

## MALAYSIA

### Response to the request for comments and observations on the International Law Commission draft articles on “Immunity of State officials from foreign criminal jurisdiction”

28 November 2023

This note provides the response of the Government of Malaysia pursuant to the request from the Secretary-General of the United Nations vide Note Verbale no. LA/COD/61 dated 26 October 2022, and the International Law Commission (“ILC”) at its seventy-third session for Governments to provide comments and observations on the draft articles on the immunity of State officials from foreign criminal jurisdiction.

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It is observed from the report of the seventy-third session of the ILC, which was held on 18 April–3 June and 4 July–5 August 2022, that the Commission has adopted, on first reading, 18 draft articles and a draft annex on the immunity of State officials from foreign criminal jurisdiction, together with commentaries thereto. The Commission further decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.

2. Notwithstanding the adoption of the draft articles and annex by the Commission on first reading, there is a prevailing need to address Malaysia’s concerns on the topic. Hence, the succeeding paragraphs will focus on Malaysia’s comments and observations on several key issues of the draft articles and annex, namely:

- a. Crimes under international law in respect of which immunity *ratione materiae* shall not apply – issues of application of international treaties to non-State parties;
- b. Application of the procedural aspect and safeguards of the draft articles in light of the significant distinction between the two types of immunity, namely immunity *ratione personae* and immunity *ratione materiae*;
- c. Application of draft article 13 (request for information) in relation to the immunity of State officials from foreign criminal jurisdiction; and
- d. Proposal to suspend national proceedings pending an international dispute settlement in draft article 18.

## KEY ISSUES IN THE DRAFT TEXT

### A. Crimes under international law in respect of which immunity *ratione materiae* shall not apply – issues of application of International Treaties to non-State parties

3. Draft article 7<sup>1</sup> has listed the crimes under international law which is understood to be in accordance with their definitions in the treaties enumerated in the annex to the present draft articles. Although draft article 7 provides that immunity *ratione materiae* enjoyed by the State officials from the exercise of foreign criminal jurisdiction shall not apply to crimes of genocide, war crimes, and crimes against humanity, such definitions are enumerated in the Rome Statute of the International Criminal Court, in which not all States are signatories.

4. The same applies to the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”) and the International Convention for the Protection of All Persons from Enforced Disappearance (“ICCPED”). Thus, Malaysia requests the ILC to further clarify how best to apply draft article 7 in respect of such circumstances, including the possible inclusion of provisions on reservations made by States parties.

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<sup>1</sup> **Article 7 – Crimes under international law in respect of which immunity *ratione materiae* shall not apply**

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
  - (a) crime of genocide;
  - (b) crimes against humanity;
  - (c) war crimes;
  - (d) crime of apartheid;
  - (e) torture;
  - (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

**B. Application of the procedural aspect and safeguards of the draft articles in light of the significant distinction between the two types of immunity, namely immunity *ratione personae* and immunity *ratione materiae***

5. It is noted that there is a lack of an international framework on the procedural aspects of State or diplomatic immunity. Hence, the ILC should be commended for the efforts to develop these draft articles.

6. Further analysis of draft article 9<sup>2</sup> found that the provision concerns the obligation to examine the question of immunity from criminal jurisdiction when the authorities of the forum State exercise criminal jurisdiction over an official of another State.

7. Based on the ILC commentary of this particular draft article, it is noted that the phrase “examination of immunity” is interpreted as “measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of an official of another State”<sup>3</sup>, and that this “examination”, “is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies”<sup>4</sup>.

8. To that end, it is understood that the examination process is completed upon the determination of the immunity of a foreign State official (as provided for in draft article 14)<sup>5</sup> and as such, the ILC has stated that the “examination” and “determination” of immunity are distinct categories although closely related.

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<sup>2</sup> **Article 9 - Examination of Immunity by The Forum State**

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
  - (a) before initiating criminal proceedings;
  - (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

<sup>3</sup> Report of the 73<sup>rd</sup> Session of the International Law Commission (A/77/10, 12 August 2022), page 244

<sup>4</sup> Ibid

<sup>5</sup> **Article 14 - Determination of immunity**

1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.
2. In making a determination about immunity, such competent authorities shall take into account in particular:
  - (a) whether the forum State has made the notification provided for in draft article 10;
  - (b) whether the State of the official has invoked or waived immunity;
  - (c) any other relevant information provided by the authorities of the State of the official;
  - (d) any other relevant information provided by other authorities of the forum State; and
  - (e) any other relevant information from other sources.
3. When the forum State is considering the application of draft article 7 in making the determination of immunity:
  - (a) the authorities making the determination shall be at an appropriately high level;
  - (b) in addition to what is provided in paragraph 2, the competent authorities shall:
    - (i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;
    - (ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.
4. The competent authorities of the forum State shall always determine immunity:
  - (a) before initiating criminal proceedings;

9. It is observed that paragraph 2 of draft article 9 provides for two specific conditions that the forum State shall adhere to in examining the question of immunity, namely “before initiating criminal proceedings”, and “before taking coercive measures that may affect an official of another State”. In this regard, there seems to be an overlap of these two conditions in paragraph 4 of draft article 14 (Determination of Immunity) though it is noted that in the latter provision, there is an exception to the types of coercive actions that may not be taken. Thus, it is recommended for the ILC to provide further clarity in distinguishing the manner in which both these provisions are to be read.

10. In any event, it can be surmised from both draft articles 9 and 14, that “examination of immunity” is merely indicating the earliest possible point in time of a procedure that may affect a foreign official. One of the possible effects of this procedure is that the competent authorities must be aware that a given procedure could affect a foreign official who may enjoy protection against certain measures of criminal enforcement by virtue of his or her immunity. This will regularly include the start of the investigation on the factual basis of a claim to immunity. In addition, the authorities should be aware that they may have to proceed to notify the State of the official and be attentive to an invocation of immunity.<sup>6</sup>

11. On the other hand, “determination of immunity” may be understood to mean a final establishment of the facts concerning the pre-conditions of immunity which will then be followed by a decision of whether or not a State official enjoys the said immunity. It can also be argued that the main difference between these two procedures is the required threshold of established evidence regarding the pre-condition of immunity. As such, it must be stressed that the ability of States and their respective competent authorities to draw a distinction between the processes is crucial in view of the investigation process that would be key in proving the factual basis of a claim of immunity, particularly immunity *ratione materiae* i.e. whether a crime was committed as an act in an official capacity.

12. Moreover, since the core principle of these draft articles concerns the basic right to liberty of a person, time is also an important factor in ascertaining the other elements in the determination of authority such as the notification to the State of the official, invocation or waiver of immunity, and any other relevant information. In this regard, it would be useful for the ILC to further expand on the discussion considering the commentaries on draft articles 9 and 14 do not discuss at length on the said issue.

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(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This sub-paragraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

<sup>6</sup> Isabel Walther, the Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction – Comments on the Procedural Safeguards Provisionally Adopted in 2021, KFG Working Paper No. 54, March 2022.

13. On a different note, it is also observed that the operation of draft articles 9, 11 (Invocation of Immunity)<sup>7</sup>, and 14 could be very much dependent on the type of immunity involved whether it is *ratione materiae* or *ratione personae*. It is argued that while the procedural provisions and safeguards under Part Four are applicable to both types of immunity by virtue of draft article 8<sup>8</sup> (which does not indicate any distinction between the two types of immunity), in practice, the relevant procedures for both these types of immunity are different.

14. For example, with regard to paragraph 2(b) of draft article 9 on the taking of coercive measure by a forum State, the provision does not make clear that for cases in relation to *ratione personae*, the authorities must immediately determine the existence of the immunity and hence, all constraining measures against the official are prohibited.

15. On the contrary, the procedure will be substantially different in cases involving immunity *ratione materiae* in the sense that the authorities may proceed with the exercise of the criminal jurisdiction as long as the State of the official has not invoked such immunity. The competent authorities may not, however, take final or irreversible measures of constraint which would render the possibility of such invocation ineffective; for instance, forced public auction, destruction of property or documents, or execution of capital punishment or death penalty.<sup>9</sup>

16. This can be inferred from the commentary of ILC for draft article 14, particularly for paragraph 4(b) as follows<sup>10</sup>:

*“However, paragraph 4 (b) of draft article 14 adds a new sentence stating that the fact that immunity must always be determined before coercive measures can be taken against a foreign official “does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official”. This clause strikes a balance between the interests of the State of the official, represented by the determination of immunity at a procedurally appropriate time, and the interests of the forum State, represented by the retention of the power to take such coercive measures as are necessary to ensure that, should the forum State subsequently be able to exercise criminal jurisdiction over the foreign official, this will not be impossible in practice. The coercive measures that could be adopted or continued will therefore be measures of a precautionary*

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<sup>7</sup> **Article 11 - Invocation of immunity**

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.
3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities before which immunity has been invoked shall immediately

<sup>8</sup> **Article 8 - Application of Part Four**

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

<sup>9</sup> Ibid.

<sup>10</sup> Report of the 73<sup>rd</sup> Session of the International Law Commission (A/77/10, 12 August 2022), page 270

nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities. The retention of the power to adopt and continue such coercive measures even after immunity has been determined is justified, in particular, by the fact that the determination may be made at an early stage of the exercise of jurisdiction and then be reversed at a later stage, especially in the judicial phase."

17. It is observed that draft article 14 again does not draw a distinction between the two different types of immunity. Nevertheless, one should also refer to the applicable principle on the invocation of immunity wherein in the seventh report (2019) of the Special Rapporteur, the following remarks were made<sup>11</sup>:

*"52. In short, given the elements examined so far, one can conclude that separate rules should apply in this case to immunity *ratione personae* and immunity *ratione materiae*. Thus, while in the case of immunity *ratione personae* the immunity of State officials from foreign criminal jurisdiction should be appraised and assessed *proprio motu* by the competent authorities of the forum State, in the case of immunity *ratione materiae*, the authorities will only have to appraise and assess the applicability of immunity when it is invoked expressly by the State of the official. This is the same position that had been taken by the former Special Rapporteur, Mr. Kolodkin.*

*53. Based on this approach, which calls for differentiated treatment between immunity *ratione personae* and immunity *ratione materiae*, one should conclude that invocation takes on special significance in the case of immunity *ratione materiae*, although this does not rule out the possibility of the State of the official – for various reasons – also invoking the immunity of its Head of State, Head of Government or Minister for Foreign Affairs from criminal jurisdiction. In any event, it is worth noting that the differentiated treatment between immunity *ratione personae* and immunity *ratione materiae* requires that the State of the official be aware of the intention of the authorities of the forum State to exercise any form of jurisdiction over one of its officials, since absent such awareness, the requirement for the State of the official to invoke immunity *ratione materiae* would become impossible to meet."*

18. Reference to draft article 11 on invocation of immunity is therefore unavoidable. Based on the text of draft article 11, similar to draft article 9 and draft article 14, no distinction was made to the procedure of invoking the two different types of immunity by the State of the official. Looking at the interrelation of these draft articles, it can be summarised that their application is dependent on each other and that there is a need for ILC to provide a clear and coherent explanation on the application of these procedural provisions vis-à-vis the two different types of immunity mentioned.

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<sup>11</sup> Seventh report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (distributed on 18 April 2019) for the 71<sup>st</sup> Session International Law Commission.

### **C. Application of draft article 13 (Request for information) in relation to the immunity of State officials from foreign criminal jurisdiction**

19. Malaysia notes that draft article 13<sup>12</sup> provides for certain requests for information between the forum State and the State of the official, which should be viewed as part of the process that a State must follow in order to exercise its right to immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity).

20. The draft article recognises the fundamental principle that any request for information must be considered in good faith. In this regard, the request for information mechanism can be seen as necessary and useful to ensure the appropriate application/invocation of immunity with a view to strengthening cooperation between the States concerned.

21. However, it is noted that this particular draft article may benefit from having a provision that concerns a situation where insufficient information is provided by the State. For instance, there could be a provision that stipulates grounds or criteria that States should follow in assessing requests for information as enshrined in various international cooperation and mutual legal assistance instruments while ensuring that they do not amount to violations of the immunity of State officials and its safeguards.

22. Additionally, taking into consideration the potential sensitivities of information that may be requested and/or exchanged between the States on the application or invocation of immunity, elements of confidentiality ought to be included in this draft article as well to safeguard the interests of the States. For example, there could be a binding obligation on the requesting State to ensure the confidentiality of information that is provided by the requested State. In this regard, it must be emphasised that confidentiality of information is a crucial provision in many existing international agreements and treaties and thus is something that should be given particular consideration.

23. Further, the Commission also highlighted that the requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as concerns of sovereignty, public order, security, and essential public interest. It is also highlighted that the draft article itself is silent on the ability of the requested State to assess whether to formulate

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<sup>12</sup> **Article 13 - Requests for information**

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.
2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.
3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The requested State shall consider any request for information in good faith.

conditions as part of the process of “considering in good faith” a request for information that could facilitate the transmission of such information.



**D. Proposal to suspend national proceedings pending an international dispute settlement in draft article 18**

24. It is noted that draft article 18<sup>13</sup> as adopted by the Commission on first reading does not include the final paragraph originally proposed by the Special Rapporteur, under which, “[i]f the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling”.

25. While some members of the Commission took the view that an obligation to suspend criminal proceedings after submitting the dispute to a binding means of settlement could constitute a useful procedural safeguard, reference to such an obligation was excluded because it was not possible to find precedents, either in existing treaties or in international jurisprudence, to support this provision.

26. Moreover, the Commission is of the view the suspension of criminal proceedings in these circumstances could encounter serious difficulties in some State legal systems. Therefore, draft article 18 does not cover this issue, and the possible suspension of domestic proceedings will depend on any relevant agreement between the parties or, where applicable, any provisional measures ordered by the International Court of Justice or other organs having jurisdiction under paragraph 2.

27. In this regard, Malaysia wishes to emphasise that there should be an acceptance that the suspension of national proceedings, which is pending an international dispute settlement on this matter, would be particularly deferential to the State of the official.

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<sup>13</sup> **Article 18 – Settlement of disputes**

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.
2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.