1 December 2023

Comments and observations by the United Arab Emirates on the draft Articles on immunity of State officials from foreign criminal jurisdiction adopted, on first reading, by the International Law Commission at its seventy-third session

Table of Contents

I. Introduction

1. The UAE welcomes the opportunity to comment on the draft articles on immunity of State officials from foreign criminal jurisdiction, a project undertaken by the International Law Commission since 2006, which has proven highly controversial and continues to generate extremely divergent viewpoints, both within the Commission and among States. The UAE expresses its gratitude to the two Special Rapporteurs for their laborious research and detailed reports, and their painstaking efforts aimed at attempting to reach an outcome that would satisfy the majority of stakeholders.

2. In deciding an approach for commenting on the draft Articles, the UAE has opted for a selective method aimed at providing its views on specific draft articles, along with preliminary views relating to the importance of distinguishing between *lex lata* and *lex ferenda*.

3. The UAE will therefore first provide preliminary comments pertaining to the underlying *lacunae* in the draft Articles which it has identified (Chapter II). Turning to the specific text of the draft Articles, the UAE sets out its view that draft Article 2 fails to provide a useful definition of an "act performed in an official capacity" (Chapter III). The comments then address why draft Article 3 on persons enjoying immunity *ratione personae* should not be limited to the *troika* (Chapter IV), and the serious defects in the limitations and exceptions to immunity *ratione materiae* under draft Article 7 (Chapter V). The UAE concludes with comments regarding Part Four of the draft Articles concerning procedural safeguards (Chapter VI).

II. Preliminary Comments

4. In light of the sensitive nature of the topic of immunity of State officials from foreign criminal jurisdiction, the UAE believes that the Commission must carefully maintain the distinction between the codification and progressive development of the law in this area. In its current form, the draft Articles make it difficult to distinguish between the attempted restatement of international law and proposals of new rules. The UAE maintains that in the absence of any sufficiently developed State practice relating to relevant provisions of the project, any further consideration of the draft Articles would only be suitable in the context of elaboration of a draft convention.

5. Though it has become common practice for the Commission no longer to distinguish clearly between the two concepts, it has retained the distinction when a draft provision contains particularly innovative language so as to alert States to the novelty of the provision and allow them to take this into consideration when deciding whether to endorse it.

6. The UAE observes that a number of provisions in the draft Articles have divided the Commission as to whether they constituted a codification of international law or its progressive development, or even new rules altogether. One member warned that the Commission had in the past referred to *lex ferenda* when, in reality, the Commission was suggesting elements that might be more accurately defined as *lex desiderata*:[1]

> "While the Commission's codification work was based on customary international law, progressive development was carried out on the basis of emerging rules of international law; that was different from the making of new laws, which was what *lex ferenda* usually implied. The Commission itself had not always used the term *lex ferenda* correctly, and it had to a certain extent led the Sixth Committee astray in that regard. Particular caution should therefore be taken when using the expression "progressive development" as it related to the Commission's mandate."

7. With respect to progressive development of international law, the UAE emphasizes the requirement that there must, at the least, exist an embryonic rule which is "emerging" or "developing". By contrast, in the present instance, several provisions proposed by the Commission constitute epitomes of new law. For instance, draft Article 7 and draft Part Four relating to procedural safeguards are best viewed as new suggestions or proposals, not law, as they do not reflect an embryonic rule or practice from which the Commission may justify the further progressive development of the law. A number of States have objected that these provisions constitute the creation of rules *ex nihilo*, and warned of the risk of overreach by the Commission in carrying out its functions.[2] The UAE agrees with these criticisms.

8. It follows that the Commission should consider deleting or revising such provisions, and if it is of the view that progressive development might be warranted, the Commission should either specify that certain provisions constitute progressive development or that the text should be proposed in the form of a draft convention. Nevertheless, serious and substantial flaws identified in the draft Articles, described below, are sufficient to call into question whether, absent substantial revision, a convention based on the draft Articles would attract widespread acceptance by States.

III. Draft Article 2 fails to provide a useful definition of an "act performed in an official capacity"

9. The UAE expresses its disappointment as to the limited outcome reached by the Commission on what should have constituted the core of its work on this topic, a

[1] A/CN.4/3143, Summary record of the 3143rd meeting, 2012, para. 31 (Murase).

[2] Topical summary of the discussion held in the 6th Committee, 2017, A/CN.4/713, paras 30-31; Commentary, draft Article 7, para. 12.

practicable definition of an "act performed in an official capacity". The UAE regrets that in the formulation of draft Article 2, the Commission has missed the opportunity to provide functional guidance. While the UAE sympathizes with the Commission regarding the difficulty of this exercise, it regrets that the Commission did not seriously attempt to streamline a process for characterizing an act as official, choosing instead to rely on draft Article 7.

10. The criteria offered by the Commentary rely on circular tautologies and provide little guidance in identifying the scope of the notion. For instance, paragraph (30) of the Commentary to draft Article 2 notes, "[s]uch acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in 'the first exercise of State authority'".

11. In this context, the UAE also wishes to confirm the understanding, in light of draft Article 14(1), that when determining whether an individual is a "State official" and "an act performed in an official capacity" as defined in Articles 2(a) and (b) respectively, it shall be necessary to take into account the law and practice of the State of the official. This may address the official's status and position within the authority of the State and their powers and authority. While this understanding is currently reflected to an extent in the commentary for draft Article 2(a),[3] it is unaddressed in the commentary for draft Article 2(b), where the point is however equally relevant.

12. As to the relevance of the issue of the attributability of the official's act to the State under the Law of State Responsibility, the Commission's instruction proves rather limited. The Commentary emphasizes the connection between immunity of foreign officials and State responsibility,[4] although it transpires from the debates that the starting point of this discussion was that "the question of individual responsibility is in principle distinct from the principle of State responsibility".[5]

13. The Commentary constitutes a missed opportunity to provide clarity and guidance in this regard, including insofar as it does not explain how to reconcile the fact that particular conduct of a State official is likely to be attributable to the State on the one hand, with the counter-intuitive result under the approach proposed in the draft Articles that a State official may not benefit from immunity, on the other hand.

[3] Commentary, draft Article 2, paras. 5,8.

[4] Commentary, draft Article 2, para. 24.

[5] A/CN.4/686, Fourth report on the immunity of State officials from foreign criminal jurisdiction by Ms. Concepción Escobar Hernández, Special Rapporteur, 29 May 2015, para. 99.

14. In this sense, the UAE is also concerned by the Commission's attempts to minimize the linkage between attribution and immunity, as well as its apparently instrumental efforts to dismiss the relevance of bases of attribution which are inconsistent with or undermine the position taken in draft Article 7 as regards the lack of immunity *ratione materiae* for certain international crimes.

15. Paragraph (25) of the Commentary to draft Article 2, whilst acknowledging the relevance of the rules of attribution contained in the Articles on State Responsibility (ARSIWA) as a "point of departure", nonetheless cautions that they were established "in the context and for the purposes of State responsibility" and suggests that their application in the context of immunity should be "examined carefully".[6]

16. The Commentary then suggests that "[f]or the purposes of immunity, the criteria for attribution set out in articles 7–11" of the ARSIWA "do not seem generally applicable". No coherent explanation is given for the wholesale exclusion of the application of those provisions; the only (partial) explanation is the Commission's view that "acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity".[7] This, however, fundamentally misrepresents the scope and purpose of Article 7 ARSIWA.

17. That provision does not constitute a free-standing and separate basis for attribution of conduct to the State. Rather, its purpose is to make clear that the conduct of the organs of a State, or the conduct of entities empowered by it to exercise governmental authority, is to be regarded as attributable even if it was carried out outside the authority of the organ or person concerned or contrary to instructions.[8] As such, Article 7 is an essentially adjectival provision, which supplements and clarifies the bases of attribution contained in Articles 4 to 6 ARSIWA.[9]

18. Further, pursuant to Article 7 ARSIWA, *ultra vires* conduct is to be regarded as attributable only if the organ, or person or entity exercising elements of governmental authority "acts in that capacity" in carrying out that conduct in question. As such, Article 7 ARSIWA is not concerned with the attribution of "purely private acts" as the Commentary wrongly implies; instead, as the Commission's Commentary on the ARSIWA make clear:

> "Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed

[6] Commentary, draft article 2, para. 25.

[7] Commentary, draft article 2, para. 25.

[8] Introductory Commentary to Part One, Chapter II, paragraph (8); Commentary to Article 7, paragraph 1.

[9] ARSIWA, Commentary to Article 7, para. 9.

from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State".[10]

19. The Commission's mischaracterization of Article 7 ARSIWA thus has the effect of minimizing the principal subject matter with which it deals, i.e., the rule that conduct which is *ultra vires* or otherwise unlawful is in principle attributable to the State if the relevant official or individual was acting in their official capacity in carrying out the relevant conduct.

20. In sum, the approach adopted by the Commission in formulating draft Article 2 is rather disappointing and leaves States without guidance as to how to assess issues relating to the immunity of a foreign official from criminal proceedings within their domestic legal systems.

IV. The category of State officials enjoying immunity *ratione personae* should not be limited to the "*troika*"

21. The Commission made the choice of limiting personal immunity to the "troika", namely the Head of State, the Head of Government, and the Minister of Foreign Affairs. The UAE would like to register its support for the position that immunity *ratione personae* should extend beyond the troika. The UAE will make two preliminary comments regarding this issue.

22. *First*, the draft Articles do not adequately address the situation of *de facto* leaders, despite the question having been raised during the debates in the Commission. The Commentary simply makes a *renvoi* to the definition of an "act performed in an official capacity".[11] This, however, is not a satisfactory approach. The concept of an "act performed in an official capacity" is inherently linked to immunity *ratione materiae*, and, therefore, is not relevant to the particular situation of *de facto* leaders.

23. *Second*, another issue raised during the debates concerned the timing of the transfer of power from a departing leader to a new one. The Commentary specifies only that the immunity "is accorded exclusively to persons who actually hold that office".[12] Newly elected leaders may not take up their duties immediately, and sometimes only in the months following election. It is, therefore, important to provide guidance on whether a newly

[10] ARSIWA, Commentary to Article 7, para. 7.

[11] Commentary, draft Article 2, para. 15.

[12] Commentary, draft Article 3, para. 5.

elected leader may or may not enjoy immunity *ratione personae* in the interim period before formally taking up office.

24. Moving to the crux of draft Article 3, the Commentary explains that the Commission was driven by two reasons in limiting immunity *ratione personae* to three specific offices within a State's political structure: State representation and functionality.[13] The Commission limits immunity *ratione personae* to the *troika* based on the rationale that "these three office holders represent the State in its international relations simply by virtue of their offices, directly and with no need for specific powers to be granted by the State" and that "they must be able to discharge their functions unhindered".

25. In the UAE's view, by proposing to limit immunity *ratione personae* to the troika, the Commission has failed to reflect the true position resulting from a thorough analysis of the practice, as well as the grounds in international law which support the conclusion that other high-ranking State officials also enjoy immunity *ratione personae.*

26. In support of this position, the UAE emphasizes that the Commentary summarizes the polarized positions within the Commission as to the scope of immunity *ratione personae*, including the debates around the use of the expression "such as" by the International Court of Justice (ICJ) in the *Arrest Warrant* case when specifying the circle of persons who enjoy this category of immunity.[14]

27. The UAE is of the view that the approach adopted by the ICJ in that case is better understood as being illustrative rather than prescriptive. Whilst the second Special Rapporteur recognized during the debates the growth of "international activity" undertaken by "other high-level State officials participating more frequently in international relations", she was however of the view that this was "carried out on the basis of unilateral and internal decisions of the State in which they performed certain functions".[15] The UAE respectfully disagrees. In today's world, and regardless of a State's internal organization, many senior members of government (ministers and vice-ministers or the equivalent thereof) have increasingly taken on roles of representation of the State in matters just as paramount as foreign affairs, and without meeting with opposition from other States.

28. In addition, the Commission should have acknowledged that representation of the State and unhindered discharge of functions are not the only underpinnings of immunity *ratione personae*. With respect to at least one member of the *troika* – the Head of State – immunity *ratione personae* has its roots in the position that the Head of State is the embodiment and

[13] Commentary, draft Article 3, para. 2.

[14] Commentary, draft Article 3, para. 11.

[15] A/CN.4/3164, Summary record of the 3164th meeting, 2013, para. 12 (Escobar Hernández).

personification of the State. This rationale means that individuals who, in light of their status within a sovereign entity, have a defined role in the constitutional architecture of the State that is so closely connected to the ontological conceptualization of that State (i.e. a crown prince, an heir apparent) may enjoy immunity *ratione personae* in a similar manner as the sovereign.

V. Limitations and exceptions to immunity *ratione materiae* under draft Article 7 are not an emerging customary rule, let alone one that is ripe for progressive development

29. The Commission's approach has overwhelmingly favored the inductive, teleological method, contrary to both the position initially taken by the second Special Rapporteur,[16] and to the Commission's assertion that "it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method".[17]

30. The UAE maintains that draft Article 7 has no foundation under customary international law and urges the Commission to revise this provision, if not delete it. The use of flawed methodologies adopted by the Commission, such as decontextualization and cherry-picking of State practice (as raised by some Commission members)[18] complicates, rather than facilitates, the codification and progressive development of the law on immunities.

A. There is insufficient State practice supporting the existence of limitations and exceptions to immunity *ratione materiae*

i. There is no "trend" denying immunity *ratione materiae* in case of international crimes

31. The Commentary confirms that the Commission considers that a "discernable trend" exists in relation to the non-application of immunity *ratione materiae* in respect of certain

[16] "No theoretical argument, personal preference or ideology could replace practice. On the contrary, practice was the necessary starting point for any rigorous study capable of facilitating the formulation of proposals for codification and progressive development" (International Law Commission Sixty-ninth session (first part), Provisional summary record of the 3360th meeting, A/CN.4/SR.3360, 2017, p. 4 (Escobar Hernández)).

[17] Commentary, draft Article 3, para. 11.

[18] This faulty methodology was criticized by several Commission members. For instance, Mr. Nolte during the 3331st meeting of the ILC, A/CN.4/3331, 2016, paras 15-22, Mr. Hassouna during the 3361st Meeting of the ILC, A/CN.4/SR.3361, 2017, p. 13, and Mr. Murphy during the 3362nd meeting, A/CN.4/SR.3362, 2017, p. 6.

international crimes.[19] However, the Commentary points to limited case law[20] and national legislation,[21] which together supposedly evince the existence of such a "trend", though it goes on to provide several "disclaimers" in relation to the case law cited, thereby diminishing its authoritative weight. In this vein, a number of members of the Commission argued that the second Special Rapporteur had failed to substantiate her premise, notably because of the paucity of decisions,[22] which the Special Rapporteur herself had conceded.[23]

32. The terminology employed by the Commission in this regard bears no meaning or significance. In the UAE's view, the assertion of a "trend" unfortunately carries no legal implication and represents an ambiguous threshold for the purposes of identifying areas appropriate for progressive development, and an entirely inappropriate one for the existence of a customary rule. In this regard, the Commentary fairly and accurately reflects the position of some members, expressed during the debates, that draft Article 7 does not embody customary international law,[24] which the UAE also endorses.

33. In addition, the UAE believes that progressive development requires the Commission first to establish that there has occurred a *notable* evolution of the law, resulting in ripeness for further development. The UAE is not of the view that this is the case for limitations and exceptions to immunity *ratione materiae*.

34. Further, the UAE is concerned that the Commission places excessive emphasis on the decision of the UK House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3*) to justify foreign officials being denied immunity in case of international crimes or violations of *jus cogens*.

35. As pointed out by one Commission member,[25] the analysis followed by the court in *Pinochet No.3* was strictly carried out in the context of the Convention against Torture. Notably, in the *Jurisdictional Immunities* case, the ICJ had been careful not to seek to draw

[19] Commentary, draft Article 7, para. 9.

[20] Commentary, draft Article 7, para. 9, footnote 1012.

[21] Commentary, draft Article 7, para. 9, footnote 1013.

[22] For instance, A/CN.4/SR.3362, Provisional summary record of the 3362nd meeting, 2017, pp. 4-5 (Murphy); See also A/CN.4/SR.3361, Provisional summary record of the 3361st meeting, 2017, p. 8 (Kolodkin).

[23] A/CN.4/701, Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, 14 June 2016, para. 220.

[24] Commentary, draft Article 7, para. 12, footnotes 1015 to 1017.

[25] A/CN.4/3145, Summary record of the 3145th meeting, 2012, para. 49 (Wood).

conclusions from the *Pinochet* case.[26] The UAE wholeheartedly disagrees with the approach and analysis of the Commission in this regard. Beyond erroneously interpreting this judgement, the Commission jeopardizes the principle of *pacta sunt servanda*, and erodes State sovereignty, by seeking to extend the binding character of a decision rooted in a treaty, to States which are not a party to it.

36. Despite the UAE's position that draft Article 7 does not constitute a customary rule, a position shared by the majority of States addressing this issue, if the Commission insists on including the divisive draft Article 7, the Commission must unequivocally specify that such a provision constitutes a proposal for progressive development (or, a proposal for a new rule of law). States and their national courts, as well international courts and tribunals, should not be misled into considering that such an unprecedented legal provision as draft Article 7, absent a disclaimer it is a proposal for progressive development, has crystallized into customary international law. In this regard, the UAE would be unable, regrettably, to support a General Assembly resolution that welcomes the draft Articles absent this essential clarification for draft Article 7. The UAE believes that the matters covered in the draft Articles should be addressed in a convention agreed by States.

ii. Civil cases and legislation also do not support the existence of such a "trend"

37. The Commission found it acceptable to look to civil cases in order to draw conclusions applicable in the criminal context. In the words of the second Special Rapporteur, "*rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, mutatis mutandis, to immunity invoked in the context of criminal jurisdiction*".[27] The Special Rapporteur's reliance upon, and reference to, civil cases is mistaken and unwelcome for at least three reasons:

a. It ignores the fundamental difference between the natures of civil and criminal matters.

b. It obviates the fact that the overwhelming majority of decisions rendered by international and national courts in the context of civil proceedings have rejected the existence of exceptions or limitations to immunity in respect of the tortious counterparts of international crimes.

[26] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, pp. 137-8.

[27] A/CN.4/661, Second report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur, 4 April 2013, para. 24.

c. Even if one were to accept the relevance of the practice in civil proceedings, it provides no support to the argument for additional exceptions to immunity. The only exception found in national legislation governing State immunity is the so-called territorial tort exception, the history of which relates to insurable traffic road accidents occurring in the forum State.

iii. The selection of crimes under draft Article 7 is arbitrary

38. The UAE objects to the list of crimes under draft Article 7 on the basis that their selection was arbitrary. The second Special Rapporteur operated on the basis of her own subjective assessment that certain crimes were seemingly automatically eligible to be included in draft Article 7. Having identified a first category of crimes, including "piracy, drug trafficking, human trafficking, corruption and other forms of international organized crime", the Special Rapporteur posited the existence of a second category, including "the crime of genocide, crimes against humanity, war crimes, the crime of aggression, torture, enforced disappearance and apartheid", and observed without further explanation:

> "Although both categories generally consist of crimes that undermine the values and interests of States and the international community, only the latter category can, strictly speaking, be considered to constitute "international crimes" or "crimes under international law" that undermine the fundamental legal values of the international community as a whole".[28]

39. The reasoning adopted in the Commentary also exposes the Commission's lack of even-handedness in selecting international crimes. For instance, despite its inclusion in draft Article 7, the Commission does not provide a citation to any judicial decision relating to immunity from jurisdiction in cases of enforced disappearance. The Commission's approach with regard to the selection of crimes under draft Article 7 is simply that of a legislative body; it threatens to destabilize State relations if domestic courts were so inclined to follow it as *lex lata*.

40. Against this backdrop, it remains unclear to the UAE how or why the prohibition of slavery, which has been recognized as a norm of *jus cogens* in the work of the Commission, and was included among the examples of rules creating *erga omnes* obligations by the ICJ, does not meet the Commission's proposed threshold.[29] The Commentary rejects the inclusion of the prohibition on slavery in the list of crimes in draft Article 7, alluding to the "transnational" nature of the crime.[30] In this regard, the UAE notes that even if, arguably, the prohibition on slavery, was a transnational crime at the time of its inception, its universal character is well-established in the modern world.

[28] A/CN.4/701, Fifth report on immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur, 14 June 2016, para. 219.

[29] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, p. 32, para. 34.

[30] Commentary, draft Article 7, para. 23.

B. The reference to international criminal law and conventions dealing with other "international crimes" is inapposite

41. As reflected in the Commentary,[31] the current formulation of draft Article 7 rests also on an acritical analysis of the current status of international criminal law, and in particular the Rome Statute, and other conventions concerning "international crimes". The UAE strongly believes that any consideration of the specific mechanism concerning immunities resulting from the Rome Statute and the relevant State parties' implementation thereof should not be considered by the draft Articles, as expressly provided for in draft Article 1(3). It should also be excluded for the simple reason that it would affect non-parties to the Rome Statute. They are irrelevant for any normative determination in respect of the existence of exceptions to immunity *ratione materiae* vis-à-vis foreign domestic courts.

42. With respect to international criminal law, the Commission has debated *ad nauseam* the relevance of developments in these spheres for the topic of immunities of State officials from foreign criminal jurisdiction. The UAE wishes to stress that the two subjects are not as inter-related as the Commission suggests. As much is clear from their titles: one is concerned with *international* jurisdiction while the other is limited to *domestic* jurisdiction. International criminal courts and tribunals set up to adjudicate international crimes are the result of the *consent* of specific States or of action by the UN Security Council under Chapter VII of the UN Charter to provide mechanisms for the prosecution of certain international crimes at the international level.

43. More specifically, the majority of the Commission imbued these debates with a focus on the ICC and the Rome Statute as implemented (or not) by the States party thereto. The fact that the Commentary refers to national legislation implementing the Rome Statute in support of the purported "trend" towards limitation of *ratione materiae* immunities is indicative that such debates affected the overall formulation of draft Article 7.[32]

44. First, the ICC is an international tribunal. The application of immunity in this context is not transposable to domestic criminal jurisdictions. Their respective natures are fundamentally distinct, the most obvious difference being that there is no question of State sovereignty before an international tribunal, where States opt to adhere to such a type of judicial system, in contrast to foreign domestic jurisdiction. As the ICC Appeals Chamber noted, "the principle of *par in parem non habet imperium*, which is based on the sovereign

[31] Commentary, draft Article 7, paras 18-22.

[32] Commentary, draft Article 7, para. 9, footnote 1013, *referring to* Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso, Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, Ireland, International Criminal Court Act 2006, Mauritius, International Criminal Court Act 2001, South Africa, Implementation of the Rome Statute of the International Criminal Court Act.

equality of States, finds no application in relation to an international court such as the International Criminal Court."[33]

45. Second, the ICC is established by a treaty. Any right or obligation stemming from such a treaty is confined to *inter partes* relations and cannot affect non-States parties. In particular, State practice stemming from the obligations to cooperate with the ICC, in the context of the Rome Statute, cannot define, still less erase, the normative framework in place between States. In this context, the UAE notes that several comments submitted to the Commission by States parties to the ICC (including Germany, Japan, France, The United Kingdom, Australia) take the view that draft Article 7 does not reflect State practice or customary international law.[34] These positions further illustrate the logical disconnect between the rights and obligations stemming from the Rome Statute and those pertaining to relations between States under customary international law.

46. These considerations align with draft Article 1(3), which, in clarifying that "the draft articles do not affect *the rights and obligations of State Parties* under international agreements establishing international courts and tribunals" (emphasis added), recognizes their "separation and independence" from the "specific legal regimes" of international criminal jurisdictions.[35] Nonetheless, this principled approach is plainly contradicted by draft Article 7 and its Commentary which rely on the State practice implementing those "specific legal regimes" to assess the scope and applicability of the immunities *ratione materiae* before foreign criminal jurisdictions.[36]

47. Further, the reference to international conventions requiring States to criminalize apartheid, torture and enforced disappearance likewise seems unhelpful and inapposite to support the existence of relevant exceptions to immunity *ratione materiae* as articulated in draft Article 7.[37] The considerations that these conventions impose obligations to prevent, suppress and punish these crimes or establish systems of horizontal international cooperation and judicial assistance between States do not in themselves support the conclusion that functional immunities do not apply in domestic proceedings concerning such crimes.[38]

---

[33] ICC, *Situation in Darfur, The Prosecutor v. Omar Hassan Ahmad al-Bashir*, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019 (*Bashir* Appeal Judgment), para. 115.

[34] UNGA Sixth Committee 22nd Meeting (n. 103), para. 98 (Australia). See also UNGA Sixth Committee, Summary Record of 20th Meeting, UN Doc. A/ C.6/ 66/ SR.20, 23 November 2011, para. 43 (France); UNGA Sixth Committee 23rd Meeting (n. 116), para. 43 (France); UNGA Sixth Committee 28th Meeting (n. 118), para. 29 (United Kingdom); UNGA Sixth Committee 24th Meeting (n. 115), paras. 57– 61 (United Kingdom); UNGA Sixth Committee 29th Meeting (n. 100), paras. 90 (Japan) and 102 (Israel); UNGA Sixth Committee 24th Meeting (n. 115), paras. 33 (Belarus), 64 (Iran) and 91 (Germany).

[35] Commentary, draft Article 1, para. 21.

[36] Commentary, draft Article 7, para. 9.

[37] Commentary, draft Article 7, paras 22-23.

[38] Commentary, draft Article 7, para. 23.

48. Despite such obligations, these treaties do not provide for the removal of immunities or even touch upon immunities at all. They also do not include any safeguards necessary to preclude the possibility that the "exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive".[39]

49. The silence of these instruments concerning the applicability of immunities cannot be construed to imply that States have renounced an important sovereign prerogative by default. This is especially the case given that some of these instruments were adopted at a time when there was no real debate or question concerning the scope of functional immunities.[40] Accordingly, the only conclusion is that customary international law was not affected,[41] and the issue falls to be addressed in conjunction with applicable domestic law, if any.

VI. Procedural provisions and safeguards do not reflect customary international law

50. Part Four of the draft Articles on procedural provisions and safeguards is without any foundation under customary international law. There exist a number of serious flaws in Part Four, which the Commission should consider deleting or substantially revising.

51. As a preliminary point, the UAE notes that the drafting of Part Four appears to have benefitted from much less attention than other Parts of the draft Articles. The debates within the Commission unfortunately did not focus on these issues with as much vigor as they did regarding the controversial draft Article 7 though they are, precisely, supposed to counterbalance those exceptions and give assurances to States that limitations and exceptions are to be considered with extreme caution. That being said, the UAE believes that Part Four does not cure the defects of draft Article 7.

52. Given the opposition to draft Article 7, it would have been desirable for the Commission to have devoted the same amount of scrutiny to the proposed procedural safeguards as it did limitations and exceptions to immunity. The overall impression resulting from Part Four is that it has been largely cobbled together with provisions inspired by related treaties which nonetheless do not substantially contribute to the refinement of that section. In particular, the UAE does not find in draft Part Four any indication of careful consideration by the Commission of specific and targeted safeguards that would mitigate against abuses of a sensitive and complex provision such as draft Article 7.

[39] Commentary, draft Article 7, para. 9.

[40] The International Convention on the Suppression and Punishment of the Crime of Apartheid has been adopted on 30 November1973; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been adopted on 10 December 1984.

[41] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, p. 25, para. 59.

53. For instance, draft Article 13 concerning "requests for information" from either the forum State or the State of the official does not serve any purpose. In practice, States share information on these issues, or they do not, and would use diplomatic channels to do so.

54. The UAE submits the same comment regarding draft Article 16 relating to the fair treatment of the official. One would think that, regardless of whether the individual is a foreign official potentially benefitting from immunity *ratione materiae*, any foreign citizen would be entitled to those protections and there should be no need to include them.

55. Consideration should be made by the Commission to substantially amend the provisions concerning examination (draft Article 9) and determination (draft Article 14), which introduce more ambiguity than clarity to a highly complex aspect of the immunity regime.

56. In particular, the wholesale application of Part Four, including draft Articles 9 and 14, to cases of immunity *ratione materiae* and immunity *ratione personae*, without distinction, risks fostering substantial abuse. For example, the Commission when noting that the forum State may apply coercive measures of a "precautionary nature" before determination of immunity pursuant to draft Article 14 (4) (b) does not distinguish between cases of immunity *ratione personae* and immunity *ratione materiae*.

57. In practice, quite different procedures will take place depending on which of the two immunities is in question. In the case of immunity *ratione personae*, the examination and determination may take place simultaneously and may not be factually distinguishable. There is little clue in the text and the Commentary on this matter.

58. Turning finally to draft Article 18, the settlement of disputes provision contains two flaws:

    i. First, compulsory dispute resolution of the sort described in paragraph 1 is clearly not supported by customary international law, and a dispute settlement clause could only be relevant if the draft Articles were intended to become a convention.

    ii. Second, the UAE notes that dispute settlement clauses are distinct in kind from others procedural safeguards. The UAE recommends that, if retained, the Commission consider the placement of draft Article 18 in a separate Part Five.