

**Submission by the Principality of Liechtenstein to the International Law Commission  
on the topic “Draft Article 7 on Immunity of State officials from Foreign Criminal Jurisdiction”**

## **Introduction**

Liechtenstein extends its appreciation to the International Law Commission (ILC) for their efforts in advancing this important topic. In June 2022, the ILC adopted on first reading the Draft Articles on immunity of State officials from Foreign Criminal Jurisdiction. The topic holds fundamental importance to the prosecution of the most serious crimes under international law, as it addresses the relationship between those crimes and immunity from foreign prosecution. In that regard, the ILC adopted Draft Article 7, which provides for limitations and exceptions to immunity *ratione materiae* (also known as functional immunity).

Liechtenstein commends the ILC’s position that functional immunity shall not apply to crimes under international law. The ILC’s work on Draft Article 7 is imperative for the overall fight against impunity for the core international crimes, which are: the crime of aggression, genocide, war crimes and crimes against humanity. Given that these four crimes make up what we call core international crimes, the list of crimes in Draft Article 7 must therefore also include the crime of aggression.

## **Observations by Liechtenstein on Draft Article 7**

Draft Article 7 correctly endorses the non-applicability of immunity *ratione materiae* to the crime of genocide, crimes against humanity and war crimes. However, for completeness, the crime of aggression must also be included in the list of crimes in Draft Article 7 to which functional immunity does not apply. The crime of aggression, as defined under international law,<sup>1</sup> is a leadership crime, which necessitates overcoming immunities to ensure meaningful accountability as well as the future prevention of the crime of aggression through the deterrent effect of the law.

Including the crime of aggression in Draft Article 7 would be consistent with the criteria provided by the ILC itself for the selection of crimes featured in Draft Article 7. As stated in the commentary to Draft Article 7, the main reason for the inclusion of those crimes in the scope of the provision was that those “are the crimes of the greatest concern to the international community as whole” and “are included in article 5 of the Rome Statute”<sup>2</sup>. According to this reasoning, the crime of aggression must be present among the list of Draft Article 7.

### *Jurisprudence*

Recognizing the absence of immunity *ratione materiae* with respect to the crime of aggression would confirm with the teleology behind the criminalization of a certain type of conduct directly under international law and the practice concerning the inapplicability of immunity to those crimes. Since Nuremberg, international criminal law has provided for the absence of functional immunities in respect to all crimes under international law. Article 7 of the 1945 London Charter stated that the “official position of defendants [...] shall not be considered as freeing them from

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<sup>1</sup> Article 8bis, Rome Statute of the International Criminal Court

<sup>2</sup> *Yearbook of the International Law Commission*, 2017, vol. II, part two, p. 127, para. 17.

responsibility". The International Military Tribunal (IMT), which described the crime of aggression as the "supreme international crime"<sup>3</sup>, endorsed the principle enshrined in the Charter by stating that "[t]he principle of International Law, under certain circumstances protects the representatives of State, cannot be applied to acts which are condemned as criminal by International Law".<sup>4</sup> The Nuremberg Judgment's legacy regarding the inapplicability of functional immunity to proceedings for crimes under international law was not confined to international proceedings, but was couched in general terms and hence pertained to domestic proceedings as well.

There have been many other proceedings both before national and international courts for crimes under international law since Nuremberg. Although most cases did not directly relate to the crime of aggression, they further bolstered the body of precedents confirming that, in conformity with the basic idea underlying the very concept of criminality under international law, there is no functional immunity for the commission of crimes under international, including the crime of aggression.

In 1948, the Tokyo Tribunal followed the same approach as its predecessor in Nuremberg, applying the principle of irrelevance of the official position to the prosecution of crimes under international law. Similarly, in 1962, in the case against Eichmann, the Supreme Court of Israel proceeded to reject functional immunity for crimes under international law by stating that those who commit such heinous crimes "cannot seek shelter behind the official character of their task or mission"<sup>5</sup>. The International Court for the former Yugoslavia (ICTY) has also emphatically rejected the application of immunity *ratione materiae* to crimes under international law through its case law. In the Blaškić judgement of 1997, the ICTY's appeal chamber recognized that functional immunity cannot be invoked before *national* or international jurisdiction for crimes under international law, even if the perpetrators have or had acted in their official capacity<sup>6</sup>. This view was confirmed by decisions issued in other cases before the ICTY, such as the Karadžić case<sup>7</sup> and the Milošević case<sup>8</sup>.

The case law reviewed above, unequivocally supports the view that, as a matter of customary international law, State officials do not enjoy functional immunity for crimes under international law and that no differentiation in that regard should be made with respect to the crime of aggression. This is also the position widely held in international legal scholarship, including most recently, a statement issued by the Dutch Advisory Council on Public International law<sup>9</sup>.

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<sup>3</sup> International Military Tribunal, Judgement of 1 October 1946 in: The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August ,1946 to 1st October, 1946), p. 422.

<sup>4</sup> *Ibid* 448.

<sup>5</sup> *Attorney-General of the Government of Israel v. Eichmann*, Record of Proceedings in the Supreme Court of Israel, Appeal session 7, Appeal Session 7, p. 29.

<sup>6</sup> *Prosecutor v. Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of the trial chamber II of 18 July 1997, Appeals Chamber, Case no. IT-95-14, 29 October 1997, para. 41.

<sup>7</sup> *Prosecutor v. Karadžić et al*, Decision on the application by the Prosecution for a formal request for deferral by the government of Bosnia and Herzegovina of its investigations and criminal proceedings in relation to Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber, Case no. IT-95-5-D, 16 May 1995, para. 23-24.

<sup>8</sup> *Prosecutor v. Milošević*, Decision on preliminary motions, Trial Chamber, Case no. IT-02-54, 8 November 2001, para. 26-34.

<sup>9</sup> Advisory Committee on Public International Law (CAVV), *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory report no. 40, 12 September 2022, p. 11-12.

### *Recent developments*

The most recent addition to the relevant body of State practice consists of the accountability efforts with respect to the Russian Federation's aggression against Ukraine. In the past year, numerous States have supported the establishment of a Special Tribunal on the Crime of Aggression against Ukraine. Some have voiced a preference for an international model due to international law jurisprudence that personal and functional immunities do not represent a bar to the prosecution of senior leaders for international crimes before international criminal courts and tribunals that are acting on behalf of the international community as a whole. Others have voiced a preference for an "internationalized" model anchored in Ukrainian law. This position must also be seen as supporting the view that State officials do not enjoy functional immunity for the crime of aggression before national jurisdictions.

### *The ILC's own work*

The inclusion of the crime of aggression in the list of crimes of Draft Article 7 would also be in line with the previous work of the ILC. The ILC has consistently rejected the application of immunity to all crimes under international law without distinction. Principle III, of the 1950 Nuremberg Principles, draft article 3 of the 1954 Code of Offenses against the Peace and Security of Mankind, and draft article 7 of the 1996 Code of Crimes Against Peace and Security of Mankind, all determine that the official position of a person does not relieve them from responsibility for the commitment of a crime under international law, including the crime of aggression.

While the ILC has so far decided not to include the crime of aggression within the scope of Draft Article 7, this position needs urgent reconsideration to better reflect recent developments and the current state of affairs with regard to functional immunities under international law. In order to avoid a serious inconsistency in the treatment of crimes under international law and in order to confirm the principle of accountability for all crimes under international law, the ILC must confirm the inapplicability of functional immunity *ratione materiae* in proceedings for crimes under international law without exception, hence ensuring such accountability also encompasses the crime of aggression.

### **Conclusion**

One of the purposes of criminal accountability is to deter future offenders and prevent recurrence of the crime in the future. The crime of aggression is a leadership crime. In order to ensure effective prosecutions, it is therefore essential to overcome immunities for the most senior leadership before foreign domestic criminal courts. The crime of aggression, a core international crime and one of the four core crimes contained in the Rome Statute, must be included in the list of crimes in Draft Article 7.

