Comments from the United States
On the International Law Commission's
Draft Articles on Criminal Immunity of State Officials
As Adopted by the Commission in 2022 on First Reading

General Observations

The United States appreciates the opportunity to provide written comments on the International Law Commission's (ILC) Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, which were adopted on first reading on June 3, 2022, and associated commentaries. The United States recognizes and appreciates the efforts of the Commission to take into account the views of States. The United States also wishes to recognize and thank the efforts of two prior Special Rapporteurs on this project, most recently Ms. Concepción Escobar Hernández and, before her, Mr. Roman Anatolevich Kolodkin. The United States welcomes Mr. Claudio Grossman Guiloff as the new Special Rapporteur and looks forward to a continued dialogue on the form and substance of this complex and challenging project.

The topic of immunity of State officials from foreign criminal jurisdiction is of vital importance and practical significance. The United States remains prepared to engage with the Commission on this topic and committed to identifying the rules under which State officials performing their official duties overseas are adequately protected – particularly in those jurisdictions which allow for private parties (as opposed to State entities) to initiate a criminal prosecution – and ensuring that those responsible for international crimes do not go unpunished.

The Commission's mandate is to document the areas in which States have established international law or to propose new rules for States to consider adopting through conventions or State practice. In addressing customary law, the Commission needs to ensure its work is well supported by relevant practice and properly distinguishes between efforts to codify international law and recommendations for its progressive development.

The Draft Articles in many instances are not supported by sufficient State practice and *opinio juris,* and accordingly do not reflect customary international law. Rather, the Draft Articles frequently appear to articulate new legal duties or proposals for the progressive development of the law but do so without adequately acknowledging that intention. This lack of clarity makes it difficult to determine how much weight to accord various provisions as reflecting (or not) existing international law and thereby undermines the overall utility of the Draft Articles to States and risks misapplication by others who look to ILC work products as authoritative.

Our concern is heightened by the striking lack of consensus regarding these Draft Articles. The United States and others have consistently objected to Draft Article 7, which

presents a clear example of this issue. Disagreement is evident among States, the Drafting Committee, and even the two prior Special Rapporteurs, who reached opposite conclusions with respect to international crimes exceptions to functional immunity. The Commission's split vote in 2017 that advanced the provisional adoption of Draft Article 7 underscores this division and was a highly unusual deviation from the normal consensus process that has promoted support for the ILC's work products.[1] When the Draft Articles were adopted on first reading last summer, it was noted that although there was not a vote, concerns about Draft Article 7 had not been resolved.[2] The Commentary to Draft Article 7, too, notes various theories for the international crime exceptions rather than presenting a unified legal rationale. The failure in this draft to reach consensus on whether or how there are or should be exceptions or limitations to functional immunity for international crimes, and the reasons for it, undermines the entire endeavor, including by exposing ambiguities in the Draft Articles' definition of an "official act." Additional State practice and broadly supported legal rationales would provide a foundation for consensus on these sensitive issues. As currently written, the Draft Articles risk uneven application, interference with existing State processes, and resulting increased tension among States. An alternative approach would be to recraft Draft Article 7 so that instead of trying to set forth a list of crimes that would not benefit from functional immunity it instead addresses the issue conceptually by delineating the factors or considerations that States should weigh in assessing whether a particular defendant charged with serious crimes would not benefit from functional immunity in a specific case. The practice in the United States has been to consider the application of functional immunity on a case-by-case basis.

The United States urges the Commission to take advantage of the appointment of the new Special Rapporteur to revisit these issues and refocus the Draft Articles on the codification of customary international law. In light of the controversy regarding the support for certain proposed provisions in the Draft Articles, a refocus on the codification of existing customary international law would be most useful to States and least harmful to what is now a workable immunity doctrine. Those aspects of the current Draft Articles that are not ripe for codification could be set aside until there is additional accumulation of widespread and consistent State practice performed out of a sense of legal obligation. The Commission should consider additional revision of the progressive elements of the Draft Articles, either by the Drafting Committee or refer these elements to a study group. The Commission should also consider presenting those elements in an annex to the Commentaries that makes clear these elements do not reflect current international law.

The Commission notes that it "has not yet decided on the recommendation to be addressed to the General Assembly regarding the present draft articles, be it to commend them to

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[1] Concepción Escobar Hernández (Special Rapporteur), *Sixth Rep. on Immunity of State Offs. from Foreign Crim. Jurisdiction*, U.N. Doc. A/CN.4/722, ¶ 12 (June 12, 2018).

[2] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 231 ¶ 3 (2022).

the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic."[3] The United States recommends that before either step is taken, the Commission start afresh on the areas of disagreement and work toward consensus. The start of Special Rapporteur Grossman's tenure provides an opportunity to take into account new ideas and perspectives. Additionally, recent events around the world have made clear the implications of these Draft Articles and should be given due consideration. We urge the Commission not to rush the next phase of review of the Draft Articles to give adequate consideration to States' concerns.

Comments on Specific Text

The United States notes that the below comments, which include both general views and specific suggestions for changes to the current draft, reflect an effort by the United States to engage in constructive dialogue with the ILC on the Draft Articles. The below comments should be understood in this specific context and not as representing approval by the United States of future work on or application of the Draft Articles and Commentary with regard to international criminal law issues outside the context of the Draft Articles. The absence of comment by the United States on a particular provision of the Draft Articles or Commentaries should not be understood to indicate the absence of concerns with respect to that provision.

Part One Introduction

Article 1 Scope of the present draft articles

1. *The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.*
2. *The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.*
3. *The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.*

U.S. Comments:

Article 1 sets forth the scope of the Draft Articles. The United States notes that, in addition to immunity from criminal jurisdiction, heads of state, heads of government, and foreign

[3] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 197 ¶ 13 (2022) (noting further that "[a]s is customary, the Commission will take this decision when it adopts the draft articles on second reading, which will enable it to benefit from any comments made by States on this issue.").

ministers who enjoy personal immunity also benefit from personal inviolability, a protection that informs their treatment in the criminal context. While inviolability may be beyond the scope of this project, additional thought as to the intersection of inviolability and immunity would add greater clarity with respect to the treatment of officials who enjoy personal immunity from foreign criminal jurisdiction. Such consideration may also serve to distinguish and clarify the treatment of foreign officials with only functional immunity.

The United States understands paragraph 3 to mean that the Draft Articles are not intended to derogate from the rights and obligations of States that are party to, for example, the Rome Statute of the International Criminal Court. In turn, any rights or obligations arising from agreements, such as the Rome Statute, only operate as among Parties to such agreements. The Commentary reinforces this meaning, where it notes, "[p]aragraph 3 emphasizes the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals."[4] Further, "conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal."[5]

The United States suggests changing "establishing international criminal courts" in paragraph 3 to "relating to" international criminal courts, as this would be clearer about addressing a broader range of agreements, such as the Agreement on the Privileges and Immunities of the International Criminal Court.

Article 2 Definitions

> *For the purposes of the present draft articles:*
> *(a) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;*
> *(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.*

U.S. Comments:

Article 2 provides definitions for two of the terms that arise in the Draft Articles: "State official" and "act performed in an official capacity." As a matter of format, the United States notes that Draft Article 2 proceeds with subparagraphs (a) and (b), while other subparagraphs are presented as a numbered list.

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[4] *Id.* at 202 ¶ 22.

[5] *Id.* at 203 ¶ 26.

"State official"

With respect to the definition of a "State official," the United States agrees with the explanation provided in the Commentary that this is a broad category in which the hierarchical level of the official is not significant in determining the applicability of functional immunity.[6] Despite this breadth, some questions about the definition remain. The Commentary indicates that with respect to immunity *ratione materiae*, States generally decide which individuals are its officials, given the "variety of national legal systems."[7] The Commentary accordingly instructs that "these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what is understood by 'State functions' depends to a large extent on the laws and organizational capacity of the State."[8] While the categorizations by sending States may be difficult to generalize, the Commentary does not resolve how forum States should assess this threshold concept when determining the applicability of immunity.

The United States further notes that while former officials do enjoy functional immunity for acts previously taken in their official capacity, we suggest that the articulation of this principle would be better placed in Draft Article 6, which addresses the scope of the immunity. Paragraph 2 of Draft Article 6 also more accurately captures the scope of functional immunity for former State officials in stating that "[i]mmunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials." The reference to "ceas[ing] to be State officials" captures the confusion that arises from defining "State officials" as current and former officials" in Draft Article 2(a) and lends further support to addressing the temporal scope of functional immunity of former State officials in Draft Article 6. Accordingly, the United States proposes deletion of the last clause of Draft Article 2, paragraph (a) ("and refers to both current and former State officials").

The United States notes the explanation in the Commentary that this definition is not reflective of international law but is "autonomous, and must be understood to be for the purposes of the present draft articles."[9] This caveat could be considered as a model flag to apply to other Articles that also present a proposal for the progressive development of the law rather than the codification of customary international law, such as Draft Article 7.

"Act performed in an official capacity"

We turn next to the definition of an "act performed in an official capacity." In contrast to the definition of a State official, defined in terms of the exercise of "State *functions*" or State

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[6] *Id.* at 207–08 ¶ 16.

[7] *Id.* at 205 ¶ 8, 207 ¶ 13.

[8] *Id.* at 207 ¶ 13.

[9] *Id.* at 204 ¶ 5 ("There is no general definition in international law of the term "State official").

representation, an official act is defined in terms of the exercise of "State *authority*." (Emphases added.) The use of these two terms creates a contrast, the significance of which is not clear. Are State functions a broader category than State authority? If so, does the language in paragraph (b) define an official act in a narrower sense than acts that are attributable to the State through its functions? The definition of an official act could be narrower than the definition of a State official because officials may, as the Commentary notes, act *ultra vires*.[10] Under such circumstances, the act of a State official may not be regarded as an official act, yet may be attributable to the State (as contemplated by Article 7 of the ILC Articles on State Responsibility for Internationally Wrongful Acts). Yet the Commentary suggests that the use of different terms is possibly interchangeable, emphasizing "the connection between the act and the exercise of State functions and powers."[11]

A more robust and precise explanation of the underlying rationale for what is (and is not) an act performed in an official capacity would improve the Draft Articles overall. The Commentary refers to but does not articulate the basis for which acts are performed in an official capacity. While the Commentary notes that unlawful acts are not necessarily exempt, the challenge is how to assess whether criminal conduct constitutes an official act in light of the facts and circumstances of a given case.[12] The lack of clarity on this point will pose a challenge to uniform application of the Draft Articles. The Commentary also contends that this definition is "without prejudice" to limitations and inapplicability of immunity in Draft Article 7, but the rationale is not clear.[13] If functional immunity applies to acts performed in an official capacity, then the meaning of official acts must logically be part of the explanation for any exceptions.

Part Two Immunity ratione personae

Article 3 Persons enjoying immunity ratione personae

> *Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.*

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[10] *Id.* at 210 ¶ 25 (The dueling contrast between acts performed in a personal capacity and official capacity is a helpful start).

[11] *Id.* at 209 ¶ 23.

[12] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 209–10 ¶ 25 (2022); Int'l Law Comm'n, Topical Summary of the Discussion Held in the Sixth Comm. of the G.A. During Its Seventy-Seventh Session, U.N. Doc. A/CN.4/755, at 19 ¶ 100 (2022).

[13] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 214 ¶ 35 (2022). As explained below, the United States does not believe that Draft Article 7 reflects customary international law.

U.S. Comments:

The status-based immunity of heads of State, heads of government, and foreign ministers from foreign criminal jurisdiction is well grounded in customary international law and confirmed by the International Court of Justice.[14] As written, Draft Article 3 is a useful and clear statement of existing customary international law.

The Commentary notes some disagreement within the Drafting Committee, a few members of which apparently question whether other high-ranking officials might enjoy such immunity based on their status alone. The United States does not find support in customary international law for an expansion of immunity *ratione personae* beyond heads of state, heads of government, and ministers for foreign affairs.

Article 4 Scope of immunity ratione personae

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae only during their term of office.
2. Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity ratione personae is without prejudice to the application of the rules of international law concerning immunity ratione materiae.

U.S. Comments:

Like Draft Article 3, Draft Article 4, paragraph 1 correctly reflects customary international law in that immunity *ratione personae*, or personal immunity, is status based, and afforded to the "troika" of heads of State, heads of government, or foreign ministers. When the official no longer holds the position, personal immunity terminates, and the official only enjoys immunity for prior official acts, or immunity *ratione materiae*. The United States further agrees that personal immunity covers all acts, as reflected in the text of paragraph 2. In addition, the United States recommends that the Commentary to this provision address the intersection of personal immunity from criminal jurisdiction and personal inviolability, a distinct protection that informs the official's treatment and may add clarity to the scope of immunity *ratione personae*.

The United States notes that paragraph 3 refers to the "rules of international law," which the United States understands to be a reference to customary international law and treaty-based international law and believes this should be clarified in the Commentary. Alternatively, it may be useful to simplify paragraph 3 so it reads "The cessation of immunity *ratione personae* is without prejudice to the application of immunity *ratione materiae*."

[14] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶¶ 54–61 (Feb. 14).

Part Three Immunity ratione materiae

Article 5 Persons enjoying immunity ratione materiae

> *State officials acting as such enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction.*

U.S. Comments:

The United States finds that the current phrasing of Draft Article 5 introduces unnecessary confusion. The simple answer to the question of which persons enjoy immunity *ratione materiae* is State officials, and the United States questions the use of the phrase "acting as such." This phrase is not found elsewhere in the Draft Articles, including Draft Article 2, which instead defines the central concept of "acts performed in an official capacity." The Commentary explains that the phrase "acting as such" is meant to distinguish functional immunity from personal immunity by referring to the official nature of the acts of the officials.[15] However, attempting to describe the scope of immunity *ratione materiae*, which applies to official *acts*, in terms of officials themselves creates a lack of clarity as to the applicable standard. The limit to which persons enjoy this immunity is not the status of the official but rather whether the act was done in an official capacity. The phrase "acting as such" also creates redundancies with Draft Article 6. Draft Article 6 paragraph 1 addresses the scope of the immunity and provides that "State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity."

Article 6 Scope of immunity ratione materiae

> *1. State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.*
> *2. Immunity ratione materiae with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.*
> *3. 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 with respect to acts performed in an official capacity during such term of office.*

U.S. Comments:

Draft Article 6, paragraph 1, limits immunity *ratione materiae* to acts performed in an official capacity. This provision refers back to Draft Article 2, paragraph (b), which defines the phrase "an act performed in an official capacity" to mean "any act performed by a State official in the exercise of State authority." U.S. views about the benefits of the Commentary engaging in

[15] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 226 ¶ 3 (2022).

a deeper consideration of what is and is not an act performed in an official capacity are found in the U.S. Comments to Draft Article 2, paragraph (b).

Draft article 6, paragraphs 2 and 3, provide that functional immunity subsists even after the individuals concerned have ceased to be State officials, and that individuals who formerly enjoyed personal immunity continue to enjoy immunity as to their prior official acts. Both provisions are consistent with customary international law and track State practice with respect to the treaty-based immunities of diplomats, consular officers, and UN officials, who continue to enjoy "residual" immunity for their official acts even after they have left their respective offices. As noted in our comments to Draft Article 2, the United States prefers the inclusion of Draft Article 6, paragraph 2 to the reference in Draft Article 2, paragraph (a) to describe the scope of immunity *ratione materiae*.

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

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

U.S. Comments:

The United States' longstanding concerns with Draft Article 7 remain. Fundamentally, Draft Article 7 is not supported by widespread and consistent State practice and *opinio juris* and, as a result, it does not reflect customary international law. Although State officials may not enjoy functional immunity in certain circumstances, Draft Article 7 creates the false impression that the non-applicability of immunity for international crimes is sufficiently established in State practice such that it forms per se rules under customary international law—and it simply does not. The United States reiterates our belief that the Commission should work by consensus on this difficult topic given the serious issues it implicates and the importance of State practice. Such consensus has not been achieved, and the United States does not agree that the Commission chose the correct path in adopting Draft Article 7 despite the many serious concerns expressed.

The Commentary purports to root Draft Article 7 in a "discernable trend" in judicial decisions of national courts and national legislation, but the text does not make clear that these examples are not equivalent to a widespread and consistent State practice and *opinio juris* and

accordingly do not establish customary international law.[16] Of the examples cited in the Commentary, the large majority are from European States, with little representation of other regions. State practice is especially limited in this area because there is little visibility into criminal investigations that do not result in prosecutions brought by national authorities either due to immunity or for other reasons, and case law is exceedingly sparse. In 2010, the then-Special Rapporteur concluded in his second report that it was "impossible to assert definitively that there is a trend toward the establishment of such a norm."[17] This uncertainty underscores the need for this critical issue to be revisited and reconsidered under the auspices of the new Special Rapporteur.

Moreover, certain examples of State practice included in the Commentary stretch the meaning of the law beyond its proper application. To highlight one example, the Commentary observes that "in rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes."[18] To support this assertion, the Commentary cites to the terrorism exception of the Foreign Sovereign Immunities Act (FSIA) of the United States and its nexus to acts of torture and extrajudicial killing.[19] However, unlike the sovereign immunity statutes of some States, the FSIA addresses only the jurisdictional immunity of foreign *States* in U.S. courts in civil matters and not the functional immunity of foreign government *officials in criminal cases*.[20]

The United States has also adopted the extraterritorial criminal torture statute and War Crimes Act, consistent with U.S. obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Convention of 1949, respectively.[21] Neither statute addresses or explicitly abrogates the functional immunity of foreign officials. Any such prosecution in the future would be addressed by prosecutors and courts on a case- and fact-specific basis rather than by application of a categorical rule denying immunity.

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[16] *Id.* at 232 ¶ 9.

[17] Roman Anatolevich Kolodkin (Special Rapporteur), *Second Rep. on Immunity of State Offs. from Foreign Crim. Jurisdiction*, U.N. Doc. A/CN.4/631 at 425 ¶ 90 (2010).

[18] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 232–33 ¶ 9.

[19] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 233 ¶ 9 n.1013; 28 U.S.C. § 1605A.

[20] *Samantar v. Yousuf*, 560 U.S. 305 (2010).

[21] 18 U.S.C. § 2340A and § 2441.

The Commentary also cites to implementing legislation for the Rome Statute, which is inapposite. As Draft Article 1 paragraph 3 provides, any rules arising from the Rome Statute only operate as among Rome Statute Parties. The lack of adequate State practice contributes directly to the lack of consensus for Draft Article 7, which was punctuated by the controversial split vote in 2017 that advanced the provisional adoption of Draft Article 7.

In addition to further consideration of the limited available State practice (and implications of otherwise unavailable State practice), Draft Article 7 requires additional review with respect to the legal basis for any exceptions to functional immunity. While Draft Article 7 states that functional immunity will not apply to certain crimes under international law, it does not explain why. Without a clear and broadly supported rationale, the Draft Article lacks a persuasive explanation and justification for the inclusion and exclusion of crimes in the exception. The Commentary acknowledges that the Commission has sidestepped the question of whether any of the enumerated international crimes could be performed in an official capacity within the meaning of Draft Article 2(b) because it has identified practice and doctrine reflecting different interpretations as to whether the inapplicability of functional immunity is explained by an absence of immunity or an exception to immunity.[22] As mentioned in our comments to Draft Article 2, this divergence adds to the uncertainty about what is or is not an act taken in an official capacity and fuels confusion about the fundamental basis of the rules the Draft Articles purport to codify. Whatever the rationale for any purported exception to functional immunity, we agree that there is no such exception to personal immunity.

The confusion surrounding what legal basis supports Draft Article 7 extends to additional crimes, not included in the text of the Draft Article but identified in the Commentary. For example, the Commentary states that the omission of corruption from the enumerated list of crimes does not imply that immunity would apply. The explanation provided is that the crime of corruption could not be considered an official act, though the Commentary also notes the alternative view that it is the official's status that makes the crime possible.[23]

Consensus on these significant, unresolved matters is not only important to enhance the utility of the Draft Articles to States but also is necessary to avoid the destabilization of foreign relations. In considering whether further restrictions on immunity were "desirable," the Special Rapporteur's 2010 report recalled "the need to avoid impairing friendly international relations."[24] The Draft Articles should be careful with the ways in which they will touch on and propose to supplement the exercise of domestic criminal jurisdiction. The United States is deeply concerned

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[22] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 237, ¶¶ 14-15 (2022).

[23] *Id.* at 241 ¶ 26.

[24] Roman Anatolevich Kolodkin (Special Rapporteur), *Second Rep. on Immunity of State Offs. from Foreign Crim. Jurisdiction*, U.N. Doc. A/CN.4/631 at 425 ¶ 91 (2010) (quoting *AU-EU Expert Report on the Principle of Universal Jurisdiction*, No. 8672/1/09 REV 1, at ¶ 46 (Apr. 16, 2009) (R6 and R8)).

that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to Draft Article 7 as reflective of existing international law, which it in fact is not. The development of law in this sensitive area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology and even-handed assessment of evidence. As detailed above, Draft Article 7 risks creating the false impression that the Commission is codifying customary international law rather than proposing progressive development of the law, it rests on limited state practice, and it lacks a clear and broadly supported legal rationale.

Finally, none of these comments should be understood to undercut the United States' support for holding accountable those responsible for international crimes. The United States agrees that there must not be impunity for international crimes. Immunity does not mean impunity, however.[25] In the United States, and in many other States, determinations of the applicability of immunity from criminal prosecution are fact-intensive and specific to each case. Furthermore, there is the possibility of waiver or prosecution in an appropriate domestic or international court of such crimes depending upon the specific facts and circumstances. Immunity from a foreign State's criminal jurisdiction can be critical to a State's exercise of its own criminal jurisdiction over its officials and the effective administration of its system of accountability. The United States urges the Commission to give these concerns careful consideration and revisit its work on Draft Article 7.

Part Four Procedural provisions and safeguards

U.S. Comments:

With respect to Part Four, the United States notes with concern that these eleven draft articles now make up the bulk of the Draft Articles but neither represent a codification of customary international law nor reflect progressive development of the law. They are recommendations for new rules. The United States questions the utility of this approach where there is scant State practice and other, more developed areas of immunity law, such as diplomatic immunity, do not contain analogous procedural provisions. The Commission and former Special Rapporteur have acknowledged that these procedural safeguards were belatedly included to

[25] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 60 (Feb. 14).

address concerns over the highly controversial Draft Article 7,[26] which only serves to underscore the lack of an adequate grounding for these new provisions.

The United States would prefer to avoid drawing conclusions concerning procedural obligations that do not yet reflect a consistent pattern of State practice. State practice is especially limited in this area because there is little visibility into criminal investigations that do not result in prosecutions brought by national authorities either due to immunity or for other reasons, and case law is exceedingly sparse. Rather than focus on specific domestic procedures, which might vary significantly according to the criminal law of each State, it may be prudent to consider any relevant international standards and the need for a State to apply principles of immunity consistently across the various organs of its government. This approach would also decrease the risk of interference with existing State processes.

We reiterate our belief that the Commission should thoroughly review Parts One through Three in light of all of the concerns raised during the course of the previous Special Rapporteur's work as well as by these comments and the comments of other States. A deeper review on the contours and underlying rationales for Parts One through Three, with an emphasis on clarity and consensus, should be the first priority of the Commission when it resumes its work on this project. The need or desirability of retaining some of Part Four would be better assessed after that review. The Commission may consider moving Part Four to a separate annex that could serve as a resource for States without unnecessarily broadening the scope of the Draft Articles from the international law of personal and functional immunity of State officials from criminal jurisdiction. In the spirit of engagement with the project, however, the United States offers the following reflections on the eleven Draft Articles that make up Part Four.

Article 8 Application of Part Four

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

U.S. Comments:

The Commentary indicates that Draft Article 8 is meant to apply the procedural rules to all prior Draft Articles, including Draft Article 7. This seems to be potentially in tension with Draft Article 7, the text and Commentary of which purport to reflect the inapplicability of functional immunity in prosecutions for crimes under international law. Draft Article 8, taken together with Draft Article 14, suggest there is some fact-specific analysis that would be relevant

[26] *See* Draft Article 7, Commentary ¶ 2; Concepción Escobar Hernández (Special Rapporteur), *Seventh Rep. on Immunity of State Offs. from Foreign Crim. Jurisdiction*, U.N. Doc. A/CN.4/729, ¶ 104 (Apr. 18, 2019).

to each case. The Commentary would be strengthened by additional explanation of how Draft Article 7 and Part Four relate.

Article 9 Examination of immunity by the forum State

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

U.S. Comments:

The purpose of this Article, and its relationship to Draft Article 14 is unclear. To the extent this Draft Article provides forum States with more flexibility in determining when and how to consider immunity in light of their domestic criminal process, it is preferable to Draft Article 14. In any event, there appears to be a tension between the two provisions and their application that needs to be considered.

Article 10 Notification to the State of the official

> *1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.*
> *2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.*
> *3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.*

U.S. Comments:

Draft Article 10 is without support in State practice and could significantly impede efforts by States to investigate serious crimes. There may be circumstances where notification to a foreign government is appropriate, but there may also be circumstances where imposing a requirement to notify another State "before the competent authorities of the forum State initiate criminal proceedings" could pose a significant risk that the individual being investigated could become aware of the investigation and compromise it, including by permitting the official to

destroy evidence, warn partners in crime, or flee from the forum State's reach. Certain investigative steps can often be taken without implicating the immunity of an official and could even be useful in ascertaining whether immunity is implicated. This is particularly the case with respect to the most serious crimes that may involve the complicity of States or targets that could seek to corrupt relevant officials. The provision also risks encroaching on the sovereignty of States to investigate crimes within their jurisdiction. The concerns with Draft Article 10 are exacerbated by the fact that Draft Article 14.2(a) purports to make Draft Article 10 notification a factor that States may consider in making immunity determinations, which is entirely without grounding in State practice. As a result, this provision could very likely have a severe detrimental effect on the investigation of crimes that cross international borders.

Finally, issues of immunity are typically outside the scope of cooperation or mutual legal assistance treaties, are not contemplated by the treaties' procedures, and are not within the competence of authorities that administer such treaties. Consequently, we do not believe that it is appropriate for notification of immunity to be through the procedures established in cooperation or mutual legal assistance treaties. Consequently, we would recommend ending paragraph 3 after "States concerned." The same concern and recommended edit extend to parallel provisions in Draft Articles 11 through 13.

Article 11 Invocation of immunity

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

U.S. Comments:

The United States is generally in agreement that a State, and only a State, may invoke the immunity of its official, and should do so in writing. The United States notes that the Commentary makes clear that a State is encouraged to invoke the immunity of its official "as soon as possible," but has the power to do so "at any other time."[27] The United States questions,

[27] Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 255, ¶ 8 (2022)

however, the utility or enforceability of dictating internal domestic processes, such as in paragraph 4.

Article 12 Waiver of immunity

> *1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.*
> *2. Waiver of immunity must always be express and in writing.*
> *3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.*
> *4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.*
> *5. Waiver of immunity is irrevocable.*

U.S. Comments:

The United States is generally in agreement that a State may waive the immunity of its official and would add language to clarify that "only" the State of the official may do so. The United States is further in agreement that such waiver should be express and in writing and is irrevocable. The United States would add that a State may waive immunity either proprio motu or upon request by the forum State.

Waiver of immunity also provides an approach for addressing the crimes in Draft Article 7, as States that wish to do so, could pre-emptively waive immunity for their officials with respect to specified international crimes.

Article 13 Requests for information

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

US Comments:

This draft article reads as largely a suggestion ("may request") rather than an obligation and as such does not raise the same concerns regarding the creation of new obligations unfounded in established State practice. At the same time, it is unclear what such a provision

adds to the Draft Articles as States may always request and share information at their discretion about any matter.

Article 14 Determination of immunity

1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination about immunity, such competent authorities shall take into account in particular:

(a) whether the forum State has made the notification provided for in draft article 10;

(b) whether the State of the official has invoked or waived immunity;

(c) any other relevant information provided by the authorities of the State of the official;

(d) any other relevant information provided by other authorities of the forum State; and

(e) any other relevant information from other sources.

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(a) the authorities making the determination shall be at an appropriately high level;

(b) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(a) before initiating criminal proceedings;

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

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

U.S. Comments:

Draft Article 14 raises but does not resolve several of the United States' previously stated concerns about the lack of adequate State practice and a unified legal rationale for the bounds of foreign official immunity. For instance, paragraph 3(b)(i) provides for some measure of a fact-specific inquiry into the underlying allegations. In this sense, Draft Article 14 underscores that functional immunity determinations are fact-specific inquiries, but does not explain why such inquiries are appropriate in the case of Draft Article 7 enumerated crimes but not other crimes that may also implicate functional immunity. Paragraph 4(a) continues a recurring issue in the Draft Articles of mandating a consideration of immunity when a forum State may not have sufficient information to be aware that immunity may be applicable or its criminal process is such that early stages of it may be engaged without compromising any such immunity. Paragraph 4(b) raises the intersection of personal immunity and inviolability, but the Commentary would benefit from additional explanation of how the inviolability of those individuals who enjoy personal immunity arises and adds to their immunity protections, for example, with arrest.

Article 15 Transfer of the criminal proceedings

> *1. The competent authorities of the forum State may, acting proprio motu or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.*
> *2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.*
> *3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.*
> *4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.*
> *5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.*

U.S. Comments:

Paragraph 1 provides that a forum State may offer to transfer the proceedings to the State of the official. This Draft Article is silent, however, with respect to a decision by the forum State to transfer proceedings to a third State or international court or tribunal. While this issue is discussed in the Commentary, express language that the Draft Article is without prejudice to this option would clarify the existing ambiguity.

Article 16 Fair treatment of the State official

> *1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.*
> *2. Any such official who is in prison, custody or detention in the forum State shall be entitled:*
> *(a) to communicate without delay with the nearest appropriate representative of the State of the official;*
> *(b) to be visited by a representative of that State; and*
> *(c) to be informed without delay of his or her rights under this paragraph.*
> *3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.*

U.S. Comments:

The United States questions the necessity, relevance, or value of this provision to the project on immunity. Once a determination is made that immunity does not apply in the case at hand, and any appeals are completed, the reach of the immunity doctrine would end and other, established areas of law would cover the fair treatment of the State official. Moreover, by setting forth some fair trial guarantees and other human rights-related protections but not others in Paragraph 2, this Draft Article could be construed as establishing a hierarchy of defendant protections and/or minimizing the importance and applicability of those that are enumerated.

The United States believes that the incorporation of the individual "right" to consular access in paragraph (2) of Draft Article 16 is misplaced. The rights of consular notification and access described in Article 36 of the Vienna Convention on Consular Relations belong to States, not individuals. As such, they are not enforceable by private individuals. The term "shall be entitled" in Draft Article 16 could likewise suggest an individually enforceable right where none exists. The language should be altered to adhere closely to the precise formulation used in Article 36, or the Draft Article should simply incorporate Article 36 by reference without attempting to paraphrase or rewrite it.

Article 17 Consultations

> *The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.*

U.S. Comments:

The United States observes that this provision, like Article 13 relating to the sharing of information, relates to the common practice that States consult as appropriate on matters of mutual concern. Such consultations should be at the discretion of both States, however, and purporting to mandate them when one of the States does not wish to pursue them is counterproductive. A State may want to demand consultation, but at the same time, it may be wary of other States drawing it into consultations that it views as unfounded or unproductive. While the qualifier "as appropriate" would seem to preserve the long-standing discretion of States to engage in consultations, the Commentary makes clear that consultation is "obligatory," and the phrase "as appropriate" allows for limited flexibility to account for unique circumstances such as diplomatic relations. The United States observes that there is no basis for obligatory consultation in customary international law. In the event that the Draft Articles take the form of a treaty, the United States recommends that the Draft Article say "should" rather than "shall."

Article 18 Settlement of disputes

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

U.S. Comments:

The United States observes that there is no basis for a settlement provision in customary international law. This dispute resolution language is only relevant if these Draft Articles take the form of a treaty, and in such case subject to any reservation by the forum State or the State of the official. Moreover, it is not clear why the present Draft Articles would include such a final clause, which is unrelated to the topic of immunity, and not other final clauses.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- *Rome Statute of the International Criminal Court, 17 July 1998, article 6;*
- *Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.*

Crimes against humanity

- *Rome Statute of the International Criminal Court, 17 July 1998, article 7.*

War crimes

- *Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.*

Crime of apartheid

- *International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.*

Torture

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.*

Enforced disappearance

- *International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.*

Conclusion

While the United States appreciates the considerable effort that the Commission has put into considering the complex issues inherent in this topic, the current Draft Articles in many instances are not supported by a widespread and consistent State practice and *opinio juris,* and accordingly, as a whole, they do not reflect customary international law. Instead, the Draft Articles in many instances articulate new legal duties or proposals for the progressive development of the law without adequate acknowledgement of that intention. This lack of clarity undermines the overall utility of the Draft Articles to States and increases the risk of misapplication by practitioners. The United States urges the Commission to take the additional time needed to refocus the Draft Articles on the codification of customary international law. Those aspects of the current Draft Articles that are not ripe for codification could be set aside from the Draft Articles until there is sufficiently widespread and consistent State practice evidencing *opinio juris*. In that respect, the Commission should consider referring the progressive elements of the Draft Articles to a study group for further consideration or setting forth those elements in an annex to the Commentary that makes clear their status as not reflecting current international law. We hope that these written comments are helpful to the Commission in advancing its work and that the Commission will revisit the complex issues over which there continue to be significant differences and recommit to the traditional approach of working towards consensus.

The United States appreciates the opportunity to have our views considered and the time and attention that the Commission and the two prior Special Rapporteurs have devoted to this important and complex topic. We look forward to continued engagement with the Commission to help address the remaining significant issues before the Draft Articles and Commentary are finally adopted.