Lithuania – Comments and Observations on the draft articles of the International Law Commission on "Immunity of State officials from foreign criminal jurisdiction", in particular on Draft Article 7 "Crimes under international law in respect of which immunity *ratione materiae* shall not apply"

The International Law Commission (ILC) has completed the first reading of the draft articles on the topic 'Immunity of State officials from foreign criminal jurisdiction'[1] in 2022 and requested, through the Secretary-General, the Governments for their comments and observations.

In response to this request and recognising the importance of the topic in current international background, Lithuania appreciates the progress and efforts made by the ILC towards compromise solution on draft articles and takes the possibility to present its observations with a special focus on the most controversial provision which is Draft Article 7 "Crimes under international law in respect of which immunity *ratione materiae* shall not apply" (hereinafter – Draft Article 7).

Draft Article 7 (1) explicitly lists six crimes under international law in respect of which immunity *ratione materiae* (functional immunity) shall not apply, namely: genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances. However, the crime of aggression, which is one of the four core crimes under international law enriched in Article 5 of the Rome Statute and over which the States Parties to the Rome Statute agreed to activate the International Criminal Court's jurisdiction in 2017, is excluded.

In principle, Lithuania is of the position that as a matter of customary international law, State officials shall not enjoy functional immunity for crimes under international law, including the crime of aggression, which is recognised as one of the gravest crimes. This position is based on the following arguments and legal grounds:

- In our view, the inclusion of crimes in Draft Article 7 should be based on either their *jus cogens* character, their inclusion in the Rome Statute, or gravity. The international criminal law along with the International Criminal Court (hereinafter – the ICC) aim to protect the highest values of the international community (peace, security, well-being, human rights, etc.) and to prevent committing the crimes under international law. It is in the interest of the international community as a whole to investigate and repress such crimes. Paragraphs 4 and 5 of the Preamble of the Rome Statute guide accordingly that the most serious crimes must not go unpunished, as well as the impunity for the perpetrators of these crimes must go to an end. In our view, Draft Article 7, must be in line with these principles rather than creating legal gaps or uncertainties in favour of impunity.
- As to the discussion[2], which crimes are of particular concern to the international community, or which are the most serious ones, or qualify as crimes under customary international law, neither Draft Article 7 nor its commentary explicitly address the basic concern: why certain crimes are on the list and others are not. The ILC reasoning to include Article 7 in the draft is as follows: (1) there is a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes

[1] Draft Articles; ILC; UN Doc A/CN.4/L.969; G2235399.pdf (un.org).
[2] Commentary to Article 7, para. 20; ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022).

under international law, and (2) it is necessary to recognise the unity and systemic nature of international law and to prevent immunity from becoming a procedural mechanism to block the implementation of international law norms regarding accountability and individual criminal responsibility[3]. The arguments are convincing and justifiable. However, in fact, the current wording of Draft Article 7, containing selective list of crimes, in our view, is inconsistent with the systematic approach, development of international law, expectations of the international community as well as current geopolitical challenges and threats to international peace and security. In particular, the exclusion of aggression defies logic and has no legal basis whatsoever. First, in 1966, the ILC provided crime of aggression as the sole example for what may be construed as a *jus cogens* norm[4]. Second, the crime of aggression is recognized as a separate crime, alongside genocide, crimes against humanity, and war crimes in Article 5 of the Rome Statute. Third, in terms of gravity, the United Nations General Assembly and the ILC described aggression as the gravest of crimes against peace and security[5]. For these reasons, the crime of aggression, in our point of view, should be within the scope of Draft Article 7.

- There is no doubt, that the definition of the crime of aggression[6] involves a personality element as well as a political component. Namely, the crime of aggression is defined as "*planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*". While an act of aggression is qualified as "*use of armed force by a State against the sovereignty, territorial integrity or political independence of another State,* <…>"[7] .So, by definition, the crime of aggression is a leadership crime, that is impossible to be committed without the State's involvement and exercise of official policy. Usually, it is the State's leader (or the most senior official) who rules to commit act of aggression against another State.
- It might be agreed that immunities derive from the idea of the State sovereignty. In general, the purpose of immunities is to allow State representatives to effectively exercise their official functions and represent the State in international relations. As regards the scope of immunity *ratione materiae*, the State officials enjoy the immunity from foreign jurisdiction only with respect to acts performed in an official capacity, however such "protection" continues to subsist after the individuals concerned have ceased to be State officials. Given that the crime of aggression is, by definition, the only crime that can be committed by persons in their official capacity, the application of functional immunity would be inconsistent with definition of the crime of aggression under the ICC Statute as there would be no one to prosecute and try for the crime of aggression. Moreover, 123 States Parties to the Rome Statute of the International Criminal Court subscribe to Article 27(2)[8] of the Rome Statute that allows immunity

[3] Commentary to Article 7, paras. 9 and 10.
[4] Yearbook of the International Law Commission 1966 Volume I Part II (un.org)
[5] Draft Code of Offences against the Peace and Security of Mankind with commentaries, 1954 (un.org)
[6] Article 8bis (1) of the ICC Statute.
[7] Article 8bis (2) of the ICC Statute.
[8] Article 27 (2) of the ICC statute ("Irrelevance of official capacity"): *"2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*".

(including immunity *ratione personae*) to be waived even if it relates to the performance of official acts also in cases of other three major categories of international crimes – crimes against humanity, war crimes and genocide. Such broad representation supports recognition that waiving of immunities in cases of gravest international crimes is possible. Therefore, adoption of Draft Article 7, as proposed, would implicate another contradiction with the Rome Statute.

- It shall not mean that the breach of international law can be legitimised or justified as official policy or functioning of a State. The principle that 'a right does not rise from wrongdoing' (lot. *Ex injuria jus non oritur*) must be borne in mind in this context as well. Even though an immunity acts as a procedural bar to the initiation of proceedings against protected persons by foreign jurisdictions[9], it shall not become one more 'weapon' in conduct of aggression and let the perpetrator avoid accountability and enjoy the impunity. Therefore, it should not be acceptable, that individuals responsible for international crimes, including the crime of aggression, would be able to hide behind the shield of sovereignty of the State for which they perform their duties. The ILC is responsible for the progressive development of international law. It may be observed that international law has long been moving away from a sovereignty-centred approach towards a human rights-centred approach, and that the protections afforded by sovereignty have been steadily narrowing. From the perspective of the development of international criminal law and the practice of the ICC, it is evident that the protection of sovereignty through immunities has also narrowed. Therefore, Draft Article 7' proposal would not only be contrary to existing international law (in the sense of the Rome Statute) but would also disrupt the progressive development of the international law.
- Lithuania supports and follows the path of progress in international law, as well as when it comes to immunities. Even though the Lithuanian national law does not regulate immunities in detail, it refers to international law (treaties) as universally recognised standards. The Constitution of the Republic of Lithuania[10] along with the constitutional jurisprudence gives guidance that the criminal laws of the Republic of Lithuania relating to liability for international crimes may not establish standards lower than those laid down by generally recognised rules of international law[11] . The Criminal Code of the Republic of Lithuania also gives preference to international treaties to which Lithuania is a Party, when it comes to applicability of immunities from criminal jurisdiction under international law and crimes committed in the territory of Lithuania[12]. Lithuanian national courts follow the approach, that those responsible for crimes under international law may not be able to avoid investigation and prosecution by a domestic court because of immunities they rely on their official capacity.

[9] General principles of international criminal law – Factsheet | International Committee of the Red Cross (icrc.org).

[10] Article 135 (1) of Constitution of the Republic of Lithuania (lrs.lt): "*In implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice*".

[11] Whilst interpreting constitutional provision of Article 135 (1), the Constitutional Court ruled that in the good faith performance of international obligations arising out of universally recognised international law, *inter alia*, *jus cogens* norms, which prohibit international crimes, the criminal laws of the Republic of Lithuania relating to liability for international crimes may not establish standards lower than those laid down by generally recognised rules of international law. Ruling of the Constitutional Court of the Republic of Lithuania, dated 18 March 2014.

[12] Article 4(4) of the Criminal Code of the Republic of Lithuania: "*The issue of criminal liability of the persons who enjoy immunity from criminal jurisdiction under international law and commit a criminal act in the territory of the Republic of Lithuania shall be decided in accordance with international treaties of the Republic of Lithuania and this Code*".

In Lithuania's January 13th case[13], the extended panel of seven judges of the Supreme Court of Lithuania noted that the lower courts' exclusion of some convicted persons from the status of combatant on a basis of the functional immunity of state officials was justified in the light of the provisions of international law. As the Supreme Court referred, the international rules stipulate that persons responsible for the commission of international crimes cannot rely on functional immunity from national or international jurisdiction even if they committed those crimes in their official capacity.

To sum up, Lithuania believes that the ILC should first follow its own established practice[14]. The ILC has recognised the fact that a person who committed a crime under international law and acted as Head of State or responsible Government official does not relieve them from responsibility under international law. The ILC has also recognised the irrelevance of the official position for the prosecution of crimes under international law. Second, the provisions of the ICC Statute shall be taken into account while construing exceptions to the functional immunities.

Any implication of hierarchy between the crimes provided for in Article 5 of the ICC Statute would bring unwanted consequences of categorisation. Therefore, we believe, that Draft Article 7 shall be revised in line with the developments of international law and States' practice, taking into account the current challenges the international justice is facing and the sense of impunity that the exclusion of crime of aggression would foster.

So, from the above, Lithuania is of the position that the crime of aggression should be added to the list of international crimes, mentioned in Draft Article 7, in respect of which immunity *ratione materiae* shall not apply.

[13] In 2022, the Supreme Court of Lithuania issued its ruling in the January 13th case. In this case over 60 high-ranking officials of the Soviet Union were found guilty and sentenced to imprisonment for their commitment of crimes against humanity and war crimes in respect of the State of Lithuania and its people. The officials of foreign country were found guilty of killing, torture or other inhumane treatment of persons protected by international humanitarian law or violation of the protection of their property, prohibited war attacks, use of prohibited means of war, i.e. preparation of criminal acts against the State of Lithuania, planning and carrying out a military operation in January 1991, occupying the Press Palace, the Vilnius TV Tower, the Lithuanian Radio and Television Building and other objects, introducing a curfew.(lat.lt).

[14] Principle III, of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal adopted by the ILC in 1950; 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.