

INTERNATIONAL LAW COMMISSION

**DRAFT ARTICLES ON IMMUNITY OF STATE OFFICIALS FROM
FOREIGN CRIMINAL JURISDICTION**

WRITTEN COMMENTS OF SINGAPORE

8 December 2023

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INTRODUCTION

1. The International Law Commission adopted the draft articles and accompanying commentaries on the topic “Immunity of State officials from foreign criminal jurisdiction” on first reading during its seventy-third session in 2022. The Commission has invited member states to submit their written comments and observations on the draft articles. Singapore’s comments are set out below.
2. Singapore appreciates the role of the draft articles in the progressive development of international law. As a general observation, Singapore reiterates the importance of the draft articles and commentaries clearly distinguishing *lex ferenda* from *lex lata* where applicable. Singapore’s detailed comments on specific articles may be found in the following sections.

**DRAFT ARTICLE 7: CRIMES UNDER INTERNATIONAL LAW IN RESPECT OF
WHICH IMMUNITY RATIONE MATERIAE SHALL NOT APPLY**

3. Singapore notes that draft article 7 has been the subject of much debate in both the Commission and the Sixth Committee. The debate reflected different positions held by members of the Commission as well as member states on whether limitations and exceptions to immunity *ratione materiae* exist under customary international law. The differences in views may be seen in the Commission’s adoption of draft article 7 by vote.
4. Singapore shares the belief that the most serious crimes under international law should not be allowed to be committed with impunity. However, Singapore’s view is that it remains tenuous to conclude that there exists a discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of the specified list of crimes under international law. The body of case law, national legislation and treaty law that may be relied upon to illustrate such a trend under international law remains limited and unconvincing. Singapore notes that this observation was shared by a number of members in the Commission.¹

¹ See paragraphs 12, and 20 to 23 of the commentary to draft article 7. Also see footnote 1015, draft articles and commentaries.

5. We agree with what some members of the Commission have pointed out, that is, that most national laws do not even regulate immunity *ratione materiae* of State officials, and that none of the relevant treaties addressing the specified crimes preclude immunity *ratione materiae* of State officials from foreign criminal jurisdiction.²
6. There also remains insufficient State practice or jurisprudence to support a proposition that exceptions to immunity of State officials exist under international law for the specified list of crimes, or that there is a trend towards such exceptions to immunity.
7. The fundamental principle underlying the granting of immunity is sovereign equality of States. The purpose behind conferring immunity to State officials lies not in the granting of personal benefit but in ensuring the officials' ability to represent their States or to exercise State functions, thereby protecting the rights and interests of the States.³ State-to-State interactions require a clear, predictable framework. Therefore, there needs to be caution in the creation of exceptions to immunity when these are not backed by sufficient, uniform State practice.
8. For the reasons stated above, draft article 7 should not be included as a draft article.

DRAFT ARTICLE 9: EXAMINATION OF IMMUNITY BY THE FORUM STATE

9. Singapore is not opposed to the general rule in paragraph 1 that the competent authorities of the forum State shall “‘examine the question of immunity without delay’ when they ‘become aware that an official of another State may be affected by the exercise of its criminal jurisdiction’”.⁴ However, there are practical on-the-ground realities that need to be taken into account in seeking to strike an appropriate balance between the forum State’s exercise of sovereignty in criminal matters and certain procedural guarantees arising from the immunity of foreign State officials; the latter should not impair the former. For example, there may be situations where a State official may behave in a manner which may pose an imminent threat to the safety of members of the public, or may pose a danger to himself or herself. The competent authorities of a forum State may be required to act swiftly in such situations.
10. In view of the above, paragraph 2(b) of draft article 9, which provides that “the competent authorities of the forum State *shall always examine the question of immunity before taking coercive measures* that may affect an official of another State, including those that may

² See footnotes 1016 and 1017, draft articles and commentaries.

³ Paragraph 5 of the general commentary in the draft articles and commentaries.

⁴ Paragraph 3 of commentary to draft article 9.

affect any inviolability that the official may enjoy under international law” (emphasis added), is too restrictive and fails to provide adequate acknowledgment of the practical realities and challenges faced by competent authorities particularly in the circumstances when they may be required to take coercive measures in the exercise of criminal jurisdiction. Singapore suggests that paragraph 2(b) of draft article 9 be amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively. One possibility could be to add a qualifier such as “as far as practicable”.

11. Further, there may be instances where there is no indication to the competent authorities at all that a subject may be an official of another State, such that the competent authorities do not become aware that issues of immunity may be implicated. In such instances, paragraph 1 makes clear that there would necessarily be no obligation to examine the question of immunity. Similarly, paragraph 2 of draft article 9 and the accompanying commentary clarifies that the obligation to examine the question of immunity, and to do so without delay, continues to be subject to the precedent condition of being aware that issues of immunity may be implicated, even in the context of paragraph 2 of draft article 9. Singapore wishes to express its appreciation to the Commission’s efforts in making these points clear in the draft articles, as well as in the commentary.⁵

DRAFT ARTICLE 10: NOTIFICATION TO THE STATE OF THE OFFICIAL

12. According to draft article 10(1), “[b]efore the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance.”
13. In this regard, Singapore shares the same concerns under draft article 10(1) as those articulated under draft article 9, and would suggest that draft article 10(1) be similarly amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively, for example through the addition of a qualifier such as “as far as practicable”.
14. Singapore notes the absence of the phrase “[w]hen the competent authorities of the forum State become aware” and the “without prejudice” language in draft article 10 that are found in draft article 9. As with draft article 9, language should be included in draft article 10, or to apply to draft article 10, to exclude situations where there are no indications, and the competent authorities are unaware, that issues of immunity may be implicated.

⁵ Paragraph 8 of commentary to draft article 9 states that “the words ‘without prejudice’ are used to emphasize that the general rule [in paragraph 1] applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2.”

DRAFT ARTICLE 12: WAIVER OF IMMUNITY

15. Paragraph 5 of draft article 12 provides that a waiver of immunity is irrevocable. Singapore agrees that a waiver of immunity should not be revoked lightly based on principles of legal certainty and good faith.
16. However, as acknowledged by certain members of the Commission, there may be situations where a revocation of waiver of immunity may be warranted, such as the surfacing of new facts previously unknown, or the occurrence of exceptional circumstances such as a change in government or legal systems which may compromise the guarantee of the right to a fair trial in the forum State.⁶
17. It is important that the draft articles not undermine the ability of a State to reassess the issuance and revocation of a waiver of immunity on a case-by-case basis, taking into account the specific circumstances. As such, Singapore is of the view that paragraph 5 should be removed.

DRAFT ARTICLE 14: DETERMINATION OF IMMUNITY

18. Singapore takes comfort from how the Commission, in using the term “appropriately high level” in paragraph 3(a) of draft article 14, had the intention of according a degree of flexibility to member states as “the determination of which ‘authorities [are] at an appropriately high level’ will depend on each State’s legal system”, while also noting that these cases “require assessment by specially qualified State authorities with a special level of competence”.⁷
19. With respect to paragraph 4 of draft article 14, Singapore has similar observations to those which we have made in respect of draft articles 9 and 10. Specifically we suggest that paragraph 4 be amended to: (i) provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively; and (ii) exclude situations where there are no indications, and the competent authorities are unaware, that issues of immunity may be implicated.

⁶ Paragraph 15 of commentary to draft article 12.

⁷ Paragraphs 15 and 16 of commentary to draft article 14.

DRAFT ARTICLE 18: SETTLEMENT OF DISPUTES

20. Singapore is of the view that the compulsory dispute settlement mechanism as set out in draft article 18(2) is not suitable for resolving issues relating to the immunity of State officials. Differences for such issues are most appropriately resolved through consultations between the two States involved.
21. Singapore's preference is to remove paragraph 2 from draft article 18. Considering the bilateral contexts in which issues of immunity of State officials most often arise, it is important not to restrict the options for peaceful means of settling disputes.
22. Even if the Commission sees the need to address circumstances in which a resolution cannot be reached under paragraph 1, the mode of dispute settlement adopted subsequently should be determined by mutual agreement between the State of the official and the forum State. In this regard, the Commission could consider amending paragraph 2 to read as follows:
 - (2) If a mutually acceptable solution cannot be reached within a reasonable time, the forum State and the State of the official may refer the dispute to the International Court of Justice or to any other means of settlement entailing a binding decision by mutual agreement.
23. If the current formulation of paragraph 2 is to remain, Singapore would recommend that an additional provision on unilateral derogation be included. The Commission has included a similar provision in draft article 15(3) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity:

A State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

CONCLUDING REMARKS

24. Singapore submits its written comments to the Commission for consideration and looks forward to further revision of the draft articles. Singapore thanks the Commission and the Special Rapporteurs for their efforts in developing the draft articles and extends its sincere appreciation.