Comments of the Islamic Republic of Iran
on
"the Draft Articles on Immunity of State officials from Foreign Criminal Jurisdiction"

1. Under international law certain State officials are entitled to absolute immunity *ratione personae*, from foreign criminal jurisdiction. Such immunity covers both acts performed in their official capacity and their private acts. The principle of immunity of the "troika" (Head of State, Head of Government and Minister of Foreign Affairs) which is well established and recognized under customary international law is the key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State. This immunity shall cease to apply to their private acts as soon as they leave office. However, they shall continue to enjoy immunity for acts performed in their official capacity without time limit, as those acts are deemed to be acts of the State.
2. In determining an act as "act performed in official capacity" or "act performed by individuals acting in their personal capacity", as a requirement for the possibility of enjoying immunity, the core criterion is governmental and official nature of such act. Therefore, the Islamic Republic of Iran maintains that all such activities that derive from the exercise of elements of governmental authority shall be entitled to immunity. Accordingly, the Islamic Republic of Iran believes that International crimes cannot be performed by individuals themselves, without governmental connivance.
3. The Islamic Republic of Iran once again expresses its dissent with the list of crimes enumerated in draft Article 7 as well as the annexed list of international treaties referred to therein, since all the listed treaties are not universally accepted, and the definitions therein fail to enjoy universal acceptance.

4. Draft Article 7 does not reflect customary international law as it lacks State practice. As a matter of fact, the manner in which draft Article 7 has been provisionally drafted, namely, adoption through vote in the ILC indicates that there has been a fundamental divergence of opinions and views on certain issues among ILC members, raising difficulty to conclude whether draft Article 7 reflects *lex lata*. Needless to say that this was the first time in the history of the ILC that its members adopted the draft Article after a recorded vote. By the same token, the Islamic Republic of Iran is not yet convinced that this draft Article is a reflection of codification of existing international law, rather it should be regarded as a progressive development of the existing law, even *lex ferenda*.
5. It should be noted that Draft Article 7 is contrary to the established jurisprudence of the International Court of Justice (ICJ). In this relation it should be recalled that the ICJ in its Judgment in the Case concerning the "*Arrest warrant of 11 April 2000 (The Democratic republic of Congo v. Belgium)*" dated 14 February 2002, (paragraphs 58-59) has accepted that the immunity of State officials originates from customary international law.
6. In the same vein, the European Court of Human Rights (ECtHR) in the case of "*Al-Adsani v. the United Kingdom*" (2001), the ECtHR considered that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through respect of another State's sovereignty". The ECtHR in the aforementioned case as well as in the case of "*Jones and others v United Kingdom*" (2014), ruled that granting immunity from jurisdiction to State officials in civil proceedings with respect to torture was not a violation of Article 6 of the European Convention on Human Rights (ECHR). More recently, the ECtHR in the case of "*J.C. and Others v. Belgium*" (2021), did not uphold the applicants' argument that State immunity from jurisdiction could not be maintained in cases involving inhumane or degrading treatment.

7. The approach of ECtHR is in line with the approach that was implicitly accepted by the ICJ. It has been bolstered by the ICJ in the judgment of case concerning "*Arrest Warrant of 11 April 2000 (Democratci Republic of Congo v. Belgium)*", dated14 February 2002 wherein it implies that the substantial rules of international law cannot overcome procedural rules. The Court further in the Judgment of the Case concerning "*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*" dated 3 February 2012, when explaining the issue of the case, denied to differentiate between both types of immunity, namely, *ratione materiae* and *ratione personae.*
8. It should be noted that Immunity of officials is distinct from immunity of States. The commentary of draft Article 7 makes reference to some cases and national legislations which are related to immunity of States to establish an exception to immunity of officials from foreign criminal jurisdiction. Obviously, such legislation and cases could not help the ILC to show a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction.
9. The ILC is expected to take the principle of sovereignty and its ensuing components, principally the immunity of State before the courts of another State, as its departure point and avoid confusing this subject with the subject of accountability of State officials. In this regard, the ICJ's ruling in the case concerning "*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*" dated 4 June 2008, that a claim of immunity for a State official is, in essence, a claim of immunity for the State, merits especial attention.
10. It should be regarded that resort to national legislation of some States in defining the concept "act performed in official capacity" is irrelevant. In this respect, national case-law and practice of national courts cannot be given the same weight as the jurisprudence of international courts and tribunals. The jurisprudence of international judicial bodies are quite important and can be informative for the

study. The review of the judgments of these bodies clarifies the mere fact that criminal nature of the acts cannot constitute sufficient basis to exclude them from being an official act and consequently disregard and undermine immunity.

11. The Islamic Republic of Iran would also like to refer to paragraph 8 of the commentary on draft Article 7, that it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; and that further, immunity does not depend on the gravity of the act in question.
12. Nevertheless, in spite of the disagreement echoed by several Member States and divergent views among ILC members, the same commentary of the 2017 with minor updates was disappointingly adopted in respect to the aforesaid draft Article.
13. Concerning the proposal of the Special Rapporteur on "recommended good practices", the Islamic Republic of Iran is of the view that producing such practices which are based on policy preferences and a lack of concrete measures may lead to unbalanced practices which can disrupt international legal order based on recognized general principles of international law including, but not limited to, non-intervention, international cooperation and sovereign equality of States.
14. The Islamic Republic of Iran, once again expresses its dissent with paragraph 4 of draft Article 11 regarding the procedural requirements of the waiver of immunity and is of the conviction that the waiver of immunity as a procedural rule is the exclusive right of sovereign States which shall be declared by the State concerned in a manner that manifests the will of that State to waive the immunity of its official. Therefore, the State of the concerned official has an exclusive authority to invoke and waive the immunity of its officials, and the waiver should be not only clear and expressed, but also should mention the official whose immunity is being waived. In relation to

paragraph 4 of draft Article 11, the Islamic Republic of Iran cannot concur with the Special Rapporteur about a general obligation deducted from a treaty on a substantial matter related to individual responsibility that can be deemed as an express waiver.

15. Meanwhile, the Islamic Republic of Iran believes that immunity is not equivalent to impunity, limiting the scope of immunity in favor of the responsibility and accountability of State officials should benefit from sufficient, widespread, representative and consistent State practice.
16. Furthermore, the Islamic Republic of Iran reiterates its firm position that a dispute settlement clause would only be relevant if the draft Articles were intended to become a treaty. While the ILC has yet to decide on the final product of the topic, Member States' views are vital for the ILC's final work in this respect. Accordingly, due to the sensitivity of the nature of immunity as the direct consequence of the principle of Sovereignty, the Islamic Republic of Iran suggests the ILC to proceed cautiously. In case the current new framework of dealing with immunity of State officials fails to receive endorsement among Member States, it would be likely to endanger inter-State relations and even the very objective of ending impunity for the most serious crimes of concern to the international community as a whole.
17. In conclusion, the Islamic Republic of Iran is of the conviction that the ILC's draft Articles on the topic in question shall be guided by existing rules of international law, as also evidenced in the jurisprudence of the International Court of Justice and taking into account the inevitable needs of an effective and stable international relations.