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**COMMENTS AND OBSERVATIONS**

**OF**

**THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

**ON**

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

**ADOPTED BY**

**THE INTERNATIONAL LAW COMMISSION ON FIRST READING**

**(REPORT OF THE INTERNATIONAL LAW COMMISSION, 73<sup>RD</sup> SESSION,  
A/77/10)**

**1<sup>ST</sup> DECEMBER 2023**

The United Kingdom of Great Britain and Northern Ireland thanks the International Law Commission (“the Commission”) for the opportunity to submit its written comments and observations on the draft articles and commentaries on immunity of State officials from foreign criminal jurisdiction, which were adopted by the Commission on first reading in 2022 and which are set out in Chapter VI of the Report of the Commission at its seventy-third session (A/77/10) (“the Draft Articles”).

The United Kingdom expresses its appreciation to the former Special Rapporteurs, Concepción Escobar Hernández and Roman Kolodkin, to the Drafting Committee and to the Commission as a whole, for their work over many years on this important topic including the preparation of the Draft Articles and commentaries.

We also welcome the appointment of Claudio Grossman Guiloff as the new Special Rapporteur for the topic and look forward to engaging with him as he takes stock, reviews the observations of States and consults on the way forward ahead of the Commission’s seventy-fifth session. In light of the fundamental importance of this topic, it is vital that the Special Rapporteur and the Commission do not rush to a second reading, but instead take the necessary time to reflect and then mould a future product which not only accurately reflects the practice of States but can also enjoy broad acceptance across the international community as a whole.

The United Kingdom has the following comments and observations on the Draft Articles:

### ***General comments***

1. The United Kingdom welcomed the Commission’s decision at its fifty-ninth session to include this topic in its programme of work. The immunity of State officials from foreign criminal jurisdiction continues to offer an opportunity for the Commission to provide valuable clarification on a matter of real practical concern for both States and individuals.
2. The United Kingdom recognises the delicate balance of interests which the immunity of State officials represents and the potential impact on international

relations. It is for that reason the United Kingdom has consistently called for the Commission to undertake a careful and thorough analysis of the *lex lata* and its policy rationale, and supported the original objective set out by Special Rapporteur Kolodkin not to formulate abstract proposals as to what international law could or should be, but to work on the basis of existing international law.

3. In light of that objective, the United Kingdom recalls its statements in recent Sixth Committee debates on the annual reports of the Commission<sup>1</sup> and reiterates that it is of vital importance for the Commission to make itself clear when it is codifying existing law and when it is suggesting the progressive development of the law, or proposing new law. This is particularly important given the Commission's acknowledgment in paragraph (12) of the General Commentary that "*As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law*". It is not sufficient for the Commission to simply provide information in the commentaries from which States – or crucially practitioners and judicial authorities – can try to deduce the status of a particular provision. Instead, the United Kingdom encourages the Commission to indicate in the commentaries accompanying the Draft Articles in a clear and transparent manner, and taking into account relevant comments it receives from States, those provisions which it considers to reflect the *lex lata* and those which it does not.
4. The United Kingdom has long expressed the view that where the outputs proposed by the Commission involve the progressive development of the law, to the Commission should pay careful attention to the views of States which remain the principal law makers in international law. This is of particular importance on a topic such as this where members of the Commission have expressed a range of legal positions, and there remains a diversity of views

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<sup>1</sup> Most recently at the 77<sup>th</sup> ([https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg\\_uk\\_2.pdf](https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg_uk_2.pdf)), 76<sup>th</sup> ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_uk\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_uk_2.pdf)), 74<sup>th</sup> ([https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk\\_2.pdf](https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_2.pdf)), 73<sup>rd</sup> ([https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)) and 72<sup>nd</sup> ([https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/uk\\_2.pdf](https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/uk_2.pdf)) sessions of the Sixth Committee.

amongst States. Therefore, while noting the Commission's statement at paragraph (13) of the General Commentary that it will decide at second reading on its recommendation to be addressed to the General Assembly, the United Kingdom emphasises that, if the Commission is going to maintain the current structure of its work on this topic which contains proposals for the progressive development of the law and new law, the appropriate form for the outcome of the Commission's work should be draft articles which could form the basis for a negotiated convention.

5. The current structure, however, is not the only option available to the Commission: the United Kingdom encourages the Special Rapporteur and the Commission more broadly to consider whether going forward other structures might help progress the topic, for example a short product codifying those rules which are clearly and universally accepted by States as the *lex lata*, while a second product explores and analyses those areas in which the Commission considers it appropriate to propose progressive development or the establishment of new rules.
6. Before turning to the detail of the Draft Articles, the United Kingdom wishes to emphasise three key points:
  - i. first, the principle which underpins and provides the policy rationale for the law of immunity is the sovereign equality of States; immunity is not conferred for the benefit of any individual, but to ensure the harmonious exercise of jurisdiction as between sovereign States.
  - ii. second, immunity is a matter which should be considered at an early stage before the merits; immunity does not depend on the gravity of the act in question, nor should the existence of criminal responsibility in itself preclude the availability of immunity.
  - iii. third, immunity does not mean impunity: the United Kingdom has a deep seated and abiding commitment to tackling impunity in all its forms. In particular, the United Kingdom notes that any immunity from foreign

criminal jurisdiction which the official of a State may have is subject to waiver by that State, including through a treaty or other agreement. Furthermore, it is universally accepted that the immunity of a State official from the jurisdiction of the forum State does not exempt that official from the jurisdiction of their own State. Furthermore, the invocation by a State of immunity *ratione materiae* in respect of acts performed by one of its officials is an acknowledgement that those acts should be treated as the acts of that State, thereby potentially engaging its responsibility on the international plane.

## ***Part One - Introduction***

### *Draft Article 1: Scope of Draft Articles*

7. The United Kingdom broadly welcomes the scope of the Draft Articles as set out in paragraph 1 of draft article 1. As stated previously in Sixth Committee, the United Kingdom agrees with the Commission's decision to limit the topic to immunity from criminal jurisdiction: although immunity from civil jurisdiction may share some common features, there are some very different considerations in play and the two topics are subject to distinct State practice and *opinio juris*.
8. Nevertheless, the United Kingdom queries whether – in the absence of precise definitions - the Commission has made sufficiently clear what it considers the terms 'immunity from criminal jurisdiction' and 'immunity from the exercise of criminal jurisdiction' to mean. In practice, forum State authorities may need to consider a range of privileges and immunities that could affect the imposition of coercive measures on the official of another State, including whether that official enjoys inviolability of person or can be required to give evidence as a witness. It would be beneficial if the Commission could elaborate both on the measures it considers to constitute the exercise of criminal jurisdiction and the interplay between immunity from that jurisdiction and other forms of privileges and immunities.

9. The United Kingdom supports the inclusion of paragraph 2 of draft article 1 which excludes from the scope of the Draft Articles special rules of international law conferring immunity from criminal jurisdiction, some of which – such as the Vienna Convention on Diplomatic Relations - represent long established frameworks reflecting the settled legal view of the international community as a whole. The United Kingdom notes that these special rules of international law may derive from custom or treaty, and that, while the examples provided by the Commission in paragraph 2 constitute the main examples of relevant *lex specialis*, they are not an exhaustive list. In particular, there may be other forms of international contact and cooperation which arise on an ad hoc basis requiring additional special rules, for example conferences, commissions and international judicial or arbitral proceedings. The United Kingdom also underlines that, while military personnel are often the subject of specific agreements between States, particularly when stationed abroad, they will otherwise be covered by the topic in the same way as any other State official.
10. The United Kingdom also respects the intention behind paragraph 3 of draft article 1: the topic concerns immunity from national jurisdiction, therefore it should not extend to prosecutions before the International Criminal Court or other international courts or tribunals. It is also important that the international community preserve the progress it has made over the years in tackling impunity and ensuring the accountability of those accused of international crimes. Nevertheless, the United Kingdom encourages the Commission to look again at the wording of the paragraph to see whether it could be further clarified or improved.
11. Finally, the United Kingdom recalls its statement in the 63<sup>rd</sup> session of the Sixth Committee that, while inclined to agree with Special Rapporteur Kolodkin that the position of family members is, generally speaking, outside this topic, the issue may have some relevance to Heads of State (particularly sovereigns). The United Kingdom continues to believe that, if the Commission proceeds without consideration of the position of family members, it should do so on the basis of an appropriate savings provision.

## *Draft Article 2: Definitions*

12. The United Kingdom agrees with the Commission that it is essential to provide a definition of 'State official' and 'act performed in an official capacity' given the centrality of these terms to the Draft Articles as a whole. In light of ever-evolving governance structures and the need for the Draft Articles to maintain relevance across diverse domestic legal regimes, the United Kingdom also agrees with the Commission's decision not to provide an exhaustive list by name of either the officials or acts which might be covered by the topic, but instead to provide criteria which can be applied on a case-by-case basis. However, the United Kingdom would encourage the Commission to review these broadly drafted definitions to ensure, first, that they provide sufficient precision and clarity as to what 'official acts' are and so what may fall within – or without - the scope of immunity *ratione materiae*; and, second, that they do not stray beyond the normative scope of the rules that the Commission is seeking to codify.
  
13. As set out by the Commission in the commentary accompanying the Draft Articles, the United Kingdom supports the Commission's explanation that an 'act performed in an official capacity' may mean a positive act or an omission, and that the junior rank of a person within a State's governmental hierarchy does not preclude their categorisation as a 'State official' provided that they represent the State or exercise State functions. The United Kingdom would also emphasise that the distinction between an 'act performed in an official capacity' and an act performed in a private capacity is not the same distinction which is drawn between *acta iure imperii* and *acta iure gestionis* in the context of State immunity from foreign civil jurisdiction. Finally, it would be beneficial if the Commission could include in the commentary relevant information as to whether acts performed *ultra vires* should be considered to constitute 'acts performed in an official capacity'.

## **Part Two – Immunity *ratione personae***

### *Draft Article 3: Persons enjoying immunity *ratione personae**

14. There is broad acceptance that under customary international law a serving Head of State, Head of Government and Foreign Minister enjoy personal immunity from foreign criminal jurisdiction during their term in office. However, whether such immunity may extend to other high ranking officials is less clear. Several cases in the domestic courts of the United Kingdom have shown the courts' willingness to recognise the personal immunity of other senior officials such as a Defence or Trade Minister.<sup>2</sup> Though the precise rationale and criteria on which entitlement to such immunity may be based continues to be unsettled, the United Kingdom would note that the ICJ left the question open as to which officials enjoy personal immunity in the *Arrest Warrant* case.<sup>3</sup> The United Kingdom would encourage the Commission to explore this area further and – as with the definitions in Part One - to consider whether it might be productive to identify criteria rather than taking a purely enumerative approach. In this regard, whilst the Commission is not examining immunity arising from membership of a special mission, it would be valuable for it to review relevant State practice and clarify that there is a distinction between immunity *ratione personae* and the immunity arising from membership of a special mission.

*Draft Article 4: Scope of immunity ratione personae*

15. The United Kingdom agrees that paragraphs 1 and 2 of this draft article as formulated by the Commission reflect the *lex lata*, not least as identified by the International Court of Justice in the *Arrest Warrant* case. It is broadly accepted that the troika enjoy full and absolute immunity for their term in office. The United Kingdom notes, however, that such immunity is, in essence, a time-limited and suspensive procedural bar: once such a person has left office, they may again be held criminally responsible by a foreign forum State for acts carried out before they took office or for acts carried out in a private capacity while in office.

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<sup>2</sup> See, for example, *Re Mofaz* ILDC 97 (UK 2004) and *Bo Xilai* ILDC 429 (UK 2005).

<sup>3</sup> *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, para. 51: "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".



16. The United Kingdom agrees with the Commission that paragraph 3 should be structured as a 'without prejudice' provision. Immunity *ratione personae* and immunity *ratione materiae* are distinct forms of immunity with separate and differing justifications: the functional immunity to which a former Head of State is entitled in respect of their official acts while in office and which subsists after they have left that office does not derive from the personal immunity to which they were entitled during their term of office.

### **Part Three – Immunity *ratione materiae***

#### *Draft Article 5: Persons enjoying immunity *ratione materiae**

17. The United Kingdom emphasises the functional nature of the immunity *ratione materiae* described in draft article 5, which is limited to “State officials **acting as such**” (emphasis added). The United Kingdom has no further comment on this draft article.

#### *Draft Article 6: Scope of immunity *ratione materiae**

18. The United Kingdom welcomes paragraph 1 of this draft article which underlines the functional nature of immunity *ratione materiae*. Paragraph 2 also accurately reflects the positive *lex lata*, in that immunity *ratione materiae* - by virtue of the fact the act was performed in an official capacity rather than by whom it was performed - continues to subsist even once the person has ceased to be a State official.
19. The United Kingdom suggests that it would be clearer to state expressly in paragraph 3 that the continuing immunity is immunity *ratione materiae*. That would both align the provision with paragraph 1 of the draft article and also avoid the implication that ongoing functional immunity is derived from immunity *ratione personae*:

“Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy

immunity **ratione materiae** with respect to acts performed in an official capacity during such term of office.” (suggested addition in bold and underlined)

*Draft Article 7: Crimes under international law in respect of which immunity ratione materiae shall not apply*

20. Accountability and the fight against impunity is a key priority for the United Kingdom, particularly in respect of the most serious international crimes. Therefore, we have previously welcomed the Commission’s consideration of possible limitations to immunity *ratione materiae*.<sup>4</sup> This is particularly germane given developments in the international law relating to certain serious international crimes, including the development of universal jurisdiction or of extradite or prosecute regimes.
21. The United Kingdom notes that the version of paragraph 1 of draft article 7 adopted by the Commission at first reading states that “*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 and (f) enforced disappearance*”; paragraph 2 also ties the meaning of those crimes – and so the scope of the proposed exception – to specific named treaties enumerated in an annex to the Draft Articles.
22. The commentary to draft article 7 provides some helpful background on the debates and discussions surrounding this proposal, including the continued division amongst members of the Commission and the diversity of views amongst States. Nevertheless, it is not clear from the commentary the basis on which the Commission has decided to frame the provision in this way. In particular, the Commission has not articulated the criteria which it used to

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<sup>4</sup> The United Kingdom agrees with the Commission that the current state of international law allows for no exceptions to immunity *ratione personae* (other than by way of waiver).

decide which international crimes to include and which to exclude from its proposal.

23. The United Kingdom notes that the treaties listed in the annex cover a wide range of criminal acts and that there is no clearly discernible norm which ties them together. Moreover, not all of those treaties have been universally adopted by States. The United Kingdom also recognises that international criminal law continues to develop, particularly through the practice of States, and that the future direction of the law continues to be actively discussed by the international community, not least in the context of the Sixth Committee's important work reviewing the Commission's draft articles on prevention and punishment of crimes against humanity. Therefore, it would have been preferable if the Commission had adopted a more targeted approach looking at the specific practice and law applicable to each of the crimes rather than making a generic proposal.
24. In this regard, we recall the decision of the United Kingdom's then highest court, the Appellate Committee of the House of Lords, in the *Pinochet* case; a case which related to the immunity *ratione materiae* of a former Head of State in respect of alleged torture and which has been specifically highlighted both in the Special Rapporteurs' reports and in the commentary adopted by the Commission. In that case, the House of Lords identified two specific provisions of the United Nations Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment which – as a matter of treaty law - constituted *lex specialis* for those States which had ratified the Convention and which led to their finding that immunity *ratione materiae* was not available. First, article 1 of the Convention requires that the pain or suffering contributing to the act of torture be “*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*”; this suggests that the acts giving rise to the crime of torture are largely co-extensive with the acts performed in an official capacity to which Part Three of these Draft Articles would otherwise accord immunity *ratione materiae*. Second, article 5 of the Convention expressly obliges States Party to establish jurisdiction when an alleged offender is present in their territory and is not

extradited. The effect of these obligations was such that – as a matter of treaty law – any immunity *ratione materiae* available under general international law would be displaced or ‘waived’. The United Kingdom, however, is not aware of similar reasoning in judgments in respect of other treaties which require the criminalisation of certain conduct and the assertion of extra-territorial jurisdiction.

25. The United Kingdom would encourage the Commission to engage with these questions and the challenges inherent in the current text of the Commission’s proposal and the methodology it used, and reflect on how best to approach this issue in future iterations of its work. The positions of States – both developments in their practice and their views on *opinio juris* – are crucial to ascertaining the current state, and understanding the possible future shape, of international law. Therefore, we urge the Commission carefully and comprehensively to review the full range of views expressed by States both in Sixth Committee and in the comments and observations submitted to the Secretary General on these Draft Articles, and ensure that those views – as well as practical examples of State practice in respect of specific crimes - are reflected in any future proposal for this draft article and its commentary.
26. The United Kingdom welcomes the Commission’s explanation at paragraph (27) of the commentary in respect of crimes committed by a foreign official in the territory of the forum State without that State’s consent, neither to the official’s presence in its territory nor to the activity carried out by the official which gave rise to the commission of the crime.

#### ***Part Four – Procedural provisions and safeguards***

27. The United Kingdom is grateful to the Commission for the attention that it has given to making proposals for the procedural provisions and safeguards contained in Part Four. The policy rationale for some procedural provisions and safeguards regulating the issue of immunity is clear; however, it is not so clear that the provisions proposed by the Commission constitute existing rules of customary international law evidenced in extensive State practice and *opinio*

*juris*. It is noteworthy that relevant treaties which codify special rules of international law relating to immunity do not include detailed procedural provisions beyond providing for waiver; and the commentaries accompanying the draft articles in Part Four identify few examples of positive State practice. The United Kingdom encourages the Commission to provide further information and clarity on this point.

28. The United Kingdom notes that general procedural provisions are likely to have significant practical implications for national authorities and encourages the Commission to take full account of the observations of States to ensure that any final version of these Draft Articles respects, and is capable of application across, diverse national legal systems. In the United Kingdom, for example, although the Government is responsible for the conduct of international affairs, including factual matters of recognition or status, determinations based on that factual status as to whether a person enjoys immunity, the scope and extent of that immunity or ultimately the effect of that immunity are matters of law for the courts, which are wholly independent of the Government.

*Draft Article 8: Application of Part Four*

29. The United Kingdom recalls its earlier comments in paragraph (8) of these observations and questions whether it is sufficiently clear what measures would constitute “*any exercise of criminal jurisdiction by the forum State*”. The commentary suggests that it is a broad reference to “*different steps that may be taken by the forum State to determine, where appropriate, the criminal responsibility of an individual*”. It is acknowledged that the reference needs to be sufficiently general to account for differences in practice between States’ various legal systems and traditions; however, if Part Four is to apply to “**any** exercise” (emphasis added), the scope of application needs to be precise. In particular, it is not clear whether the Commission intends for the procedural provisions and safeguards to apply only where the person whose immunity is in question is also the suspect whose criminal responsibility is to be determined, or whether the exercise of criminal jurisdiction could include other measures such as witness testimony.

30. The United Kingdom also questions whether exactly the same procedural provisions and safeguards would be appropriate for examining and determining questions of both personal immunity and functional immunity. For example, the United Kingdom notes that invocation of immunity *ratione materiae* by a foreign State is likely to carry weight in determining whether the act was performed in an official capacity; however, the scope and application of immunity *ratione personae* is such that invocation by the State of the official is, in practice, unnecessary.

*Draft Article 9: Examination of immunity by the forum State*

31. The United Kingdom notes that the wording of paragraph 1 of this draft article is fairly imprecise, not least the phrase “*become aware*”. Although the United Kingdom appreciates the reason why the Commission uses a generic plural reference to the “*competent authorities of the forum State*” in paragraph 1, the United Kingdom highlights that the processes and division of responsibility within a forum State may be complex spanning judicial, executive and independent law enforcement or prosecutorial bodies; and, in particular, different bodies may be responsible for the various steps identified by the Commission such as examination, notification and determination. Therefore, it may not be evident at what point a **competent** authority (emphasis added) has become aware.
32. Therefore, it would be preferable if the obligation to consider immunity *ratione materiae* were triggered where, one, the competent authorities of the forum State were considering exercising criminal jurisdiction in respect of an individual; two, it was made clear by that individual, or by the State whom they were purporting to represent, that they claimed the status of a State official; and, three, the proposed exercise of criminal jurisdiction would, if the claim to that status were made out, engage or impinge on the immunity owed in respect of the individual by virtue of that status.

33. The United Kingdom strongly agrees with the Commission's explanation at paragraph (6) of the commentary that "*the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied*". In many cases, the competent authorities of a State will need to carry out scoping exercises and the initial collection of evidence before it is possible to determine whether to progress with a full investigation, and the possibility that persons relevant to the investigation may have immunity of some form should not prevent that, provided that no measures are taken which would impinge on the person's immunity. In light of the importance of this principle, the United Kingdom encourages the Commission to consider whether it should be included in the Draft Articles themselves.
34. The United Kingdom questions the rationale for including both a general and a specific rule in paragraphs 1 and 2, given that the underlying principle for both is the same, namely that a forum State should not take coercive measures against a person having immunity, absent a specific waiver of that immunity, and so the question of immunity must be examined before such coercive measures are undertaken. The United Kingdom is grateful for the Commission's explanation at paragraph (10) of the commentary as to the meaning of "*before initiating criminal proceedings*", however it is respectfully suggested that the ordinary and natural meaning of the term may be broader, including the formal commencement of an investigation into a suspect, and so could lead to confusion.
35. The United Kingdom notes that the phrase "*may be affected by*" the exercise of criminal jurisdiction is imprecise. Moreover, the explanation at paragraph (6) of the commentary that it should be read as "*if it hinders or prevents the exercise of the functions of that person*" is inconsistent with the subsistence of immunity *ratione materiae* in perpetuity: the person subject to the exercise of foreign criminal jurisdiction may be a former State official whose functions have long since ceased. It is also noteworthy that some measures, even though coercive

in nature, may not hinder or prevent the exercise of an official's functions in practice.

36. In paragraph [7] of these observations it was noted that the Draft Articles do not explore the question of inviolability. Therefore, the United Kingdom would be grateful if the Commission could explain its intention in linking at paragraph 2(b) of draft article 9 the question of immunity with measures that may affect an official's inviolability.
37. In light of these observations, the United Kingdom encourages the Commission to revisit this draft article and its commentary to see whether it may be possible to bring further clarity and precision, while respecting the operational practices of States.

*Draft Article 10: Notification to the State of the official*

38. The United Kingdom supports the rationale set out by the Commission in paragraph (2) of its commentary; however, draft article 10 is more broadly drawn than required by that rationale. For example, given that the definition of State official in draft article 2 includes former officials, it could be argued that paragraph 1 requires the forum State to notify the foreign State of proposed measures against a former official even in respect of private acts carried out by that official for which immunity is not available, including where those acts were performed after the termination of the person's official functions. The United Kingdom considers that mandatory notification in such a scenario would be an unacceptable constraint on the forum State's exercise of jurisdiction.
39. The United Kingdom also emphasises that there may be other circumstances where notification prior to the exercise of a coercive measure, such as issuing an arrest warrant, could compromise the investigation or lead to the suspect evading justice. This would be unacceptable in cases such as when the suspect is a State official, but it is clear that their acts were not within scope of immunity *ratione materiae* as set out in draft article 6.



40. The United Kingdom recognises that any notification should contain sufficient information for the State of the official to consider whether to invoke<sup>5</sup> or waive immunity. However, the United Kingdom does not believe that it is necessary to require such information to list the competent authorities within the forum State that may be responsible for the exercise of jurisdiction. It is likely that a wide range of judicial, executive, investigative and prosecutorial authorities may be involved with responsibility for different elements of the exercise of jurisdiction, and a mandatory requirement to provide a foreign State with a full explanation of those national processes and responsibilities would be disproportionate. There is also a risk that such a requirement could lead to delay or disputes between the parties, if the State of the official insists on receiving that information before taking any requested action, such as a decision to waive immunity.

*Draft Article 11: Invocation of immunity*

41. The United Kingdom acknowledges the practical benefits of invocation as a means whereby a foreign State can assert the immunity of its official and whereby the forum State can take account of any information provided by the State of the official for the purpose of determining immunity – including whether a particular act was performed in an official capacity. However, the United Kingdom underscores that invocation is not a legal requirement for the activation of immunity: any immunity subsists as a rule of law and must be respected and be given effect by the competent authorities of the forum State regardless, especially in the case of immunity *ratione personae*.
42. The United Kingdom would be grateful if the Commission could clarify why it has provided that paragraph 2 identifying the required contents of an invocation should be mandatory, when the invocation itself is not obligatory. The United Kingdom would also be grateful if the Commission could explain the State practice on which it bases the requirement that invocation of immunity must be in writing. The United Kingdom does not believe that – given each could be

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<sup>5</sup> See paragraph (41) of these observations.

effected through diplomatic channels - there should be a substantive difference between the form of notification in draft article 10 and the form of invocation in draft article 11. The United Kingdom further notes that in its caselaw the International Court of Justice has not criticised as procedurally invalid the oral invocation of immunity.<sup>6</sup>

*Draft Article 12: Waiver of immunity*

43. The United Kingdom underscores that the right or ability of a State to waive the immunity of its officials is fundamental to the procedural nature of immunity and is an effective means to ensure that there is no substantive impunity for alleged wrongdoing. Nevertheless, it is important to also acknowledge that, absent specific agreement, there is no legal obligation on a State to waive immunity.
44. Given the far-reaching consequences of waiver and the need for certainty, the United Kingdom agrees with the Commission that a specific waiver of immunity should be express and in writing. The United Kingdom, though, questions why the Commission did not find it necessary to make a reference in the Draft Articles to the content of the waiver: although it could be argued that the requirement for a waiver to be 'express' requires the State of the official first to specify the acts to which the waiver applies (and those to which it does not) and second to indicate to which measures by the forum State the waiver applies, it might be clearer to stipulate that expressly in the Draft Articles. It is not uncommon for States not to waive immunity completely from the outset, but to provide specific and limited waivers at each stage of the criminal process from investigation through arraignment, trial and then sentencing (where relevant).
45. The United Kingdom notes the rationale provided in paragraph (8) of the commentary as to why the Commission did not retain paragraph 4 of the draft article originally proposed by Special Rapporteur Escobar Hernández in her seventh report. Nevertheless, the United Kingdom wishes to emphasise that

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<sup>6</sup> See for example the oral invocation of immunity in respect of immovable property by the Ambassador of Equatorial Guinea, cited in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment of 6 June 2018, paragraph 25, available at: <https://www.icj-cij.org/case/163>.

not only may a State make a general waiver, but that such a waiver may be made by way of treaty, exchange of notes etc. as a matter of general policy, rather than in response to a specific case.

46. The United Kingdom has taken note of the debate summarised in paragraphs (14) to (18) of the commentary and recalls its comments at Sixth Committee in 2021.<sup>7</sup> There is a dearth of State practice in this area; yet, at the same time, the United Kingdom cautions against making an assumption that, just because States do not regularly revoke waivers of immunity, there must be an absolute rule against such revocations. The possible exceptions identified by members of the Commission - such as a change of government or legal system which calls into question whether the basic rules of due process will be followed for the individual in respect of whom immunity was waived - are by their very nature wholly exceptional. The United Kingdom believes that in such exceptional circumstances, it should be possible for a State to revoke its waiver of immunity where that is the only way to ensure respect for the fundamental rights of its official. It goes without saying that any such revocation of waiver must not be made arbitrarily.
47. The United Kingdom notes the argument at paragraph (17) of the commentary that *“doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in respect of facts not covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles”*. The United Kingdom does not believe that the emergence of new facts by itself is sufficient to nullify the effect of a waiver: it is important, both for reasons of legal certainty and good faith, that the effect of a waiver, which is to submit a person to the criminal jurisdiction of a foreign State, cannot be altered arbitrarily. Moreover, it would introduce significant uncertainty if an express waiver of immunity in respect of a criminal process were to be implicitly qualified

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<sup>7</sup> Available at: [https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_uk\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_uk_2.pdf).

by conditions, whether relating to due process or other matters, the effect of which would be to nullify the waiver if the conditions are not - in the unilateral opinion of just one of the parties - satisfied.

*Draft Article 13: Requests for information*

48. The United Kingdom agrees that it may be useful in certain situations for there to be an exchange of information between the forum State and the State of the official (or vice-versa) in order for those States to take the decisions envisaged under Part Four of these Draft Articles such as relating to the examination, invocation, determination or waiver of immunity. However, such an exchange of information should not be mandatory and may not be required in practice. The contact between the forum State and the State of the official may also not be confined to requests for information, but could, for example, include a request to waive immunity.
49. It is right that a requested State should consider any request for information in good faith (particularly where there is no obligation to respond to that request), but it is also important that a requesting State should act in good faith when requesting information: any such request should be limited to information which is reasonably required in order to take those decisions envisaged by Part Four and requests should not be used as a procedural tactic to extend timelines. It also needs to be acknowledged that there may be limits on the extent of information which can be shared by either party, particularly in respect of personal data or national security.

*Draft Article 14: Determination of immunity*

50. The United Kingdom agrees that paragraph 1 of this draft article reflects existing international law: it is for the competent authorities of the forum State to determine both whether a foreign official has immunity and the extent of that immunity in accordance with the national law and procedures of that State and in conformity with applicable rules of international law.

51. Although the United Kingdom recognises that in some cases the information highlighted at sub-paragraphs (a) to (e) of paragraph 2 may be relevant to the decision by the competent authorities of the forum State, it does not believe that consideration of all that information should be obligatory in every case where the question of immunity is under examination. First, there will be cases where some of the information is not pertinent or necessary. In this regard, it is noteworthy that the Commission does not consider that the provision of information, even when requested under draft article 13, is obligatory, nor that the invocation of immunity under draft article 11 is a prerequisite to give effect to that immunity. Second, there may also be cases where the information is irrelevant to the decision at hand: for example, it would not necessarily be appropriate for a competent authority to take into account the procedural question whether the forum State has made a notification to the State of the official when determining the substantive question whether a foreign official has immunity *ratione personae* under law.
52. The United Kingdom appreciates the Commission's explanation at paragraph (13) of the commentary that paragraph 3 of draft article 14 is a proposal for new law to "*ensure a proper balance between the interests of the forum State and those of the State of the official*". However, there remain fundamental tensions in the Commission's proposal which need to be resolved.
53. First, paragraph (15) of the commentary explains that the requirement for the authorities making the determination of immunity to be "*at an appropriately high level*" combines requirements for both expertise and seniority: the authorities should be "*specially qualified*", have a "*special level of competence*" and also enjoy "*sufficiently high-level decision-making power*". It is noted that the appropriate balance between these factors may lie differently in different systems.
54. Second, the United Kingdom welcomes the requirement to determine the question of immunity at a "*high level*". This should ensure that the decision-maker will have received the necessary information and advice from relevant competent authorities across the national system and elsewhere, and will have

sufficient authority within that national system to take a final decision. Nevertheless, it would be helpful if the Commission could clarify in the commentary that such a “*high level*” decision-maker should not imply the politicisation of a decision which is ultimately a question of law. The Commission is right to point out that the exercise of criminal jurisdiction over a foreign official may have a significant impact on relations between the forum State and the State of the official, however that impact is not relevant to the determination of immunity.

55. Third, immunity is a question that should be considered as a preliminary matter. However, the Commission’s proposal that the competent authorities should “*assure themselves that there are substantial grounds to believe that the official committed any of the crimes*” would require the competent authorities to investigate and consider matters of substance. This is unlikely to be appropriate in principle and is likely to encounter significant barriers in practice, not least that the competent authority responsible for determining immunity may not be the competent authority responsible for such an investigation and that it may simply not be possible to gather sufficient evidence to meet the threshold of “*substantial grounds to believe*” without exercising coercive measures against the suspect, including carrying out interviews or collecting electronic and documentary evidence. It is notable that the precedent of article 61(7) of the Rome Statute cited by the Commission is a judicial process to confirm charges and commit a defendant to trial on those charges after the completion of the substantive investigation and involves a hearing where the defendant or their legal representative has a right to participate. That is not a suitable parallel to a procedural decision by a competent authority which is required to take place before coercive measures may be taken.
56. Fourth, it must be emphasised that whether a person has immunity in respect of the exercise of criminal jurisdiction by the forum State is a procedural question of law. The fact that a third State also wishes to assert its jurisdiction may be relevant to whether the forum State ultimately wishes to proceed in exercising its jurisdiction or to defer to that third State, but is not relevant to the question of immunity under the law of the forum State. There may also be

occasions of international cooperation between the forum State and the third State which require the exercise of criminal jurisdiction by both, for example the arrest of a suspect by the forum State and subsequent extradition to the third State to stand trial. In each of these cases, the determination of immunity is a procedural question which must be resolved before the execution of coercive measures.

57. The United Kingdom notes that paragraph 4 of this draft article is similar to paragraph 2 of draft article 9; therefore, it invites the Commission to consider its observations at paragraph [30-36] above in respect of both provisions.
58. Moreover, the United Kingdom would be grateful if the Commission could provide further explanation in respect of the new sentence added to paragraph 4(b) of draft article 14 – “*does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official*”. If it has been determined that the official enjoys immunity from jurisdiction, then it should not be legally possible for the forum State to exercise that jurisdiction by taking coercive measures against the official. The purported justification provided at paragraph (34) of the commentary that coercive measures could still be taken against a person with immunity because the determination of that immunity could be reversed at a later stage contradicts the very purpose of immunity which is to prevent the exercise of jurisdiction and is inconsistent with the procedural provisions and safeguards set out elsewhere in Part Four.

*Draft Article 15: Transfer of the criminal proceedings*

59. The United Kingdom wishes to underline its commitment to tackling impunity in all its forms. We remain of the view that it is usually best to investigate and prosecute suspected crimes in the place where the alleged activities took place and where the victims and evidence will likely be located; we also emphasise the primacy that should be accorded to a State’s investigation of alleged crimes by its own service personnel.

60. The United Kingdom queries whether it is appropriate to include a single standalone provision relating to international cooperation and mutual legal assistance in draft articles relating to immunity from national jurisdiction. This is partly a question of principle: if a foreign official enjoys immunity from the exercise of jurisdiction by the forum State and that immunity has not been waived by the State of the official, then there can be no proceedings to transfer. It is also a question of practicality: we would encourage the Commission to consider whether it would be more appropriate to instead signal the possibility of using existing mechanisms as between the forum State and the State of the official to allow for the transfer of proceedings where appropriate. In particular, this would ensure that any such arrangements are supported by appropriate procedural provisions and safeguards; it would also mean that there are avenues for the State of the official to request from the forum State further mutual legal assistance, for example the sharing of evidence or the deposition of witnesses, which is likely to be required to undertake a prosecution outside of the forum State.
61. The United Kingdom notes the explanation at paragraph (6) of the commentary as to why the Commission decided to retain the phrase “*offer to transfer*”. However, we query whether that terminology is appropriate for a process that must be agreed by both States and would normally be motivated by the interests and proper administration of justice.
62. It is welcome that the Commission has acknowledged at paragraph 5 of this draft article that the forum State may have other binding obligations under international law which may affect the possibility to transfer proceedings to the State of the official.

*Draft Article 16: Fair treatment of the State official*

63. Fair treatment, including a fair trial and full protection of fundamental rights, is the basic right of any person subject to the exercise of criminal jurisdiction; it is not limited to the exercise of criminal jurisdiction against a foreign official nor is it dependent on a determination of immunity. Therefore, the United Kingdom



questions whether it is necessary to include paragraph 1 of this provision in the Draft Articles.

64. Paragraph (7) of the commentary explains that in paragraph 2 of draft article 16 the Commission is making a proposal for new law – “*establishes a new right*”. However, it is not clear from the commentary why the Commission has framed the right in the way that it has nor how it envisages that the right will function as a safeguard in the context of Part Four of the Draft Articles. The United Kingdom would welcome further clarity from the Commission on that and would highlight the following issues which arise from the current text.
65. First, the Commission is proposing that the right to communicate and be visited should be conferred on the official rather than on the State of the official. This is contrary to the precedent cited in the Vienna Convention on Consular Relations, and appears inconsistent with the Commission’s description of those proposed rights as a safeguard to balance the interests of the forum State and the State of the official.
66. Second, the provision applies to all State officials - which in accordance with draft article 2 would encompass both current and former officials - and applies irrespective of the timing or nature of the acts for which the official has been detained. This blanket provision appears to go further than what would be strictly required in respect of a safeguard relating to the examination or invocation of immunity.
67. Third, the right of the official to communicate with a representative of their State (outwith any consular assistance) is limited by paragraph 2 to where the official has been incarcerated. It is acknowledged that this is one of the “*most extreme*” scenarios in which criminal jurisdiction may be exercised by the forum State against the official, but if the purpose of the communication between the official and the State of the official is not just to ensure the welfare and fair treatment of the official, but also to enable the State of the official to gain a better understanding of the situation and so take an informed decision as to whether to invoke or to waive immunity, then there is no rationale to limit that right solely

to periods of incarceration, particularly if practicalities or bail conditions would otherwise prevent communication.

68. Fourth, it is not clear whom the Commission considers may fall within the description of “*nearest appropriate representative of the State of the official*”. There is considerable ambiguity in the phrase, not least who it is envisaged should determine the ‘appropriateness’ of the representative and whether the geographical proximity of one representative would preclude the assertion of the right by another representative. The Commission may also wish to consider how this provision might operate – particularly the right to be visited - in a scenario where the forum State may have accorded recognition to the State of the official but has not yet established, or has previously broken off, diplomatic or consular relations.
69. Fifth, the Commission has argued that rights relating to consular access and assistance are covered by paragraph 1. It would be useful if the Commission could clarify the extent to which it considers there is overlap between that and the proposed new rights in paragraph 2, and how it envisages the provisions might interact.
70. Finally, it is noted that paragraph 3 of this draft article is inspired by article 36 of the Vienna Convention on Consular Relations. However, that provision has a clearly stated purpose, namely “*with a view to facilitating the exercise of consular functions relating to nationals of the sending State*”. Paragraph 2 enumerates proposed rights but does not set out the purpose of those rights. Therefore, it is not clear how paragraph 3 could be operationalised in practice without the yardstick of a purpose against which the States concerned could measure the application of relevant laws and regulations.

#### *Draft Article 17: Consultations*

71. Consultations remain a useful and flexible mechanism by which States can discuss matters of mutual importance. However, the United Kingdom queries whether it is appropriate or necessary to make consultations in the context of

these Draft Articles obligatory – “*the Commission decided to use the word ‘shall’ to denote the obligatory nature of the consultations*” – particularly where the Commission has provided for other discretionary mechanisms, such as requests for information in draft article 13, which are designed to facilitate the exchange of information where that is considered necessary to decisions on the examination, invocation, determination or waiver of immunity.

#### *Draft Article 18: Settlement of disputes*

72. The United Kingdom notes paragraph (3) of the commentary and underlines its view that a provision providing for the compulsory adjudication of disputes by the International Court of Justice would only be appropriate in a treaty to be negotiated and agreed by States and cannot be considered to be codification of international law.
73. Furthermore, the United Kingdom encourages the Commission to reflect on what disputes between the forum State and the State of the official should properly be amenable to adjudication by the International Court of Justice. For example, paragraph 3(b)(i) of draft article 14 currently requires the competent authorities of the forum State to make a criminal-style determination as to whether there are substantial grounds to believe that the official committed the relevant crime.

#### **Concluding remarks**

74. The United Kingdom reiterates its thanks to the Commission for its work preparing the current Draft Articles and commentaries. We look forward to further engagement with the Commission going forward as it reflects on the observations of States and revises the Draft Articles and accompanying commentaries accordingly.