

## **Comments of the Czech Republic on the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading**

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

### **Part One, Two and Three of the draft articles**

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

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

As expressed by the House of Lords in its decision in the case of Jones versus Saudi Arabia of 14 June 2006, “*the circumstances in which a State will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law, ... including the cases when the state is liable for acts done under colour of public authority, whether or not they are actually authorized or lawful under domestic or international law*”. Importantly, it does not mean that the State official would not be personally responsible for its actions, since, as pronounced by the European Court of Human Rights in the same case, “*there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts. There is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts. This potential dual liability*

is reflected in Article 58 of the Draft Articles, which provides that the rules on attribution are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State. ... Thus, as the existence of individual criminal liability shows, even if the official nature of the acts is accepted for the purposes of State responsibility, this of itself is not conclusive as to whether, under international law, a claim for State immunity is always to be recognised in respect of the same acts.” In our view, it would be useful if the Commission could further clarify the interrelation among the immunity *ratione materiae* of State officials from foreign criminal jurisdiction and the responsibility of States for internationally wrongful acts.

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

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

Finally, the Czech Republic regard as prudent that the Commission did not include in the text of the draft article 7 the exception concerning crimes committed by foreign officials in the territory of the forum State. We also concur with the Commission’s conclusion that certain crimes, such as political assassination, espionage, sabotage, espionage or kidnapping, or other similar crimes committed by State officials in the territory of a foreign state are subject to the territorial sovereignty of the forum State as any other crime and do not give rise to immunity *ratione materiae*. On the other hand, it may be advisable to study in more detail the legal consequences of a situation in which the home State of the perpetrator would assume, in the aforementioned circumstances, its responsibility under international law for such illegal act committed by his State official in the territory of another State. The Commission could deal with this issue in the commentaries.

## **Part IV of the draft articles (procedural provisions and safeguards)**

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

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

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