Translated from Spanish

Permanent Mission of Colombia to the United Nations

Comments of the Republic of Colombia on the draft articles on immunity of State officials from foreign criminal jurisdiction of the International Law Commission

In response to the request of the International Law Commission to Governments for any comments or observations they wished to make on draft articles 7 to 18 and the draft annex of the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted on first reading at its seventy-third session (2022) and the commentaries thereto, the Republic of Colombia has the honour to submit the following observations:

1. Comments on draft article 2

In Colombia, article 20 of the Criminal Code stipulates that public servants, for the purposes of criminal law, are the members of public corporations and the employees and workers of the State and its local offices and services.

Colombia agrees that immunity only covers "acts performed in an official capacity", since it is precisely that link that justifies the recognition of immunity. However, the definition of "act performed in an official capacity" still merits further analysis. Analysis is required of whether the scope of this definition, in addition to military and police activities, acts related to the administration of justice and administrative acts, also includes the conduct of political acts.

It should be determined whether or not the "act performed in an official capacity" under investigation by the forum State refers to an act committed within its jurisdiction, because if such act falls outside the forum State's jurisdiction, the discussion then enters the realm of universal jurisdiction, which is an issue that still requires further development and analysis.

2. Comments on draft article 3

Colombia wishes to emphasize that, in its view, with respect to persons enjoying immunity *ratione personae*, the general principle is that the only two cases in which Heads of State, Heads of Government and Ministers for Foreign Affairs may currently be investigated and tried for international crimes before foreign national courts are: (i) when the State they represent waives immunity; and (ii) when they no longer hold the office and criminal proceedings are opened in connection with private acts.

3. Comments on draft article 4

The scope of the phrase "or prior thereto" included article 4, paragraph 2, should be reviewed, as the purpose of recognizing immunity for private acts occurring prior to the term of office of Heads of State, Heads of Government and Ministers for Foreign Affairs is not clear.

With regard to acts performed in an official capacity, it is also unclear whether immunity is recognized when such acts occurred before they acquired the quality that justifies immunity.

The immunity of Heads of State from foreign criminal jurisdiction has already been recognized by courts such as the International Court of Justice. The immunity of Heads of Government and Ministers

for Foreign Affairs is mentioned in the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and, implicitly, in the United Nations Convention on Jurisdictional Immunities of States and Their Property.

Colombia agrees with the assertion in the draft article that immunity *ratione personae* should be limited only to Heads of State, Heads of Government and Ministers for Foreign Affairs and should not be extended to other high-ranking officials, taking into account the fact that they are not diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961.

It is understood that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity ratione *personae ceases*. Immunity *ratione materiae*, however, might still apply.

4. Comments on draft article 5

With regard to draft article 5, it is important to take into account where the crime qualified as an "act performed in an official capacity" took place, and to determine whether the forum State alone has standing to initiate criminal proceedings, or whether the draft article would constitute a way of codifying the institution of universal jurisdiction.

5. Comments on draft article 6

Regarding draft article 6, paragraph 2, Colombia understands that the recognition of immunity is based on the nature of the act performed by the official, which does not change by virtue of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear.

6. Comments on draft article 7

There are precedents of cases in which national courts have denied the application of the functional immunity of foreign State agents when international crimes of a *jus cogens* nature are involved, such as the *Eichmann* case in Israel, the *Barbie* case in France and the *Kappler* and *Priebke* cases in Italy.

Colombia agrees with that assessment, given that, insofar as such crimes involve *jus cogen* norms, their investigation and prosecution cannot be refused under any circumstances.

It should be made explicitly clear that the principle of universal jurisdiction does not fall within the scope of draft article 7. To date, there is no specific provision on the application of universal jurisdiction in Colombia. There are also no precedents in which Colombia has sought to apply universal jurisdiction to violations of fundamental rights committed by foreign nationals in another territory.

7. Comments on draft article 9

With respect to draft article 9, Colombia notes that, in the event that the immunity of the official is not granted by the forum State, there are no mechanisms preventing the other State from taking retaliatory measures.

Colombia also emphasizes that inviolability is enshrined in instruments such as the Vienna

Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

It is worth noting that coercive measures in Colombia may be (i) custodial or (ii) non-custodial. With respect to custodial measures, such judicial decisions cannot be implemented if the official is within the jurisdiction of his or her own territory. However, it would be relevant to consider whether it is possible to invoke immunity in the event that the official is in a third State.

The Colombian legal system provides that the Attorney General's Office may suspend, interrupt or waive criminal prosecution in cases where the principle of prosecutorial discretion applies and, therefore, the concept of criminal immunity as defined in the draft articles does not exist. Only diplomatic immunity exists, pursuant to international treaties on the subject. The laws of Colombia would need to be amended following an analysis of whether the competent authority would be the Attorney General's Office or the Supreme Court of Justice (exercising special jurisdiction). Similarly, the role that the Ministry of Foreign Affairs, the Ministry of Justice and/or the Attorney-General's Office would play would need to be defined.

8. Comments on draft article 10

The phrase "initiate criminal proceedings" in draft article 10 is very broad and interpretations of when or through what action a criminal proceeding may be initiated may vary depending on what criminal systems apply in the jurisdictions involved.

9. Comments on draft article 14

Draft article 14 raises a number of concerns for the State of Colombia. For example, in the event that the forum State recognizes the immunity of the foreign official, when does such immunity apply? While the official is in office? Until the criminal action ceases?

Furthermore, in such cases, are the competent authorities the same as those responsible for making a determination on similar issues, such as diplomatic immunity and inviolability?

With respect to paragraph 2 (e), Colombia recommends assessing the utility of specifying the types of "other sources", in order to ensure the credibility and provenance of information that may be taken into account for the determination of immunity.

10. Comments on draft article 15

With respect to draft article 15, Colombia recommends including a provision that establishes the need for communication between the States concerned to be timely, within reasonable and foreseeable time frames, given the timespans of criminal proceedings.

11. Comments on draft article 16

Colombia notes that the detainee rights set out in draft article 16 are stipulated in other international instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 6) and the Vienna Convention on Consular Relations (article 36). Both instruments have been ratified by Colombia.

In this regard, Colombia suggests that the Commission analyse the relevance of including in the draft article, or in another paragraph, a specific provision regarding the possibility of extradition from the

forum State to the State of nationality of the official.

General comments

The State of Colombia appreciates the work carried out by the International Law Commission aimed at regulating the immunity of State officials from foreign criminal jurisdiction. However, given the complexity of the subject, Colombia believes that the Commission should not rush its analysis.

In view of the close relationship between the draft articles and universal jurisdiction, the scope of the draft articles must be limited. It would also be useful to assess whether the draft articles should be limited to addressing the immunity of foreign criminal jurisdiction in relation to offences or crimes committed within the jurisdiction of the forum State.

In particular, Colombia believes that, although the draft articles take into account existing norms in different areas of contemporary international law, they should reflect customary international law.

The draft articles are limited to immunity from foreign criminal jurisdiction and do not affect the legal regime applicable before international criminal courts. Similarly, Colombia understands that, under the draft articles, as currently drafted, immunity *ratione materiae* extends, in principle, to all State officials, regardless of the position they hold or the specific functions they perform for the State, with the exception of those State officials covered by special regimes.

Lastly, Colombia reserves the right to amend or supplement the present comments or to submit additional comments at a later date, during the opportunities made available to Governments for such purpose.