



Latvijas Republikas Ārlietu ministrija
Ministry of Foreign Affairs of the Republic of Latvia

No. 41-26705

The Ministry of Foreign Affairs of the Republic of Latvia presents its compliments to the Secretary-General of the United Nations and has the honour to submit its observations referring to the Report of the International Law Commission A/77/10.

The Latvian specific comments are focused on Article 7 of the Draft Articles on Immunity of State officials from foreign criminal jurisdiction.

The Ministry of Foreign Affairs of the Republic of Latvia avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

Enclosure: Comments of the Republic of Latvia in relation to Article 7 of the Draft Articles on Immunity of State officials from foreign criminal jurisdiction.

Riga, 4 December 2023

To the Secretary-General of the United Nations
NEW YORK

Comments of the Republic of Latvia in relation to Article 7 of the Draft Articles on Immunity of State officials from foreign criminal jurisdiction

In June 2022, the International Law Commission (hereinafter – the Commission) at its seventy-third session adopted, on first reading, the Draft Articles on Immunity of State officials from foreign criminal jurisdiction after more than a decade long consideration of the topic. The importance and complexity of the topic is marked by its scope, namely, it addresses the relationships between crimes under international law and immunity *ratione materiae*. Draft Article 7 lays out crimes under international law in respect of which immunity *ratione materiae* shall not apply. Currently, Draft Article 7 includes three out of four the most serious crimes of concern to the international community as a whole: war crimes, crimes against humanity and the crime of genocide, failing to include the crime of aggression. Therefore, immunity *ratione materiae* applies to the crime which previously mentioned crimes usually are derived from.

While the Commission justified the inclusion of war crimes, crimes against humanity and the crime of genocide as “the crimes of the greatest concern to the international community as a whole” that are included in Article 5 of the Rome Statute, it did not apply the same reasoning for the crime of aggression.¹ The main considerations to not include the crime of aggression in 2017, although it was at the time also included in Article 5 of the Rome Statute, were that, **firstly**, the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, **secondly**, the special political dimension of this type of crime, given that it constitutes a “crime of leaders”, **thirdly**, the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court’s jurisdiction over this crime.² Even though the Commission has updated its reasoning on the third consideration, excluding it from the commentary, as jurisdiction of the International Criminal Court over the crime of aggression has been activated since 2018, the other two reasons have remained.

The international realm has changed significantly since 2017 when Draft Article 7 was provisionally adopted by the Drafting Committee. Russia’s aggression against Ukraine in 24 February 2022 has proven that accountability gap for the crime of aggression still exists and international community must close this gap to prevent impunity. Therefore, Latvia takes the view, that the crime of aggression shall be included in the list of Draft Article 7. Further written comments will lay out main considerations to uphold Latvia’s position.

In the commentary to Draft Article 7, the Commission recognizes the need to balance the purpose of immunity for which it was established (to protect the sovereign equality and

¹ Yearbook of the International Law Commission, 2017, vol. II, part two, p.127, para. 17

² Yearbook of the International Law Commission, 2017, vol. II, part two, p.127, para. 18

legitimate interests of States) and accountability for the most serious international crimes. In the view of the Commission “striking this balance will ensure [...] that it [*ratione materiae*] is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.”³

Taking into account the specific provisions for the International Criminal Court to exercise its jurisdiction over the crime of aggression, international community may find itself in the situations where, on the one hand, immunity *ratione materiae* blocks attempts to ensure accountability before national judicial bodies, on the other hand, failure of the international community to establish international tribunals, before whom immunities do not apply, stalls the efforts to ensure accountability for the crime of aggression.

This would thus contradict the intentions of the Commission to establish the criminal responsibility for the most serious crimes under international law (which is also the crime of aggression according to Article 5 of the Rome Statute) by applying balanced approach, because in previously mentioned situations immunity *ratione materiae* will prevail and, thus, will impunity.

Returning to the arguments outlined by the Commission on exclusion of the crime of aggression from Draft Article 7, Latvia indicates the following.

Firstly, regarding the nature of the crime of aggression, it should be emphasized that although, the adjudication of this crime may lead national courts to the determination whether the use of force by another State complies with international law, it is not a special feature to the proceedings in which crime of aggression is considered. To the contrary, national courts, in order to answer preliminary questions in the context of proceedings for other most serious crimes under international law, will need to make conclusions on the legality of the use of force.

Secondly, although the Commission rightfully determines that the crime of aggression has a special political dimension, this determination can be also applied to the other most serious crimes under international law listed in Draft Article 7. In Latvia’s opinion, the Commission has found and introduced safeguards and procedural provisions that will serve to avoid the possibility to exercise foreign criminal jurisdiction over State officials in a political or abusive manner.

³ Report of the International Law Commission on the work of the seventy-third session (2022), Chapter VI, p.234, para.10



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The Permanent Mission of the Republic of Latvia to the United Nations in New York presents its compliments to H.E. Mr. António Guterres, Secretary-General of the United Nations, and has the honour to submit observations from the Ministry of Foreign Affairs of the Republic of Latvia referring to the Report of the International Law Commission A/77/10.

The Permanent Mission of the Republic of Latvia to the United Nations in New York avails itself of this opportunity to renew to H.E. Mr. António Guterres, Secretary-General of the United Nations, the assurances of its highest consideration.

New York, 5 December 2023

H.E. Mr. António Guterres
Secretary-General of the United Nations
NEW YORK