

## COMMENTS AND OBSERVATIONS OF ROMANIA

ON

### THE DRAFT ARTICLES ON IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION ADOPTED BY THE COMMISSION ON FIRST READING (REPORT OF THE INTERNATIONAL LAW COMMISSION, 73<sup>RD</sup> SESSION, A/77/10)

27 NOVEMBER 2023

Romania thanks the International Law Commission (“the Commission” or “ILC”) for the opportunity to submit its written comments and observations<sup>1</sup> on the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction adopted by the Commission on first reading in 2022, which are set out in Chapter VI of the Report of the Commission at its 73<sup>rd</sup> session (A/77/10) (“the Draft Conclusions”). Romania expresses its sincere appreciation to the Special Rapporteur, Mr. Claudio Grossman Guiloff, to the former Special Rapporteur, Ms. Concepción Escobar Hernández, to the Drafting Committee, and to the Commission as a whole, for their work on this important topic and the preparation of the Draft Conclusions and commentaries.

In relation to the Draft Conclusions, Romania would like to submit the following comments and observations:

1. Romania welcomes the provisions of Draft Article 7, which identifies the international crimes that preclude the application of immunity *ratione materiae* (also known as functional immunity). Draft Article 7, as a reflection of customary international law, provides that immunity *ratione materiae* from foreign criminal jurisdiction shall not apply in respect of the core crimes of international law, i.e. the crime of genocide, crimes against humanity and war crimes.

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<sup>1</sup> ILC Report, 73rd session (A/77/10), para. 66: ‘At its 3609th meeting, on 3 August 2022, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see section C below), 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. However, draft Art. 7 does not include within its scope the crime of aggression, which represents, as well, a crime under international law, which at times when it occurs offers the context for the commission of other crimes under international law in respect of which as determined by the Commission the functional immunity *does not apply*.
3. Romania disapproves, however, of the decision *not* to include the crime of aggression among the instances that preclude the operation of functional immunity for the reasons identified below.
4. Romania contends that Draft Articles 5 and 6 correctly specify that state officials acting as such enjoy functional immunity concerning acts performed in an official capacity. Functional immunity continues to subsist after the individuals concerned have ceased to be State officials. Romania agrees that immunity *ratione materiae* applies also to Heads of State, Heads of Government, and Ministers for Foreign Affairs who are no longer in office and thus no longer enjoy personal immunity.<sup>2</sup>
5. Nevertheless, functional immunity is not absolute, and in some instances, its application can be excluded. Romania maintains that international crimes constitute such an exception to functional immunity. Extensive and uniform state practice indicates already formed customary international law in this regard. In its commentary on Draft Article 7, the Commission has already identified numerous cases where domestic courts have repeatedly ruled that there is no immunity *ratione materiae* for persons who have committed international crimes.<sup>3</sup> Furthermore, state practice in this regard is not limited solely to judicial decisions. Some states, as the Commission has already pointed out, have included in their domestic legislation the non-applicability of functional immunity in relation to international crimes.<sup>4</sup> This tendency is also reflected in the literature and the judgments of international tribunals.<sup>5</sup>

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<sup>2</sup> ILC Report, 73rd session (A/77/10), Draft Articles 3, 4, 6 (3).

<sup>3</sup> ILC Report, 73rd session (A/77/10), p. 232, footnote 1012.

<sup>4</sup> ILC Report, 73rd session (A/77/10), p. 233, footnote 1013.

<sup>5</sup> ILC Report, 73rd session (A/77/10), p. 234, footnote 1014.

6. Having established that the exception for international crimes is of a customary nature, Romania asserts that the crime of aggression should also be in the list of crimes for which no such immunity applies.
7. The Commission decided not to include the crime of aggression, “in view of 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, as well as the special political dimension of this type of crime, given that it constitutes a ‘crime of leaders’.”<sup>6</sup>
8. Regarding the point that the crime of aggression has a special political dimension, it is important to acknowledge that all international crimes might possess such a political dimension, especially when committed in an official capacity. While international crimes can certainly be committed as private acts, they are most often committed in an official capacity. The individuals responsible for these crimes, acting from a leadership position, use state institutions, such as the military or police, to carry out these acts. Moreover, in certain cases, international law itself requires the special status of the perpetrator, i.e. that the acts be committed by officials. Such is the case with the Convention Against Torture, which stipulates that “the term ‘torture’ means any act [...] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.<sup>7</sup>
9. Hence, Romania argues that a “political dimension” is inevitable when it comes to international crimes, and this should not bar the crime of aggression from being included in Draft Article 7, as an exception from the operation of immunity *ratione materiae*.
10. As for the argument that the national courts would be required to determine the existence of a prior act of aggression by the foreign State, Romania would like to argue again that this may be the case with other international crime. In the case of crimes against humanity, for example, a national court may be required to determine the existence of a

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<sup>6</sup> ILC Report, 73rd session (A/77/10), p. 239, para. 21

<sup>7</sup> 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, Art. 1.

state policy to carry out a systematic or widespread attack on the civilian population. Similarly, when focusing on an alleged genocide, courts may have to consider the State policy in order to prove the special intent to commit genocide.

11. Additionally, it is worth noting that the Commission itself referred to the crime of aggression in its past works. For instance, in the Draft Code of Crimes against the Peace and Security of Mankind,<sup>8</sup> as well as in the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.<sup>9</sup>
12. The Nuremberg Tribunal considered the crime of aggression the “supreme international crime”<sup>10</sup> and found that “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law.”<sup>11</sup>
13. National courts have also excluded the operation of functional immunity in relation to international crimes, in cases such as the one against *Eichmann*.<sup>12</sup> More recent practice on this matter can be observed in the case law of the International Criminal Tribunal for

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<sup>8</sup> Article 16 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind provides that “An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”

<sup>9</sup> Principle III of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal states that “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”

<sup>10</sup> IMT, judgment 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. 421.

<sup>11</sup> *Ibidem*, p. 447.

<sup>12</sup> *Attorney-General of the Government of Israel v. Eichmann, Judgement of the Supreme Court of Israel*.

the former Yugoslavia,<sup>13</sup> and in the inclusion of the Crime of Aggression in the Rome Statute of the International Criminal Court.<sup>14</sup>

14. It is for the above-mentioned reasons that Romania considers that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction does not apply in respect of the crime of aggression, and that the crime of aggression should therefore be added to the international crimes listed in Draft Article 7.

15. Alternatively, if the Commission decides not to add the crime of aggression, Romania would favor a more general wording which mentions that functional immunity does not apply in respect of international crimes, without listing said crimes.

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<sup>13</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; 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; Prosecutor v. Milošević, Decision on preliminary motions, Trial Chamber, Case no. IT-02-54, 8 November 2001, para. 26-34.

<sup>14</sup> 1998 Rome Statute of the International Criminal Court (last amended 2010), Art. 8 *bis*.