

International Law Commission's Draft Articles on Immunity of State officials from foreign criminal jurisdiction, as adopted on 1st reading in June 2022

Comments of Ireland

December 2023

1. Ireland welcomes the opportunity of submitting written comments to the International Law Commission ('ILC' or 'the Commission') on its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction and their accompanying commentaries, adopted by it on first reading on 3 June 2022.
2. Ireland wishes to thank the ILC for its important work on this complex and sensitive topic, and for producing a set of draft articles and commentaries for States' consideration and comment. In particular, Ireland wishes to thank the Special Rapporteurs, Concepción Escobar Hernández and Roman Kolodkin, for their detailed consideration of this topic. Ireland also welcomes the appointment of Claudio Grossman Guiloff as the new Special Rapporteur for this topic and looks forward to engaging with him further on it.

General comments

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

Draft Article 1

4. Ireland agrees that the Draft Articles should be without prejudice to the immunities enjoyed by categories of individuals such as diplomatic envoys and consular officers which are already regulated by existing legal instruments (draft article 1(2)).
5. As a strong supporter of accountability, Ireland agrees with the inclusion of a 'without prejudice' provision in the Draft Articles in order to address their relationship with the rules governing international criminal courts and tribunals. We therefore welcome the inclusion of such a provision at draft article 1(3) and support its proposed positioning within the Draft Articles. We suggest however that for the sake of greater legal certainty it be amended to refer also to international agreements 'relating to the operation of' international criminal courts and tribunals as well as to 'other instruments establishing and relating to the operation of international tribunals' (such as Security Council Resolutions).

Draft Article 2

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

Draft Articles 3 and 4

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

Draft Articles 5, 6 and 7

8. Ireland appreciates the efforts of the Commission in attempting to formulate comprehensive rules on the scope and content of immunity *ratione materiae* but is of the opinion that some further work on draft articles 5, 6 and 7 is required if these are to accurately reflect existing customary law in this area. In particular, while acknowledging the difference of opinion within the Commission on draft article 7, in Ireland's view the absence of a provision such as this would mean that the scope of immunity *ratione materiae* would be much broader than international law currently allows. Our view is that such immunity is in fact subject to important limits imposed by international criminal law as it has developed in recent decades. These limits, we believe, should indeed be the subject of a draft article.
9. Whether such a draft article takes the form of a list of stated crimes or, instead, criteria by which States may determine whether immunity *ratione materiae* will apply in certain types of cases is ultimately a matter for the Commission but Ireland can certainly see attractions to the latter approach.
10. As to what such criteria might be, in Ireland's view these should reflect the development of international criminal law since World War II, as a result of which certain acts constituting violations of customary international rules intended to protect values of the highest importance to the whole international community have become crimes under international law. A number of these have been codified by international convention. In respect of these crimes international law permits the exercise of universal jurisdiction by the forum state over non-resident aliens present on its territory alleged to have committed the crime outside that territory. The rules criminalising these acts also expressly contemplate commission of the crime by state officials or those carrying out a state policy and are specifically intended to entail individual criminal responsibility regardless of the status of the perpetrator or whether he or she acted pursuant to an order of a Government or of a superior. These developments of the law would have been pointless if they were not also intended to supersede pre-existing rules conferring functional immunity on the perpetrator.
11. The universal jurisdiction attaching to such crimes under customary international law is permissive and may be contrasted with the approach taken in some cases where the crimes have been codified by convention. Under some of the instruments concerned the exercise of universal jurisdiction is no longer discretionary - states parties have an obligation to exercise that jurisdiction or, alternatively, to extradite the person concerned to a state prepared to do so.

12. Accordingly, in Ireland's view immunity *ratione materiae* before a foreign domestic court does not - and cannot - apply in cases of crimes under international law such as torture, genocide, crimes against humanity and serious violations of the laws and customs of war. The crime of aggression - the most serious crime under international law - can also be added to this list with the question of the prior determination of an act of aggression being left to what is currently Part Four of the Draft Articles. The absence of the crime of aggression from a list of crimes in draft article 7 could imply a hierarchy between the most serious crimes under international law and undermine attempts to seek accountability where acts of aggression have been committed.
13. If the Commission chooses to maintain a list of crimes rather than formulate criteria, Ireland is of the view that the inclusion of two crimes on the present list that fall within the ambit of crimes against humanity - namely the crimes of *apartheid* and enforced disappearances - creates confusion. Though the commentary to draft article 7(1) seeks to clarify the rationale for including these two crimes in their own right, this approach could imply that other crimes which come within the ambit of crimes against humanity but are not listed in draft article 7 are somehow excluded.
14. As regards draft articles 5 and 6, Ireland agrees that, read together and subject to draft article 7, they reflect existing customary law. However, we believe it would be more helpful if draft article 5 were amended to read 'Subject to draft article 7, State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction in accordance with draft article 6.'

Part Four – Procedures and Safeguards

15. Ireland finds useful many of the provisions set out in Part Four of the Draft Articles, both in assisting States in the application of the substantive rules set out in Parts Two and Three and also in helping to avoid possible abuse or politicisation of the exercise of criminal jurisdiction by one State over an official of another State. Nevertheless, unless the Commission intends to transmit the Draft Articles to States as a basis for the negotiation of a future treaty, in Ireland's view Part Four would be more appropriately expressed as Guidelines rather than draft articles.
16. As regards the possible addition of the crime of aggression to any list of crimes for which immunity *ratione materiae* does not apply, in Ireland's view Part Four provides a location to address concerns relating to the political dimension of this crime. Guidance to national courts that they establish that either the United Nations Security Council or the General Assembly have determined that an act of aggression has taken place could be inserted here. Establishing that such a determination has been made would provide a strong basis for a national court to determine in turn that the crime of aggression has been committed and that immunity *ratione materiae* does not apply.
17. Ireland also supports the content of draft article 14 which would establish important safeguards where a State is considering prosecution for one of the crimes enumerated in draft article 7. In particular, Ireland supports draft article 14(3), which aims to reduce the risk of politicisation and misuse of draft article 7 while also ensuring that effect can be given to that draft article and that its use in good faith is not prevented. An important element of this paragraph is the need for any determinations regarding immunity to be made by authorities at an appropriately high level.

Concluding remarks

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