity *ratione materiae*, as it introduces an element concerning its substantive scope, which is a matter covered by draft article 6. Accordingly, it considered that this phrase creates uncertainty about the applicable standard for determining which acts are covered by immunity *ratione materiae*.<sup>145</sup>

## 2. Recommendations of the Special Rapporteur

136. The Special Rapporteur notes that, as explained in the commentary, the majority of members of the Commission were of the view that it would be useful to retain a separate article addressing the personal scope of immunity *ratione materiae*. However, in order to address the concerns expressed by several States as to the uncertainty introduced by the expression “acting as such,” he proposes to further expand on this matter in the commentary and amend draft article 5 as follows:

### *Article 5*

#### *Persons enjoying immunity ratione materiae*

*State officials ~~acting as such~~ enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction, in accordance with draft article 6.*

137. Nevertheless, the Special Rapporteur would not oppose merging draft articles 5 and 6 if the Commission were to favour this approach.

### *Article 6*

#### *Scope of immunity ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. 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 with respect to acts performed in an official capacity during such term of office.

138. The commentary to this draft article is contained in paragraph 69 of the Report of the Commission of 2022.<sup>146</sup>

## 1. Comments and observations by States

139. Draft article 6 outlines the scope of immunity *ratione materiae* and its relationship to immunity *ratione personae*. It consists of three separate paragraphs: the first limits immunity *ratione materiae* to acts performed in an official capacity; the second explains that immunity for such acts continues after the individuals concerned have left office; and the third notes that immunity *ratione materiae*

<sup>144</sup> United Kingdom (*ibid.*).

<sup>145</sup> United States of America (*ibid.*).

<sup>146</sup> A/77/10, pp. 227–230.

continues to apply, with respect to acts performed in an official capacity, to individuals who enjoyed immunity *ratione personae*, even after they leave office.

140. Sixteen States submitted specific comments regarding draft article 6: Brazil, the Czech Republic, France, Ireland, the Islamic Republic of Iran, the Kingdom of the Netherlands, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden), Romania, the Russian Federation, Switzerland, the United Kingdom and the United States. The majority of the States agreed with the current content of draft article 6, concurring with the statement that it reflects customary international law. States, such as Ireland, considered that further work on draft article 6 was required to accurately reflect existing customary international law.<sup>147</sup>

141. Five States commented directly on draft article 6, paragraph 1. States generally supported this paragraph. Norway (on behalf of the Nordic countries) agreed with the formulation of draft article 6, paragraph 1, noting that immunity *ratione materiae* is only granted in respect of “acts performed in an official capacity”.<sup>148</sup> The United Kingdom also welcomed draft article 6, paragraph 1, as noted in its comments.<sup>149</sup>

142. The United States commented on the consistency of draft article 6, paragraph 1, with State practice and customary international law regarding the treaty-based immunity of diplomats, consular officers, and United Nations officials. At the same time, the United States expressed their view that it would be beneficial for the Commission to engage in a deeper consideration of what is and is not an act performed in an official capacity in the commentary to draft article 2.<sup>150</sup>

143. The Russian Federation questioned the compatibility of draft article 6, paragraph 1, with draft article 5. It questioned how acts of “State officials acting as such” under draft article 5 could be determined not to have been “performed in an official capacity” under draft article 6, paragraph 1. Therefore, the Russian Federation suggests that this issue only be addressed in draft article 6, paragraph 1, to avoid confusion.<sup>151</sup>

144. The Nordic countries also suggested the Commission consider merging draft article 5 with draft article 6, paragraph 1, as noted above in relation to draft article 5.<sup>152</sup>

145. Six States commented directly on draft article 6, paragraph 2. The majority of States that commented agreed that the paragraph adequately reflected customary international law.

146. Brazil agreed that immunity *ratione materiae* with respect to acts performed in an official capacity continued even after a State official left office and noted that this rule reflected the jurisprudence of the International Court of Justice.<sup>153</sup> The Islamic Republic of Iran, Norway (on behalf of the Nordic countries) and the United States of America also noted in their comments that immunity *ratione materiae* for such acts was not time limited.<sup>154</sup> Relatedly, the United Kingdom noted this paragraph reflected *lex lata*, linking immunity *ratione materiae* to the fact that an act was performed in

<sup>147</sup> Ireland (A/CN.4/771).

<sup>148</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>149</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>150</sup> United States of America (*ibid.*).

<sup>151</sup> Russian Federation (*ibid.*).

<sup>152</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>153</sup> Brazil (*ibid.*).

<sup>154</sup> Islamic Republic of Iran (immunity for the troika, with respect to acts performed in their official capacity, is not time barred), Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) and United States of America (*ibid.*).

an official capacity.<sup>155</sup> Accordingly, such immunity subsisted even after the person has ceased to be State official.<sup>156</sup>

147. Romania questioned whether the formulation of draft article 6, paragraph 2, correctly characterized customary international law regarding immunity *ratione materiae*. It noted that such immunity was not absolute and its application could be excluded in some instances, such as in cases where the accused has committed international crimes.<sup>157</sup>

148. Five States commented directly on draft article 6, paragraph 3. States generally agreed that this paragraph reflected customary international law, but suggested some clarifications.

149. The Kingdom of the Netherlands pointed out that this draft article was uncontroversial and reflected the law as it stood. However, the Kingdom of the Netherlands recommended that, in order to streamline the draft articles, confirmation that immunity *ratione materiae* continued after cessation of the immunity *ratione personae* of the troika could be further addressed in the commentary to the draft article.<sup>158</sup>

150. The United States also considered that those who formerly enjoyed immunity *ratione personae* continued to enjoy immunity *ratione materiae* as to their prior official acts.<sup>159</sup>

151. Romania also agreed that immunity *ratione materiae* applied to Heads of State, Heads of Government and Ministers for Foreign Affairs who were no longer in office and thus no longer enjoyed immunity *ratione personae* for prior official acts.<sup>160</sup>

152. France suggested amending draft article 6, paragraph 3, to clarify that the immunity that continued to be enjoyed was an immunity from jurisdiction.<sup>161</sup>

153. Similarly, the United Kingdom proposed to state expressly in draft article 6, paragraph 3, that the continuing immunity was immunity *ratione materiae*. The United Kingdom reasoned that that would align the provision with draft article 6, paragraph 1, and avoid the implication that ongoing immunity was derived from immunity *ratione personae*.<sup>162</sup>

154. Furthermore, as mentioned in other sections of the present report, States have suggested combining portions of draft article 6 with provisions currently contained in other draft articles, namely draft articles 2 and 5, and draft article 4, paragraph 3.

155. To decrease redundancy in the draft articles, Switzerland suggested merging draft article 6, paragraph 3, with draft article 4 paragraph 3, as both paragraphs discussed the link between immunity *ratione personae* and immunity *ratione materiae*.<sup>163</sup>

156. Norway (on behalf of the Nordic countries) suggested incorporating the definition of an “act performed in an official capacity” into draft article 6. Norway noted that, while mention was made to acts performed in an “official capacity” in draft article 4 as well, that paragraph covers all acts performed, regardless of whether

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<sup>155</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>156</sup> *Ibid.*

<sup>157</sup> Romania (*ibid.*).

<sup>158</sup> Kingdom of the Netherlands (*ibid.*).

<sup>159</sup> United States of America (*ibid.*).

<sup>160</sup> Romania (*ibid.*).

<sup>161</sup> France (*ibid.*).

<sup>162</sup> United Kingdom of Great Britain and Northern Ireland (*ibid.*).

<sup>163</sup> Switzerland (*ibid.*).

the act was executed in a private or official capacity. Therefore, the only substantial use of the term is made in relation to draft article 6.<sup>164</sup>

157. The United States similarly proposed moving mention of the applicability of immunity *ratione materiae* to both current and former officials from the definition contained in paragraph (b) in draft article 2 to draft article 6 to prevent confusion regarding the temporal scope of immunity *ratione materiae*.<sup>165</sup>

## 2. Recommendations of the Special Rapporteur

158. The Special Rapporteur appreciates the comments made by States and proposes the following amendments to draft article 6 to reflect these sentiments.

159. The Special Rapporteur agrees with the need to confirm in the commentary that immunity *ratione materiae* continues after cessation of immunity *ratione personae* of the troika.

160. Further, the Special Rapporteur agrees that this article covers immunity from jurisdiction, but it also could cover some measures of constraint adopted by national authorities with regard to an official from another State. The commentary could further address this issue.

161. The Special Rapporteur also notes the comments offered by States regarding merging draft article 5 and draft article 6, paragraph 1, which aim to avoid duplication. However, the Special Rapporteur considers it useful to keep these articles separate for the reasons already mentioned in paragraph 137 of the present report.

162. The Special Rapporteur agrees with the need to clarify the type of immunity referred to in draft article 6, paragraph 3, and is open to the concrete proposals aiming to merge draft article 6, paragraph 3, and draft article 4, paragraph 3, in order to avoid duplication. The Special Rapporteur will refer this matter to the Commission before formulating any recommendations, as, in his opinion, the current text does not raise a substantive problem. If these two paragraphs were to be merged, the commentary should be adapted accordingly.

163. Below is the suggested updated text of draft article 6, including the changes to paragraph 3.

### *Article 6*

#### *Scope of immunity ratione materiae*

1. *State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.*
2. *Immunity ratione materiae with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.*
3. *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.*

<sup>164</sup> Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*).

<sup>165</sup> United States of America (*ibid.*).

## Annex I

### Marked-up text of the draft articles adopted on first reading with proposed modifications

#### Part One Introduction

##### Article 1 Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organisations and military forces of a State.
3. ~~The present draft articles do not affect the rights and obligations of States under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.~~ The present draft articles do not affect the rights and obligations of States under:
  - (a) treaties establishing international criminal courts and tribunals as between the parties to those agreements; or
  - (b) binding resolutions establishing international criminal courts and tribunals.

##### Article 2 Definitions

For the purposes of the present draft articles:

- (a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
- (b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

#### Part Two Immunity *ratione personae*

##### Article 3 Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

##### Article 4 Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of ~~the rules of international law concerning~~ immunity *ratione materiae*.

### **Part Three** **Immunity *ratione materiae***

#### **Article 5** **Persons enjoying immunity *ratione materiae***

State officials ~~acting as such~~ enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, in accordance with draft article 6.

#### **Article 6** **Scope of immunity *ratione materiae***

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. 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.

## Annex II

### Clean text of the draft articles with proposed amendments of the Special Rapporteur

#### Part One Introduction

##### Article 1

##### Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organisations and military forces of a State.
3. The present draft articles do not affect the rights and obligations of States under:
  - (a) treaties establishing international criminal courts and tribunals as between the parties to those agreements; or
  - (b) binding resolutions establishing international criminal courts and tribunals.

##### Article 2

##### Definitions

For the purposes of the present draft articles:

- (a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
- (b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

#### Part Two

#### Immunity *ratione personae*

##### Article 3

##### Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

##### Article 4

##### Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity *ratione personae* is without prejudice to the application of immunity *ratione materiae*.

## **Part Three**

### **Immunity *ratione materiae***

#### **Article 5**

##### **Persons enjoying immunity *ratione materiae***

State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, in accordance with draft article 6.

#### **Article 6**

##### **Scope of immunity *ratione materiae***

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
  2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
  3. 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.
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