Advisory Committee
on Public International Law

Advisory report on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction

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On 3 June 2022, the International Law Commission adopted, on first reading, the draft articles on immunity of State officials from foreign criminal jurisdiction.[1] On 7 November 2022, the Advisory Committee on Issues of Public International Law (CAVV) received a request from the Minister of Foreign Affairs to produce an advisory report on these draft articles.[2]

The topic of immunity of State officials from foreign criminal jurisdiction has been under consideration by the ILC since 2007 and is thus the topic that has been on its current programme of work the longest. To a greater extent than usual, the project has caused a deep division within the ILC, and a similar division is also apparent from the reactions of States to the work of the ILC which are communicated annually during the meeting of the Sixth Committee of the General Assembly of the United Nations.

In essence, this division concerns the question of whether some of the draft articles set out positive law *(lex lata)* or a desirable direction for development of the law *(lex ferenda)*. The principal bone of contention is draft article 7, which provides that functional immunity does not prevent the exercise of criminal jurisdiction over foreign State officials suspected of committing certain crimes under international law (i.e. particularly serious violations of international law such as genocide or crimes against humanity which are presumed to entail individual criminal responsibility under international law), although there is also disagreement on other points of the draft articles, as is apparent from the accompanying commentary. It also strikes the CAVV that some topics have *not* been included in the draft articles, for example immunity from civil and administrative jurisdiction, immunity from execution and rules about inviolability. Nor is there yet any clarity about whether these draft articles will eventually be presented as a draft treaty to the General Assembly, this being of particular relevance to the question whether it would be worthwhile including a mandatory dispute resolution clause.

The CAVV notes that although adoption on first reading usually marks the start of the completion phase of the ILC's work, it is debatable whether that is also the case here. In view of the critical stance taken by States and the many questions to which the draft articles and accompanying commentary give no clear answer, chances are that the ILC will have to go back to the drawing board. The CAVV considers that thorough revision of the draft articles and particularly of the commentary would indeed be desirable. Nonetheless, in this advisory report the CAVV will comment separately on each of the draft articles.

It should be emphasised that this advisory report builds on an earlier advisory report dating from 2011, in which the CAVV had already stated it was in favour of an exception to functional immunity for crimes under international law.[3] In its recent advisory report on prosecuting the crime of aggression, the CAVV once again spoke out in favour of such an exception.[4]

Chapter 1 of the advisory report first briefly explains the main questions regarding the content and scope of the immunity of State officials from foreign criminal jurisdiction and also briefly outlines the context in which the draft articles were adopted on first reading. Chapter 2 of the report discusses in more detail each of the eighteen draft articles in turn. The CAVV has chosen to examine in depth the most important controversial points. On other points, the report is limited to a brief reflection or question, or to the observation that a given draft article or the accompanying commentary still lacks persuasiveness or requires further clarification. The advisory report concludes with an evaluation and some final remarks on the future of the project.

The CAVV adopted the advisory report on 16 June 2023, and recommends that the government take account of the following observations when determining its position on the ILC draft articles on the immunity of State officials from foreign criminal jurisdiction.

The draft articles in context

International law distinguishes between two forms of immunity which constrain the exercise of jurisdiction over foreign State officials without the consent of their home State, namely personal immunity and functional immunity.

Personal immunity arises from the need to protect the exercise of the functions of State officials engaged in international relations, especially when they are abroad in their official capacity. For example, diplomatic immunity protects diplomats from the jurisdiction of the receiving State,[5] and State officials participating in an official ('special') mission are, in the State where they are on an official mission, protected by a form of personal immunity related to diplomatic immunity.[6] Personal immunity from all foreign criminal jurisdiction at all times is considered necessary for a limited number of State officials, including in any event Heads of State, Heads of Government and Ministers for Foreign Affairs (together known as the *troika*), and applies irrespective of the official's whereabouts and, in the event of presence in the forum State, also irrespective of the capacity in which the official is present.[7] Personal immunity lapses as soon as a State official ceases to hold the relevant post or once the official mission has ended.

All State officials are entitled to functional immunity from foreign jurisdiction. This immunity applies only to official acts, but continues to apply even after the official leaves office for official acts committed while in office. State officials who are no longer protected by personal immunity after leaving office or after completion of a special mission are still entitled to functional immunity for official acts.

Both immunities are of a procedural nature. Immunity does not therefore imply that such persons are no longer subject to the criminal law. Potentially, therefore, their criminal responsibility continues to apply, even if the forum State cannot give effect to that responsibility owing to the existence of immunity.

When the willingness to prosecute international crimes on the basis of universal jurisdiction increased in the 1990s, the question arose of whether personal or functional immunity of foreign State officials would prevent the exercise of criminal jurisdiction over these crimes. As regards personal immunity from the criminal jurisdiction of another State, the International Court of Justice answered this question in the affirmative in the *Arrest Warrant* judgment of 2002.[8] But the controversy about functional immunity continued to exist and was undoubtedly the reason why the ILC included the topic in its programme of work in 2007.[9]

The debate within the ILC revealed a profound division on this point. Opposite conclusions were also reached by the two Special Rapporteurs, Roman Anatolovich Kolodkin (2008-2011) and Concepción Escobar Hernández (2012-2022), who with their eleven reports had taken the lead in the debate. According to Special Rapporteur Kolodkin, the arguments for an international crimes exception to functional immunity were not convincing,[10] while Special Rapporteur Escobar Hernández concluded that international law *did* provide for such an exception or limitation.[11] The two Special Rapporteurs also reached different conclusions about whether the personal immunity of the members of the troika extends to other high-ranking State officials. This question was answered in the affirmative by Special Rapporteur Kolodkin[12] and in the negative by Special Rapporteur Escobar Hernández.[13] On both these points, the draft articles adopted on first reading were in keeping with the view taken by Special Rapporteur Escobar Hernández, but the debate on a possible exception to or limitation of functional immunity in respect of crimes under international law became heated. Some of the ILC members threw their weight squarely behind Special Rapporteur Escobar Hernández, while others said they were in favour of article 7, but noted that this draft article was a reflection of the ILC's mandate to promote the progressive development of international law;[14] yet a third group considered that the direction in which the

draft article proposed to develop international law was not desirable.[15] Owing to the ensuing stalemate, a roll call vote on the adoption of the draft article was held in 2017 in a departure from the usual practice in recent decades. The draft article was adopted by twenty-one votes for and eight votes against (with one abstention and four members absent).[16] Although the draft articles were adopted without a vote in 2022 on first reading, some members which had voted against in 2017 noted that their views on draft article 7 remained unchanged.[17]

Due to the controversy about draft article 7, the role of the draft articles concerning the procedural aspects of functional immunity gradually changed. Critics of draft article 7 emphasised that possible substantive limitations on the right to functional immunity could be developed only together with procedural rules. Once it became clear that the ILC would not reach consensus on draft article 7, the idea was conceived of framing the procedural rules as procedural *safeguards* that would contain the risk of politicisation and abuse in order to reduce resistance to draft article 7. Part Four of the draft articles, which is entitled 'Procedural provisions and safeguards', contains eleven draft articles on topics such as invocation and waiver of immunity by the sending State of the official and examination and determination of immunity by the forum State. The draft articles raise various substantive questions that will be discussed in chapter 2 of this advisory report, but it is worth noting here that the procedural provisions are often not based on existing State practice, and have in any event been partly designed with a view to winning over opponents of draft article 7. The ILC therefore seems to be working towards the adoption of a text that can serve as a basis for treaty negotiations. The commentary to the draft articles states that the ILC '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 the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic. As 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.'[18] However, the draft articles in Part Four suggest that the ILC has already anticipated this to some extent. The CAVV supports the line taken by the ILC and will therefore explain below, when discussing draft articles 7, 17 and 18, why it considers that working towards the adoption of a treaty text is the best way to bridge the fundamental differences of opinion within the ILC and within the international community.[19]

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Discussion of individual articles

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*

In draft article 1, paragraph 1 the ILC defines the scope of the draft articles: the draft articles apply to the immunity of State officials from the criminal jurisdiction of other States. It follows that the draft articles do not relate to the exercise of civil and administrative jurisdiction. Moreover, rules regarding the inviolability of State officials and immunity from execution are not included in the draft articles. Immunity from execution concerns the prohibition on 'executing a judgment or any other measure of execution or protection in respect of the beneficiary of this immunity or in respect of the property which enjoys this immunity', whereas inviolability refers to the duty of the forum State 'to refrain from taking any coercive measures with regard to certain persons, buildings or property.'[20]

The CAVV would prefer a more comprehensive approach and therefore invites the ILC to extend the scope of its work to include immunity from execution and the issue of inviolability.[21] After all, conventions that subject the immunity of State officials to a special regime, such as the Vienna Convention on Diplomatic Relations (VCDR),[22] the Vienna Convention on Consular Relations (VCCR)[23] and the Convention on Special Missions,[24] without exception also cover the rules regarding inviolability and immunity from execution. It should also be noted that the resolution of the Institute of International Law on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' clearly distinguishes between inviolability, immunity from jurisdiction and immunity from execution.[25] Although these rules are relevant only to State officials who have personal immunity,[26] the CAVV considers that their inclusion in the draft articles is logical and necessary.[27] For example, the draft articles could deal with summonses to appear or requests to present a document such as a passport.[28] As such, these measures do not, in principle, involve the exercise of criminal jurisdiction and may therefore not fall within the current scope of the draft articles. It is evident from the reports of the Special Rapporteurs that they favour a broad interpretation of the term 'exercise of criminal jurisdiction' to include, for example, the preparation of inspection reports, the gathering of evidence, the questioning of witnesses and the confiscation of passports.[29] However, the CAVV wonders whether some of these measures could not better be addressed through the concepts of inviolability or immunity from execution, although it is also aware that the dividing line between inviolability, immunity from jurisdiction and immunity from execution is sometimes fine.[30]

Both these conventions and the work of the Institute of International Law also deal with the issue of immunity from civil and administrative jurisdiction. However, the CAVV does appreciate the reasons for the ILC's decision to limit the draft articles to immunity from criminal jurisdiction. This is not because the law on immunity of State officials from foreign civil and administrative jurisdiction has already fully crystallised, but precisely because that is *not* the case; properly identifying the many facets of immunity from criminal jurisdiction is in itself a considerable challenge.[31]

In draft article 1, paragraph 2, the ILC indicates that the draft articles merely constitute the *lex generalis* in respect of the immunity of State officials. The draft articles do not therefore apply in cases where State officials are subject to special rules of international law *(lex specialis)* on immunity from national jurisdiction. The ILC refers, for example, to the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[32] the Convention on the Privileges and Immunities of the United Nations,[33] the Convention on the Privileges and Immunities of the Specialized Agencies,[34] status of forces agreements and, possibly, customary international law.[35] The CAVV has no further comments on draft article 1, paragraph 2.

In draft article 1, paragraph 3, the ILC provides that the draft articles do not affect the rights and obligations of States under international agreements establishing international criminal courts and tribunals. In the ILC's own words, such a provision is intended 'to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals.'[36] As the draft articles are explicitly limited to immunity from the criminal jurisdiction of another State, in keeping with draft article 1, paragraph 1, it is debatable whether the draft articles and the international agreements referred to in paragraph 3 cover the same topics. At first sight, the inclusion of a conflict clause therefore seems unnecessary. However, the CAVV can well imagine that the provision has been included in view of the debate on the immunity of officials of States not party to the Statute of the International Criminal Court,[37] in particular in relation to the horizontal relationship between States; after all, when a State Party is requested by the Court to arrest and surrender to the Court an official of a non-State Party on its territory,[38] that situation falls within the scope of both the draft articles and the Rome Statute. If that is indeed the background to the provision, the CAVV considers that the wording of the provision and of the accompanying commentary are needlessly confusing. Draft article 1, paragraph 3 first emphasises the relative effect of treaties, in other words the principle that the rights and obligations under treaties establishing an international criminal tribunal apply only to the parties to those treaties. The commentary then goes on to state that the term 'as between the parties to those agreements' in draft article 1, paragraph 3 'does not…imply any statement whatsoever in relation to any other obligation that can be imposed upon States under international law, in particular by the Security Council or any other international organization'.[39] Without further interpretation, both those who favour and those who oppose a limitation of immunity in horizontal relations between a State Party and a non-State Party in the context of the exercise of criminal jurisdiction by the International Criminal Court may feel that this wording supports their view. By referring to 'obligations under international law' in the commentary, the ILC could be said to leave open the possibility that the International Criminal Court need not recognise the personal immunity of nationals of States not bound by the Statute because this immunity is not recognised by general international law in the case of international tribunals. On the other hand, the commentary speaks of obligations that can be imposed by international law, although in a case where immunity is not applicable under customary law no obligation can be said to be imposed. The most obvious interpretation of the commentary is that the ILC wishes to recognise that States which are not party to a convention establishing an international court may be obliged by the Security Council to cooperate with the Court, but the reference to international law in general, and to other international organisations (which, after all, unlike the Security Council, cannot set aside the rights and obligations of States under other rules of international law) is a source of confusion. The CAVV thinks it would be advisable to make clear that the conflict clause of draft article 1, paragraph 3 relates only to the exercise of national criminal jurisdiction in the context of proceedings before an international criminal court and amending the commentary in such a way that it no longer raises more questions than it answers.

— 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.

Draft article 2 defines two terms that are crucial to the application of the functional immunity rule: 'State official' and 'act performed in an official capacity'.

Draft article 2 (a) defines State official as 'any individual who represents the State or who exercises State functions, and refers to both current and former State officials.' The provision therefore first makes it clear that *former* State officials too come within the definition of State official. Incidentally, the CAVV will regularly indicate in this advisory report that a given draft article also applies to former State officials, because not all readers will be aware of this definition if they only read parts of the report.

The CAVV believes that the definition in draft article 2 (a) may possibly result in the scope of the provision being too wide. According to the commentary, the term 'State official' should be interpreted autonomously (i.e. independently of the position a particular person holds under national law) by reference to the criteria set out in draft article 2(a) – representing the State or exercising State functions (or both).[40] As the commentary goes on to say that a '"State official" is the individual who is in a position to perform …State functions',[41] the definition would also seem to include individuals who are not organs of the State and to whom no State functions have been assigned under the national law of the State of the official.[42] The CAVV is not in favour of a wide definition of this kind because it extends functional immunity to situations that do not come within the normative scope of the rule.

What must be understood by the term 'State official' or 'act performed in an official capacity' within the meaning of draft article 2 (b) depends on the rationale and content of the functional immunity rule. Basically, there are two approaches.[43]

The first approach treats the functional immunity of State officials as an integral part of the State immunity rule. The State immunity rule prohibits the exercise of jurisdiction over foreign States when they are sued in respect of sovereign acts. The rule is sometimes explained by reference to the maxim *par in parem non habet imperium*, i.e. equals do not have authority over one another. To prevent circumvention of the State immunity rule, it should also not be possible for State officials to be called to account abroad for acts in respect of which the State itself would have enjoyed immunity if the case had been brought against the State. In this approach, all acts of State officials that can be imputed to the State under international law are treated as 'acts performed in an official capacity'.[44]

The second approach regards functional immunity as an independent rule of international law which is also based on the sovereign equality and independence of States, but which must be clearly distinguished from the State immunity rule. In this approach, the functional immunity rule rests on two pillars: 1) State officials are not accountable in their personal capacity for acts they perform for and on behalf of the State (a general principle recognised by most domestic legal systems) and 2) in order to protect its territorial sovereignty and independence, the State of the official has the sole right to determine the mandate of its officials *and* to establish at law whether an official has acted in accordance with that mandate in a given case.[45] In this approach, official acts, or acts performed in an official capacity, are acts for which an official is not individually accountable and cannot be held individually accountable by the forum State.

The two approaches therefore define the normative elements of the functional immunity rule in fundamentally different ways. How this normative basis or rationale influences the debate on the existence of limitations or exceptions to the rule will be explained below in the discussion of draft article 7.

The ILC decided to leave open the question of what constituted the normative basis of the rule of functional immunity. In the commentary to draft article 2 (b), the ILC says that while attribution of an act to a State is a prerequisite for the act to be characterised as having been performed in an official capacity, this does not prevent it from also being attributed to the individual.[46] According to the ILC, the criteria for attribution set out in articles 7 to 11 of the articles on responsibility of States[47] do not seem generally relevant in determining whether an act must be treated as an official act, but what the ILC means by this is not entirely clear from the commentary.[48] The decision not to choose between the two approaches appears to have been taken for pragmatic reasons. As the two approaches are so different, it is unlikely that the ILC would have closed ranks if one of the options had been explicitly chosen. But the CAVV considers that the subsequent debates about possible exceptions or limitations to the functional immunity rule have been clouded by the lack of a shared understanding of the conceptual basis of the rule. After all, the answer to the question *whether* a particular act should be treated as an official act may differ according to the approach adopted. And, as will be explained in more detail below in respect of draft article 7, the chosen approach also determines what arguments for or against an exception for 'international crimes' are convincing in the light of the rules governing the determination of the content and scope of customary international law. The CAVV therefore considers that the draft articles would benefit from a clear explanation of the different conceptual approaches to the rule. Although the existence of opposing views on whether functional immunity has exceptions or limitations is already apparent from the draft articles and the commentary, they do not reveal how these contradictions may possibly be traced back to different conceptions of the rule as such.

The CAVV considers the second approach – i.e. functional immunity as an independent rule of international law – to be more in keeping with both State practice and *opinio juris* regarding the functional immunity rule and with the nature of the State immunity rule.[49] The difference between the two approaches becomes particularly apparent when a State official is sued in a personal capacity. Naturally, when proceedings are instituted against a State official in an official capacity, i.e. as a representative of the State, the rule of State immunity must apply because it is actually the State against which the proceedings are instituted.[50] But when proceedings are instituted against a State official in a personal capacity, which is by definition the case in criminal proceedings, the liability of the State is not at issue. The CAVV considers that application of the State immunity rule (instead of the independent rule of functional immunity) in situations in which an official of a foreign State is held responsible in a personal capacity for acts that are *also* attributable to the State, but where the State itself is not involved in the legal proceedings (either directly or indirectly), and its responsibility does not need to be established either, is not evident and not in accordance with international law. Such an application would mean that the lawfulness of 'acts of State' may also not be tested in legal proceedings in which the foreign State itself is not involved. In some domestic legal systems, such a limitation is adopted in the context of the act of State doctrine. Although a few early applications of the act of State doctrine coincided with the functional immunity rule,[51] in its modern form the doctrine is a rule of national law which applies mainly in common law countries, having first been formulated in the United States and the United Kingdom. The doctrine is a product of considerations involving the separation of powers, or *forum non conveniens*, and cannot be regarded as an obligation arising from the principle of sovereignty under international law.[52]

In view of the above, the CAVV wonders whether the definition of State official in draft article 2 (b) is not too broad. Functional immunity protects the territorial sovereignty and independence of the State of the official by protecting the sovereign functions of the State from foreign interference. However, the CAVV considers that a condition for this protection is that the exercise of official functions has a basis in the national law of the State of the official, in other words that the privilege of functional immunity should be granted only to those who have been officially designated by the State to perform official functions. In the opinion of the CAVV, *de*

facto State organs,[53] or private persons whose actions can be imputed to the State but who have no official mandate under the national law of the home State, should not fall within the scope of the definition of State official. If the concept of 'State official' is delimited in this way, it is actually not interpreted autonomously. Instead, it could be provided that possession of such a status under national law is required.

Draft article 2 defines only two concepts. The original intention was to formulate definitions of a number of other key terms as well, namely 'criminal jurisdiction', 'immunity from criminal jurisdiction', 'immunity *ratione materiae*' and 'immunity *ratione personae*'. The ILC ultimately decided not to define these terms owing to the differences in definitions and practices in different legal systems and the fact that comparable terms are not defined in other instruments such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions.

The CAVV agrees that 'criminal jurisdiction' is a concept that is hard to define, but wonders whether the rights and obligations in the draft articles that depend on whether criminal jurisdiction is exercised, in particular draft articles 9 and 14, are now sufficiently clearly delimited. As the commentary to these draft articles does deal with the concept of 'criminal jurisdiction', this advisory report will consider the commentary in more detail below when discussing the relevant draft articles.

The CAVV believes that it would nonetheless be desirable for the terms immunity *ratione materiae* and immunity *ratione personae* to be defined at the start of the draft articles. These terms are now implicitly defined in those instances where the content and scope are described, but as the content and scope can also be interpreted in the light of the rationale, or normative basis of the rules, it would be logical and useful to have a preliminary consideration of the rules as such. As noted above, particularly in respect of functional immunity, differences of opinion regarding the expression 'official act' can be traced back to differences of opinion about the nature and rationale of the immunity rule. And in the case of personal immunity, the personal scope of the rule can be understood only in the light of the nature and rationale of this form of immunity. Although it is certainly possible to discuss the nature and rationale of the rules in the comments to other draft articles, the CAVV believes that it would be preferable to include a brief consideration of these two key concepts at the start of the draft articles.

***Part two: Immunity* ratione personae**

Part Two concerns the immunity *ratione personae* of the 'troika', namely the Head of State, the Head of Government and the Minister for Foreign Affairs.

This part consists of two draft articles dealing with three elements: the subjective element (draft article 3) and the material and temporal elements (draft article 4).

— 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.*

Draft article 3 contains a closed list of persons entitled to immunity *ratione personae*: the Head of State, the Head of Government and the Minister for Foreign Affairs, together known as the 'troika'. The commentary explains that the immunity of the members of the troika is based on two grounds: 1) under international law, these persons represent the State as soon as they take up their office, or, as the ICJ put it in the *Arrest Warrant* case, 'he or she is recognized under international law as representative of the State solely by virtue of his or her office',[54] and 2) the importance of the uninterrupted performance of these functions. To quote the ICJ, a Minister for Foreign Affairs is 'in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings' and because '[i]n the performance of these functions, he or she is frequently required to travel internationally, [he or she] must be in

a position freely to do so whenever the need should arise'.[55] The commentary also explains that some ILC members consider that other high-ranking State officials who frequently travel outside the national territory and represent the State, such as a Minister of Defence or a Minister of International Trade, are also entitled to the protection of this rule.[56] They refer in this connection to the fact that in its judgment in the *Arrest Warrant* case, the ICJ stated that 'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.'[57] According to advocates of a broader application of the rule, the ICJ apparently also assumes that the three officials mentioned are merely examples of officials protected by the rule. This position has also been taken by a handful of domestic courts.[58]

However, the CAVV agrees with the ILC that only the three named officials are protected by this far-reaching form of immunity *ratione personae*.[59] The CAVV's understanding is that the reference to the troika was intended only to indicate the substantive effect of the immunity. After all, this interpretation does not prevent other State officials from enjoying immunity *ratione personae* in certain circumstances. In particular, State officials who are on an official ('special') mission abroad are protected by ad hoc personal immunity during the mission.[60] However, the personal immunity referred to in these draft articles is an immunity that applies at all times, i.e. regardless of whether a State official is present abroad and regardless of the purpose for which the official is present abroad. This far-reaching form of immunity shields the members of the troika from any exercise of foreign criminal jurisdiction, even where that exercise of jurisdiction does not in any way prevent them from travelling abroad for the purpose of maintaining international relations. This is illustrated by the dispute that led to the ICJ's judgment in the *Arrest Warrant* case. The disputed Belgian arrest warrant made an exception for official visits by the Congolese Minister of Foreign Affairs to Belgium, but the issuing and circulation of the warrant was nonetheless regarded as a violation of the minister's immunity and inviolability.[61]

The immunity of the troika thus goes well beyond ad hoc personal immunity and diplomatic immunity. Although diplomats play a key role in maintaining diplomatic relations, diplomatic immunity is limited to the jurisdiction of the receiving State – and any transit States[62] – although arrest and prosecution in a State other than the receiving State would make it impossible for the diplomat to perform their functions. In short, diplomatic immunity protects the performance of a diplomat's functions (not the individual), but does not go so far as to ensure that the diplomat can continue performing these functions at all times. The far-reaching personal immunity of the troika must therefore certainly be understood in part in the light of the first ground mentioned above: i.e. a Head of State, Head of Government or Minister for Foreign Affairs is recognised under international law as a representative of the State 'solely by virtue of his or her office'.[63] This does not apply to State officials who are not members of the troika. Although other high-ranking State officials also play an important role in maintaining a State's international relations, the CAVV considers that for the effective performance of these functions it is sufficient for such officials to enjoy ad hoc diplomatic immunity during missions.

The CAVV believes that the words 'such as' in the *Arrest Warrant* case can be interpreted differently from the meaning attributed to them by proponents of a broader application of the immunity of the troika. The ICJ merely stated that other officials may also enjoy immunity from foreign jurisdiction, but the reference to diplomatic and consular officials in itself shows that it is unlikely that the ICJ intended that the (personal) immunity of other officials should have the same content and scope as that of the members of the troika; after all, diplomatic and consular officials each enjoy a different and, in both cases, much less far-reaching, form of personal immunity than the members of the troika. This much-discussed phrase can thus also be understood as referring to the form of personal immunity related to diplomatic immunity, namely ad hoc diplomatic immunity, which provides protection to State officials on an official mission.

— 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.

Draft article 4 deals with the temporal and material elements of immunity ratione personae.

As far as the temporal element is concerned, the ILC notes that paragraph 1 provides for Heads of State, Heads of Government and Ministers for Foreign Affairs to enjoy immunity *ratione personae* only during their term of office. That is only logical, because after their term of office they no longer represent the State. As regards the material element, the ILC states in paragraph 2 that this immunity is complete: it extends to both private and official acts, including acts committed by the person concerned *before* his term of office.

The CAVV considers that the scope of the immunity *ratione personae* reflects positive law. The rules laid down in draft article 4 are based on the ICJ's *Arrest Warrant* judgment.[64] The immunity *ratione personae* of the troika from the domestic jurisdiction of other States is absolute: this immunity also extends to all acts, including those that qualify as crimes under international law.[65] There is no indication that customary international law has changed in the meantime.

In draft article 4, paragraph 3, the ILC has included a 'without prejudice' clause. This clause explains that, after cessation of immunity *ratione personae*, members of the troika can still be protected by immunity *ratione materiae*. Indeed, in so far as the person concerned has performed acts in an official capacity during the term of office as representative of the State, functional immunity will apply (see draft articles 5 and 6 below).

***Part three: Immunity* ratione materiae**

Part Three concerns the functional immunity or immunity r*atione materiae* of officials of foreign States. As in Part Two, the ILC distinguishes between a subjective element (draft article 5) and a material and temporal element (draft article 6). In the controversial draft article 7, the ILC provides for a limitation of, or exception to, functional immunity in respect of crimes under international law.

— Article 5

Persons enjoying immunity ratione materiae

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

Pursuant to draft article 5, foreign State officials who act in that capacity enjoy functional immunity. Unlike draft article 3 on immunity *ratione personae*, draft article 5 does not list specific persons entitled to functional immunity. Nor is that necessary: all state officials (i.e. including former State officials) enjoy functional immunity. Logically, the commentary refers back to draft article 2 (a) for the definition of State official ('"State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials.').

— 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.

Draft article 6 clarifies the material and temporal elements of functional immunity. Paragraph 1 provides that functional immunity extends only to acts performed in an official capacity. This means that State officials cannot claim functional immunity with respect to acts performed in a private capacity (unless, of course, they enjoy immunity *ratione personae*). Paragraph 2 indicates that functional immunity is *permanent*: in so far as persons in a position of authority have performed an act in an official capacity, they will *always* be able to invoke functional immunity, even after ceasing to hold office. In the opinion of the CAVV, none of this is controversial and the provisions reflect the law as it stands. Paragraph 3 provides that persons who have enjoyed immunity *ratione personae* continue to enjoy functional immunity after their term of office with respect to acts performed in an official capacity during that term of office. Strictly speaking, this provision is superfluous as it is implicit from paragraphs 1 and 2 and, furthermore, draft article 4 already provides for continuation of functional immunity after cessation of the personal immunity of members of the troika. The CAVV therefore considers that it would be better for this information to be included in the commentary to draft article 6.

— 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:*

   (a) crime of genocide;
   (b) crimes against humanity;
   (c) war crimes;
   (d) crime of apartheid;
   (e) torture;
   (f) enforced disappearance.

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.*

1. The decision to formulate draft article 7 as *lex ferenda*

Draft article 7, as adopted on first reading, provides that functional immunity does not apply in respect of a number of specified crimes under international law. It is without doubt the most controversial provision of these ILC draft articles. As noted in the introduction to this advisory report, when this draft article was provisionally adopted in 2017 it even came to a vote – something which is highly exceptional.[66] The ILC has, in its own words, included this draft article because it considers that (1) there is a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law, and (2) it is necessary to recognise the unity and systemic nature of international law and to prevent immunity from becoming a procedural mechanism to block the implementation of international law norms regarding accountability and individual criminal responsibility.[67] Although the commentary does not explicitly state that the ILC considers draft article 7 to be a progressive development of the law *(lex ferenda)*,[68] the wording used in the commentary does not support the view that it represents the state of the law as it is *(lex lata)*, and it is apparent from the records of the Commission's deliberations that there was no majority in the ILC to adopt draft article 7 as *lex lata*.[69]

The CAVV considers that presenting the exception to functional immunity as a desirable direction for development of the law fails to do justice to the complex State practice regarding the prosecution of crimes under international law committed by foreign State officials. State practice in the wake of the Second World War leaves little doubt that States intended to make it possible for officials suspected of crimes under international law to be tried by foreign courts. On the other hand, since the 1990s in particular, when the rule was first applied on a larger scale and other than in the context of the Second World War, state practice *also* reveals widespread resistance to the rule, which has become apparent precisely

through the work of the ILC. It follows that the exception to functional immunity for crimes under international law seems not so much a desirable development as a rule that needs further delimitation (as discussed in more detail in relation to the procedural safeguards of Part Four). Although an exhaustive analysis is not possible within the limited scope of this advisory report, the CAVV will endeavour to explain both developments briefly below.

In 1945, States were united in their desire to ensure that acts that had shocked the international legal order, such as those committed by the Nazi regime, would be prosecuted and punished, no matter where in the world the suspects might be and regardless of whether these crimes had been committed in an official capacity. For example, the Nuremberg Tribunal stated: 'The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.'[70] A General Assembly resolution unanimously adopted by States a short while later confirmed that this principle has general application in the trial of 'offences against the peace and security of mankind'.[71] Principle III of the Nuremberg Principles, as adopted by the ILC in 1950, contains a comparable provision: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'[72] And the ILC confirmed in 1954 that these principles apply to proceedings before both national and international tribunals.[73] Moreover, to ensure the trial of future international crimes, States adopted a series of conventions, under which the possibility of trial by a foreign court was expressly made possible and in some cases even mandatory.[74] Under customary international law, crimes under international law are crimes for which there is individual responsibility under international law. Furthermore, it follows from the very nature of the concept of 'international crime' that all States have the right to exercise universal jurisdiction precisely in order to determine that personal responsibility of the State official.[75] Even *before* the ILC started work on the draft articles, it was clear that the principle of universal jurisdiction had developed into a principle of positive law in customary international law, and the fact that some States have criticised certain applications of the principle does not detract from this.[76] In the *Eichmann* case, the Israeli Supreme Court put it this way: 'Of such odious acts it must be said that in point of international law they are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.'[77]

However, in the ILC commentary to draft article 7 these conventions and the developments in international criminal law are not presented as directly affecting the functional immunity rule, but are instead part of a discussion about values and the systemic interpretation of international law. This does not make clear how the values and developments in question are relevant in determining the content and scope of the rule in terms of positive law. Special Rapporteur Escobar Hernandez's fifth report identified the importance of various other rules of international law as follows: 'Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm.'[78] The fifth report then examined the subjects of *jus cogens*, the fight against impunity, the right to reparation, the obligation to prosecute crimes under international law or other international crimes and concluded that 'the arguments that have been analysed above make it clear that there are sufficient grounds in contemporary international law to conclude that the commission of international crimes *may* constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.'[79] In other words, developments in international criminal law are presented as arguments for adapting the existing rule of customary law. However, arguments about the *lex lata* content and scope of customary

international law can also be coherent when they give effect to key concepts that define a rule, in cases where the normative basis or rationale of the rule serves as the guide. Lord Sumption explained this in relation to restrictions on State immunity in a case before the UK Supreme Court:

> '[T]he adoption of the restrictive doctrine has not proceeded by accumulating exceptions to the absolute doctrine. What has happened is that governments, courts and writers of authority have been prompted by the widening scope of State operations and their extension into commerce and industry, *to re-examine the true basis of a doctrine* originally formulated at a time when states by and large confined their operations in other countries to the classic exercises of sovereign authority. The true basis of the doctrine was and is the equality of sovereigns, and that never did warrant immunity extending beyond what sovereigns did in their capacity as such.'[80]

The position that functional immunity does not extend to crimes under international law can be defended as a *lex lata* position by reference to the normative basis, or rationale, of the functional immunity rule and the developments in international criminal law that have a direct bearing on it. As States have unanimously imposed a limit on their freedom to determine the mandate of State officials in the form of individual responsibility for crimes under international law, and as States have determined that, in certain circumstances, *all* States may try those suspected of committing these crimes and that determining whether a mandate has been exceeded no longer falls within the exclusive jurisdiction of the sending State of the official, individuals can no longer hide behind functional immunity (although this does not, however, prevent the State itself from incurring responsibility for the actions of its official and being able to invoke State immunity when sued in civil proceedings before a foreign court).

The UK House of Lords held in the *Pinochet* case that States that are party to the Torture Convention cannot invoke functional immunity if their officials are prosecuted for torture in other State Parties.[81] As the involvement of State officials is part of the definition of torture, and as the Convention imposes an obligation on States to prosecute persons suspected of torture who are within their territory, the Law Lords considered the only logical conclusion to be that functional immunity was not applicable. To quote Lord Millett, 'No rational system of criminal justice can allow an immunity which is coextensive with the offence.'[82] Hence Chile could not invoke functional immunity to protect its former Head of State from British jurisdiction in extradition proceedings instituted by Spain, which wished to prosecute Pinochet for instances of torture committed in Chile during his term of office.

The CAVV's advisory report no. 20 on the immunity of foreign State officials, written in 2011, was also based on these principles and extended the logic of the *Pinochet* judgment to conventions in which the role of the State is not part of the definition of the international crime as in the Torture Convention because the conventions in question are actually directed at state officials.[83] The CAVV first considered the various international conventions providing for the individual responsibility of perpetrators of international crimes and the jurisdiction of foreign courts in determining such responsibility, and concluded that '[i]f it were to be possible for state officials, in the event of prosecution by a foreign state, to evade the operation of these conventions by alleging that the act in question was committed in an official capacity and is covered by functional immunity, this would be contrary to both the letter and the spirit of the conventions.'[84] The CAVV also argued that functional immunity should not apply to crimes under international law outside the treaty context, but its use of the expression 'marked trend' to describe the state of international law on this point still reflected a cautious approach.[85]

It is noteworthy that the government response to the CAVV's 2011 advisory report immediately opened the door to a *lex lata* approach to the non-applicability of functional immunity to international crimes. The Minister wrote that 'the functional immunity [that Heads of State, Heads of Government and Ministers for Foreign Affairs] continue to enjoy once their period in office has ended will most likely not prevent a Dutch criminal court from exercising its jurisdiction,

if there is reason to believe that international crimes have been committed. The final judgment lies with the court.'[86] Subsequently, in 2015, the Dutch government also notified the ILC, in respect of individuals enjoying personal immunity, that 'officials suspected of having committed international crimes in their official capacity, should not be able to claim immunity successfully once they have left office. The functional immunity that those concerned enjoy after they have left office will probably not constitute an obstacle to the exercise of jurisdiction by a Dutch court, if a reasonable suspicion exists that they have committed international crimes. Any final decision on this point must, of course, be made by the courts.'[87] In 2016, the Netherlands formulated the same position in unmistakably *lex lata* terms with regard to all State officials, citing Dutch case law: 'The Netherlands further considers that functional immunity does not extend to the commission of international crimes committed by those concerned in their official capacity.'[88]

When the CAVV revisited the issue in 2022, on this occasion in relation to the crime of aggression, it formulated its support for the exception differently, stating that 'there are good arguments for saying that functional immunity from criminal jurisdiction does not apply to international crimes.'[89] As explained above, the CAVV is of the opinion that the relationship between the two principles of international criminal law – individual responsibility and universal jurisdiction – and the rule of functional immunity is more direct than was assumed in 2011. The CAVV considers that the argument that functional immunity does not apply to crimes under international law for which individual criminal responsibility and universal jurisdiction are accepted under customary international law is legally convincing. The CAVV shares this view with a considerable number of leading authors,[90] and in 2001 and 2009 the Institute of International Law too concluded that functional immunity does not extend to international crimes.[91] Likewise, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed in 1997 that 'exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity *from national or international jurisdiction* even if they perpetrated such crimes while acting in their official capacity.'[92]

However, it cannot be denied that the manner in which universal jurisdiction has been exercised and used since the 1990s was not foreseen by States and that, in view of these developments, a large number of States no longer support the unrestricted limitation of functional immunity with regard to crimes under international law (or with regard to international crimes under international conventions). The British *Pinochet* case can be seen as a turning point.[93] Although the House of Lords ruling was explicitly limited to the specific provisions of the Torture Convention, it did draw attention to the possibility of exercising universal jurisdiction in order to try State officials before foreign courts. Subsequently, there were numerous attempts to prosecute current and former foreign State officials for alleged international crimes during brief visits to foreign territory, often prompted and supported by human rights organisations.[94] State practice and *opinio juris* in support of draft article 7 is by no means insignificant.[95] Well-known examples are the judgment of Amsterdam Court of Appeal in the *Bouterse* case (2000),[96] the judgment of the Italian Supreme Court in the *Lozano* case (2008),[97] the judgment of the Swiss Federal Criminal Court in the *Nezzar* case (2012)[98] and, more recently, the judgment of the German Supreme Court (2021) in criminal proceedings against Syrian government officials.[99]

It is noteworthy, however, that the individuals in these cases – and in other cases in which universal jurisdiction was exercised in respect of international crimes – were generally no longer in government service, had voluntarily left their country (for example by emigrating or seeking refuge in other countries), had fallen into disgrace in their own country or held a relatively low-ranking position in the state hierarchy ('low-cost defendants').[100] In addition, the home State did not invoke the immunity of the suspect in all cases.

Moreover, the relevant case law is not entirely consistent. In 2005, for example, the Dakar Court of Appeal refused, on the grounds of functional immunity, to extradite Hissène Habré, Chad's

former Head of State,[101] to Belgium, which wanted to prosecute him for torture, genocide, crimes against humanity and war crimes. However, it should be noted that the Extraordinary African Chambers of the Senegalese courts *nonetheless* exercised their jurisdiction over Habré in 2016; evidently, they did not consider immunity to be an obstacle.[102] And in 2021, in apparent contradiction to its previous judgment in the *Barbie* case,[103] the criminal chamber of the French Court of Cassation held that the allegation against former President Bush and other US government officials that torture was committed at Guantanamo Bay did not warrant an exception to immunity.[104] However, in 2023, the French Court of Cassation, in plenary session, ruled that France could exercise its universal criminal jurisdiction over a former member of the Syrian security services charged with international crimes, which implies that functional immunity was not considered relevant.[105]

The context in which the Nuremberg Principles were adopted, namely a united international community and a widely shared desire to prosecute the crimes of the Nazi regime that had already been established d*e facto*, differs fundamentally from the circumstances in which the exception to functional immunity is often invoked today. For a long time, States have not actively exercised their universal jurisdiction in the fight against impunity for international crimes. Owing to the Cold War, the practice was, for many years, mainly confined to prosecuting former Nazi criminals in countries to which they had fled after the Second World War.[106] Only after 1990 did international criminal law evolve further, in particular through the establishment of the ad hoc tribunals for Yugoslavia and Rwanda, the exercise of universal jurisdiction, particularly by a number of European countries, and the entry into force of the Statute of the International Criminal Court in 2002. It was not until courts began again to effectively exercise their jurisdiction over State officials of other countries that it became clear to some States that the principles they had wholeheartedly embraced in the aftermath of the Second World War could at the current juncture cause serious political tensions and disrupt international relations. Although most of the cases that were brought were based on strong evidence that the accused persons bore responsibility for committing international crimes, it became clear that many States had great difficulty in accepting the untrammelled application of international criminal law, in particular the jurisdiction of other States over their current and former officials. Ironically, the ILC's work has only reinforced the resistance, or in any event made it visible. It is apparent from the input of States in the work of the ILC in the Sixth Committee of the General Assembly that a good many States now do not consider the exceptions for crimes under international law laid down in draft article 7 to constitute positive law[107] while only a limited number take a different view.[108] A slightly larger number of States support draft article 7 as a desirable direction for development of the law. Other States, particularly members of the Non-Aligned Movement (such as Iran), but also countries such as the United States, Israel and Russia, now *oppose* the possibility of an exception to functional immunity for crimes under international law.[109] The CAVV acknowledges that many States have objections to the exception, perhaps due to increased fear of politically motivated prosecutions.[110] The CAVV considers that this opposition should be taken seriously and that possible risks should therefore be addressed by means of procedural rules and safeguards (see below), albeit without undermining the fundamental non-applicability of functional immunity in respect of crimes under international law.

There are therefore two sides to the debate on the applicability of functional immunity to crimes under international law. On the one hand, there is international criminal law and the conviction deeply entrenched in State practice that individuals responsible for such crimes should not be able to hide behind the cloak of sovereignty of the State for which they perform their duties; and, on the other, doubts have arisen in many States about the complete abandonment of the protective effect of functional immunity. The CAVV considers that the argument that functional immunity does not apply to crimes under international law for which individual criminal responsibility and universal jurisdiction are accepted under customary international law is still legally convincing. However, the CAVV also believes that the marked resistance of many

States to certain applications of the functional immunity exception is not unfounded and that it is important for the ILC at this stage of the project, and in the light of the opposition and resulting deadlock, to work to achieve a solution.

The ILC has tried to do this by including procedural safeguards in Part Four designed to overcome resistance to draft article 7 by providing sufficient guarantees against politically motivated and unfounded prosecutions. But, without a clear explanation of the legal status of draft article 7, this road seems to be a dead end. Opponents will feel supported by the use of *lex ferenda* terminology in the commentary to draft article 7, and will therefore have no reason whatever to accept the inclusion of draft article 7 in any binding treaty text. So a treaty is doomed to fail in advance. Only if the ILC manages to provide a clear explanation of the arguments in favour of a *lex lata* approach and thus create scope for the further development of these arguments in future national proceedings is there a chance that opponents of this development will opt for the lesser of the two evils, namely a treaty text that contains at least sufficient safeguards to protect the legitimate interests of the State of the official.

2. Limitation to certain crimes under international law

The ILC has decided to apply the exception or limitation[111] set out in draft article 7 only to the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance. The commentary explains the choice as follows:

> 'First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law *(jus cogens)*. Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute, where they are described as 'the most serious crimes of concern to the international community as a whole.'[112]

The CAVV would favour a more generally formulated rule providing for the limitation of functional immunity to be based on the factors of individual criminal responsibility and universal jurisdiction. Draft article 7 would then be worded in such a way that functional immunity is not applicable to customary international crimes to which universal jurisdiction applies, of which the commentary could naturally provide some uncontroversial examples. The commentary could also indicate that immunity may obviously also be limited by treaties. In the context of this ILC project, it is not necessary to take a position in the debate about which crimes exactly qualify as crimes under customary international law, nor in the debate about whether universal jurisdiction is applicable to all crimes under international law. The current list of crimes to which functional immunity does not apply gives rise to much unnecessary debate and questions, and the commentary to draft article 7 also fails to explain why certain crimes are on the list and others are not.

3. Two categories of crime that draft article 7 no longer mentions: corruption-related crimes and crimes committed in the territory of the forum State without that State's consent to the performance of the activity that gave rise to the commission of the crime

Initially, draft article 7 was not limited to crimes under international law. Also excepted from the scope of functional immunity in the text proposal of Special Rapporteur Escobar Hernández were 'corruption-related crimes' and 'crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed'.[113] These two categories of crime have not been included

in the final text of draft article 7. However, the commentary notes that '[t]his does not mean... that the Commission considers that immunity from criminal jurisdiction *ratione materiae* should apply to these two categories of crimes'.[114]

As regards crimes of corruption, the ILC added that '[t]hey do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.'[115]

It was already apparent from the debate about crimes committed in the territory of the forum State that the Special Rapporteur's text proposal was misguided. The proposal was based on the so-called 'territorial tort exception' as this may possibly apply to State immunity. Although the status of this exception under customary international law is not yet fully established, many States recognise an exception to the State immunity rule for claims 'to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property'[116] arising from torts committed by foreign States in the territory of the forum State. However, the territorial exception to functional immunity is of a different nature: it may apply only if a State official is present in the territory of the forum State without consent, or performs certain acts in that territory without consent. This possible exception was discussed at length in Special Rapporteur Kolodkin's second report:

> 'If a State did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that State. ...the State, consenting to the presence and activity of a foreign official in its territory, consented in advance to the immunity of that person, in connection with his official activity. If, though, there was no such consent, and the person is not only acting illegally but is present in the State territory illegally, then it is fairly difficult to assert immunity. Examples of this type of situation include espionage, acts of sabotage, kidnapping, etc. In judicial proceedings concerning cases of this kind, immunity has either been asserted but not accepted, or not even asserted.'[117]

As regards the non-inclusion of this category, the commentary to draft article 7 notes as follows: 'The Commission considers that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.'[118]

The CAVV is not convinced by the reasoning in the commentary for the omission of these two categories of crime from the list of crimes to which functional immunity does not apply. First of all, although these crimes do not constitute 'official acts', this does not explain why they should not be mentioned in draft article 7. After all, even with regard to crimes under international law, the Commission leaves open whether or not they are official acts;[119] that is precisely why the draft article speaks of *non-applicability* of, rather than *exceptions* to, functional immunity. This is because non-applicability can be the result of an exception to the rule or a limitation resulting from the application of the rule. More importantly, however, the CAVV considers that the chosen solution does not provide enough clarity. Although the parts of the commentary cited above seem clear, the commentary as a whole still leaves room for debate.

As regards the definition of corruption, there was clearly a difference of opinion within the ILC. The commentary to draft article 7 mentions that some members of the Commission regard corruption as an official act whereas others consider it is a private act.[120] Furthermore, the explanation and analysis of the limitation concerning territorial crimes committed 'without consent' is not sufficient to bring the debate that undoubtedly exists on this point to an authoritative conclusion. Apparently, the heated debates about crimes under international law have prevented an in-depth discussion of these two categories of crimes.

The CAVV believes that the applicability of functional immunity to crimes of corruption and to territorial crimes committed without the forum State having given consent to enter its territory

or to perform within its territory the sovereign activity in the context of which the crime was committed is a subject that deserves more attention and discussion. There seem to be strong indications that functional immunity is at least partly limited in the case of both these categories of crime, but the contours of these exceptions or limitations are unclear.[121] The CAVV therefore considers it advisable to devote separate draft articles to these two types of crime and for the ILC's position to be set out in greater depth.

Part Four: Procedural provisions and safeguards

Part Four contains the procedural rules governing the invocation and application of personal and functional immunity, some of which have been specifically drafted with the controversy about draft article 7 in mind. According to the ILC, these procedural provisions and safeguards serve three purposes:[122]

1. maintaining a balance between the rights and interests of the State of the official and the rights and interests of the forum State;
2. promoting mutual trust and the stability of international relations;
3. and ensuring that the exercise of criminal jurisdiction with regard to an official of another State is not abusive or politically motivated.

The CAVV notes that other treaties that codify international immunity rules contain hardly any procedural rules. The Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the UN Convention on State Immunity contain a provision on the waiver of immunity, but no provisions relating to the invocation of immunity, notification to the foreign State, or the process of determining immunity. In Part Four, the ILC is clearly searching for *new* rules which a possible future convention could contain.

Below, the CAVV will provide article-by-article commentary on the main points and, above all, will examine whether the procedural safeguards as they are now formulated, in particular in draft article 14, paragraph 3, sufficiently meet the objections of States to an exception to functional immunity for crimes under international law.

— 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.

Draft article 8 makes clear that the procedural provisions and safeguards contained in Part Four apply to all exercises of jurisdiction over foreign State officials, current or former, where the provisions of Parts Two and Three of the draft articles are at issue. The draft article has been included to address the concerns of some ILC members and reaffirm that Part Four also applies when jurisdiction is exercised pursuant to the exception or limitation set out in draft article 7. Although the CAVV considers that, in view of the content of the procedural provisions and safeguards, the applicability of Part Four is not in question in the case of prosecution of crimes under international law, it can appreciate the desire not to leave any uncertainty whatever about this. As it stands, however, draft article 8 gives the impression that Part Four applies to all exercises of jurisdiction over crimes committed by foreign State officials, current and former. Nonetheless, it does not seem to be the intention that the procedural rules and safeguards should also apply when a current or former official who enjoys only functional immunity is suspected of committing a crime in a private capacity. For example, does Part Four apply when a retired police officer is suspected of committing a murder while abroad? The CAVV believes that this would not be the case, and is of the opinion that the wording of draft article 8 requires further delimitation.

— 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.

Draft article 9 provides that once the forum State becomes aware that a current or former official of another State may be affected by the exercise of its criminal jurisdiction, it must examine the question of immunity without delay. This is a preliminary examination which does not answer the question of *whether* immunity is actually applicable – this *determination of immunity* is regulated separately in draft article 14. Neither here nor in the commentary does the ILC indicate what is meant by 'competent authorities'. As the commentary explains, this depends on the legal system of the forum State and must be assessed on a case-by-case basis.[123] The commentary defines 'exercise of criminal jurisdiction' as 'such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts'.[124] The obligation to examine the question of immunity arises only if the official 'may be affected by the exercise of the criminal jurisdiction of the forum State'. According to the ILC, this is the case only 'if it hinders or prevents the exercise of the functions of that person by imposing obligations upon him or her'.[125] The commentary emphasises that the collection of evidence in the criminal investigation can proceed without examination of the question of immunity if this does not impose any obligations on the official under the domestic law of the forum State.[126] Paragraph 2 provides that the examination referred to in paragraph 1 must *always* be carried out before criminal proceedings are initiated and before coercive measures are taken that may affect an official of another State, including measures that may affect the inviolability of the official.

The CAVV would make four observations about this draft article and the accompanying commentary.

First, the CAVV considers that the discussion of the expressions 'criminal jurisdiction' and 'criminal proceedings' in the commentary to draft article 9 raises questions. How do immunity rules relate to the imposition of sanctions, which are understood to be restrictive measures of an administrative nature such as an entry ban or the freezing of assets (for example, EU sanctions against Russian officials)? And what rules apply when State officials are called to testify: does this come within the scope of this draft article or not? The CAVV believes that such questions need to be addressed in these draft articles and thus that the terms should be defined in draft article 2.

The second point concerns the comments explaining the phrase 'may be affected by the exercise of its criminal jurisdiction' in paragraph 1. The commentary states that a State official is affected only if an act of the forum State 'hinders or prevents the exercise of the functions of that person by imposing obligations upon him or her.' As former State officials are also protected by functional immunity, the CAVV considers that this explanation needs to be altered. In the opinion of the CAVV, it would be preferable to treat only the *constraining nature* of the act as decisive for the question of whether immunity prevents the performance of the act. A State official is affected by the exercise of criminal jurisdiction if the official is subject to a 'constraining act of authority',[127] regardless of whether that official is thereby also hindered in the exercise of his functions.

Third, the CAVV considers that the distinction between 'examination of immunity' in draft article 9 and 'determination of immunity' in draft article 14 is still insufficiently clear from the

commentary. The CAVV also wonders why draft article 9 does not provide, as draft article 14 does, that the obligation in this draft article 'does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official'. By providing for this in draft article 14, but not in draft article 9, the ILC creates the impression that measures to prevent a State official from leaving the territory are *not* allowed during the period in which the examination of immunity is taking place. The CAVV wonders whether it would not be better to treat the examination and determination of immunity as a continuous process and to regulate it in a single draft article.

Finally, the CAVV would observe that draft article 9 refers to the possible inviolability of foreign State officials and repeats the position already taken in respect of draft article 1, namely that the draft articles should also take into account international law on the inviolability of State officials. Inviolability applies only when personal immunity is at issue, and draft article 9 (like draft article 14) does not clearly distinguish between these two categories. The CAVV believes that national authorities need more guidance in determining what actions are or are not permitted before the final determination of immunity, and what role the distinction between personal and functional immunity plays in this. It should be noted in this connection that inviolability entails more far-reaching procedural restrictions than merely barring measures that limit the freedom of the official. For example, in *Djibouti v. France* the ICJ explained that inviolability 'imposes on receiving States the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability'.[128] This obligation means that persons enjoying inviolability should be treated with due respect. In *Djibouti v. France*, the ICJ held, for example, that if it were to be established that, during an official visit by the Head of State of Djibouti to France, the French authorities had leaked confidential information to the media concerning a witness summons addressed to that Head of State, this would constitute a violation of the inviolability of the Head of State.[129] However, it has been observed that in this context there is only a thin dividing line between the requirements of international courtesy and obligations under international law,[130] and it would be useful if the ILC could provide some clarity here by taking the implications of this aspect of inviolability into account in Part Four.

— 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.

Draft article 10 obliges the forum State to notify the State of the official of any intention to initiate criminal proceedings or take coercive measures against the official. The commentary explains that it is for the State, not the official, to decide on the invocation and waiver of immunity, but in order for the State to be able to exercise those powers it must be aware of the intention to exercise criminal jurisdiction.

The only comment the CAVV would make in respect of this draft article concerns its relationship with draft article 14, paragraph 4 (b). According to that draft article, the obligation to determine immunity before taking coercive measures that may affect the official 'does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.' As draft article 10 does not make this reservation, it would seem to follow that the notification obligation also applies to mandatory measures that are necessary in order to ensure that any future criminal

proceedings can take place. The CAVV is of the opinion that the exception of draft article 14 should also be included in draft article 10 (and, as stated above, also in draft article 9) in order to prevent the official in question from being able to leave the territory of the forum State in time after notification to avoid prosecution.

— 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.*

Draft article 11 provides that a State *may* invoke the immunity of its officials. This makes it clear that the invocation of personal and functional immunity is not a precondition for the examination of the issue of immunity by the forum State.[131] On the contrary, as just noted, the forum State is obliged to examine the issue of immunity as soon as it becomes clear that a current or former State official may be affected by the intended exercise of criminal jurisdiction. The CAVV considers that it would be a good thing if the ILC were to provide explicitly in the commentary to draft article 11 that the forum State is obliged to examine *proprio motu* the issue of immunity.

However, invoking immunity is not entirely without legal consequences. In the context of functional immunity, the question of whether or not the State of the official has invoked immunity may nonetheless play a role in determining whether the act for which the official is being held responsible was committed in an official capacity, as will become clear in the discussion of draft article 14 below.

Draft article 11 requires States to invoke immunity in writing and as soon as possible. The first point the CAVV would make is that the formulation of obligations with regard to the invocation of immunity when the invocation itself is not mandatory is puzzling. Moreover, as these requirements are not a consequence of current customary law,[132] the question arises of why the ILC believes that they would help to achieve the objectives stated above. Possibly, the ILC believes that the requirements contribute to the stability of international relations as the fact that the invocation is in writing helps to avoid any later disputes about whether the State of the official has invoked immunity, and timely invocation means that the forum State can take the position of the State of the official into account when determining immunity in accordance with draft article 14, paragraph 2 (b). As it stands, however, the commentary does not make this clear.

— 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.*

Draft article 12 deals with the subject of waiver of immunity. As immunity is a procedural rule that does not exempt protected individuals from the operation of the law of another State, the State of the official, as the right-holder, may, by waiving immunity, enable the forum State to exercise criminal jurisdiction after all. The CAVV wishes to raise two brief points in relation to this draft article.

First, the CAVV is of the opinion that paragraph 5, which provides that waiver is irrevocable, needs to be qualified. The ILC explains that paragraph 5 reflects a rule of international law and is based on the principle of good faith and the importance of legal certainty.[133] Although no provision of this kind is found in comparable articles in other conventions, for example the Vienna Convention on Diplomatic Relations, it is generally assumed that waiver is indeed irrevocable. On the subject of the relevant provision in the Vienna Convention on Diplomatic Relations, Eileen Denza notes, for instance, that 'it is not possible for the sending State to revoke a waiver once it has been given with authority and with full knowledge of any entitlement.'[134] She refers in this connection to the ILC's commentary to this article: 'It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance.'[135] Nonetheless, it would be going too far to adopt this principle as a strict rule. Just as the binding nature of conventions is reversible in very exceptional circumstances, so waiver of immunity should, in the opinion of the CAVV, be revocable in very exceptional circumstances. The ILC's *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* also provide that a unilateral act of a State can be revoked in exceptional circumstances. In the commentary, the ILC specifically mentions the doctrine of the fundamental change of circumstances which may, in exceptional cases, allow termination of conventions and is also applicable to unilateral acts.[136] It is evident from the commentary to this draft article that some ILC members had difficulty in accepting paragraph 5: '[...] some members also expressed the view that exceptions to this general rule might be warranted in some situations, such as when new facts not previously known to the State of the official come to light after immunity has been waived; when it is found in a particular case that the basic rules of due process have not been observed during the exercise of jurisdiction by the forum State; or when exceptional circumstances of a general nature arise, such as either a change of government or a change in the legal system, that could result in a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction.'[137] In view of the internal debate about this, the ILC invites States to comment explicitly on paragraph 5.[138] The CAVV considers that it is advisable to qualify paragraph 5, for example by adding the words 'save in exceptional circumstances' or 'in principle' as also advocated by ILC members.

Second, the CAVV believes that it would be useful for the commentary to include a consideration of the distinction between immunity from jurisdiction and immunity from execution and, on a related subject, also how waiver of immunity affects inviolability in cases where this is applicable. In her discussion of article 32, paragraph 4 of the Vienna Convention on Diplomatic Relations, Eileen Denza notes that the logic of the distinction between civil proceedings (where a separate waiver is required for the execution of a judgment) and criminal proceedings where this does not appear to be the case does not seem immediately apparent – and in the case of the Vienna Convention does not seem to be a conscious decision either.[139] She argues that 'the better view is that the [Vienna Convention] does not exclude a waiver of immunity by the sending State expressly limited to the proceedings necessary to determine guilt'.[140] Conceivably, a State might be prepared to have the guilt of its official established in proceedings before a foreign court, but not prepared to allow any judgment to be executed. Moreover, pecuniary fines imposed in criminal proceedings may also involve issues relating to inviolability of property. The CAVV considers that this issue should in any event be addressed in the commentary.

— 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.*

Draft article 13 provides that the forum State may request information from the State of the official that it considers relevant in determining immunity and that the State of the official will consider such a request in good faith. The CAVV believes that this provision is unnecessary and that it would be more logical to cover this topic in the commentary to draft article 14.

— 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.*

Draft article 14 provides that a decision must always be taken on the question of immunity before criminal proceedings are initiated or coercive measures taken that may affect the State official and any inviolability the official may have, although this does not preclude the taking of measures necessary to ensure that criminal prosecution remains possible. Moreover, this draft article specifies what factors the forum State must take into account in its decision on immunity, *and* formulates a number of additional

safeguards for determining immunity in cases in which draft article 7 may possibly be applicable. The commentary describes this provision as 'one of the most fundamental procedural safeguards contained in this part'.[141] The CAVV would make the following four observations about the draft article, which it views as the most important at this stage.

The first point concerns the clause in paragraph 4 (b), which provides that coercive measures necessary to ensure that criminal proceedings remain possible are excepted from the obligation to make a decision on the question of immunity before coercive measures are taken. The commentary makes it clear that this is not about arrest, but about 'measures of a precautionary nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities.'[142] According to the commentary, the words 'or continuance' mean that coercive measures of this kind may be continued even *after* immunity has been determined. On this point, the commentary states as follows: 'The retention of the power to adopt and continue such coercive measures even after immunity has been determined is justified, in particular, by the fact that the determination may be made at an early stage of the exercise of jurisdiction and then be reversed at a later stage, especially in the judicial phase.'[143] The CAVV is of the opinion that that the present wording and the very limited commentary fail to make clear how this clause relates, in particular, to personal immunity and the accompanying inviolability. This is because the ILC, by using this wording, does not exclude the possibility that even a sitting Head of State may be prohibited from leaving the territory of the forum State after immunity and inviolability have been positively determined. In the opinion of the CAVV, this would in all probability conflict with personal immunity and/or inviolability, and would also be inconsistent with one of the reasons underlying the inclusion of these procedural safeguards, namely to promote mutual trust and the stability of international relations. But even in the case of officials who have only functional immunity (and do not therefore enjoy inviolability), continuance of coercive measures after it has been determined that they are entitled to immunity seems very far-reaching. As draft article 7 still generates so much controversy and for many States agreement with draft article 7 is dependent on the robustness of the procedural safeguards, it is all the more important that this provision should be clarified and delimited.

The second point concerns paragraph 2 (b): 'In making a determination about immunity, such competent authorities shall take into account in particular … whether the State of the official has invoked or waived immunity'. Here too, the CAVV believes that a distinction should be made between personal and functional immunity. In the case of functional immunity, whether or not immunity is invoked may shed light on whether the act with which the official is charged qualifies as an 'act performed in an official capacity' within the meaning of draft article 6, paragraph 1. In particular, non-invocation of immunity (certainly after notification in accordance with draft article 10) would suggest that the State of the official does not consider that the act in question was performed in an official capacity, although regime change may also sometimes explain its silence on this subject. And if a State does invoke immunity, this is in any case an indication that it considers the exercise of foreign jurisdiction to be undesirable. By contrast, personal immunity is absolute and it is not clear to the CAVV how the non-invocation of that immunity by the State of the official is a factor that must be taken into account when the forum State determines immunity, as any waiver of immunity must always be express.

The third point concerns paragraph 5, which provides that any determination that immunity is not applicable is open to challenge through judicial proceedings. The same obligation does not apply in cases where it is decided that immunity *does* apply. The commentary refers to 'the need to strike a balance between the rights of the foreign official, on the one hand, and those of the victims of the crimes he or she is alleged to have committed, on the other' and to 'the right of access to justice, which is a basic component of the right to effective judicial protection',[144] but explains

that the ILC does not wish to oblige States to provide for judicial review of a non-judicial decision that immunity is applicable and instead wishes to leave this to States themselves. One reason for this is that a prosecutor's decision not to prosecute when immunity exists is not subject to judicial review in all States. Although the CAVV understands this reasoning and appreciates that mandatory judicial review of all immunity decisions is not acceptable to many States, it wonders whether this provision does not too easily allow the interests of the foreign State to override those of victims of alleged crimes.

The fourth and last point concerns the question of whether the additional safeguards contained in paragraph 3 with regard to decisions on immunity in the context of the application of draft article 7 sufficiently address the objections expressed by more and more States to that draft article. The ILC has provided three safeguards. First, paragraph 3 (a) stipulates that the authorities that decide on the question of immunity must be at an 'appropriately high level' (whereas, according to paragraph 1, ordinary decisions are made by the 'competent authorities').[145] Second, paragraph 3 (b) (i) provides that those authorities must assure themselves that there are 'substantial grounds to believe' that the official has committed any of the crimes under international law listed in draft article 7. And, third, paragraph 3 (b) (ii) provides that consideration must be given to the fact that another authority or court is already exercising or intends to exercise jurisdiction over the official.

The three safeguards in paragraph 3 of article 14 raise all kinds of interesting questions, but the CAVV has decided to address only the one crucial question in this advisory report, namely does paragraph 3 succeed in removing the objections to draft article 7? In any event, a few ILC members who had voted against the provisional adoption of draft article 7 in 2017 were still unconvinced in 2022, and emphasised that the procedural safeguards did not remove their fundamental objections to draft article 7.[146] Likewise, during the annual meeting of the Sixth Committee of the United Nations General Assembly at the end of 2022, the views of States that had been previously critical of the work of the ILC remained unchanged: for example, the United States spoke of 'longstanding concerns (…) that remain unaddressed'.[147] Below, the CAVV makes two suggestions for ways of further strengthening the safeguards of draft article 14, paragraph 3.

The first suggestion builds on paragraph 3 (b) (ii), which requires the forum State, when deciding on immunity, to give consideration to any request or notification by another authority or court regarding its exercise of or intention to exercise criminal jurisdiction over the official. This provision obliges the forum State to consider a request or notification from any other authority or court that exercises or intends to exercise jurisdiction over the state official. This may be an international court, such as the International Criminal Court, the State in whose territory the crime was committed or the State whose national committed the crime. The commentary to the provision is worded cautiously and merely states: '[A]ssessing whether a court other than those of the forum State is exercising or intends to exercise jurisdiction may be a useful tool for avoiding a conflict between respect for immunity and establishment of criminal responsibility for the commission of crimes under international law. This amounts to an enhanced procedural safeguard for the purposes of Part Four of the present draft articles.'[148]

The CAVV wonders whether the jurisdictional claim of the State of the official could not be strengthened to some extent by incorporating the horizontal principle of complementarity or subsidiarity in the draft articles. According to this principle, the forum State can exercise jurisdiction over crimes under international law in cases where another State has a stronger connection to the crime or the accused, or an international court, only if that other State is unable to exercise jurisdiction.[149] In 2017, ILC member Georg Nolte suggested that instead of a general exception to immunity for crimes under international law, as now provided for in draft article 7, a solution could be sought based on the duty of States to prosecute these crimes *themselves* and, if they fail to do so, to waive immunity.[150] The proposed text to replace the current draft article 7 read as follows:

'The State of the official shall either waive

immunity or submit the case for prosecution before its own courts in relation to the following alleged crimes:

(i) Genocide, crimes against humanity, war crimes, and torture;

(ii) [Possible other crimes].'

Cautious support for this proposal can be found in the work of Kress, who, incidentally, is himself a firm advocate of draft article 7 in its current form. He has described the proposal as 'the most promising attempt at striking a fair balance between the different concerns at stake which is currently under discussion'.[151]

The CAVV believes that a rule providing for the sending State of the official to have primary jurisdiction deserves serious consideration, but only in combination with strong procedural safeguards that inspire confidence in and guarantee the effective and serious exercise of jurisdiction by the home State.[152] But the CAVV is also of the opinion that such a provision should not replace draft article 7. If the safeguards *cannot* be provided, the forum State should be able to exercise its criminal jurisdiction over foreign State officials without requiring a waiver of immunity by the sending State of the official, as explained in the discussion of draft article 7.

The second suggestion goes back to the discussion of draft article 7 above. The CAVV concluded that the yawning gap between the broad agreement on the Nuremberg Principles after 1945 and the current controversy over the rule contained in draft article 7 can be explained by the application of the principle of universal jurisdiction in cases brought against current or former State officials where it is doubtful whether the court of the forum State is actually acting on behalf of the international community as a whole. The Nuremberg Principles were embraced in the context of the aftermath of the Second World War: atrocities that were unanimously condemned by the international community and a sense of determination that those responsible should be held accountable before international or national tribunals. In view of the controversy about draft article 7, the CAVV wonders whether it would not be wise to define the scope of the exception in draft article 7, bearing in mind the circumstances in which the exception was originally accepted by States. Draft article 14, paragraph 3 currently provides that there must be 'substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7', but perhaps the exception to immunity from crimes under international law should be made conditional on the existence of substantial indications that the international community defines the acts to be prosecuted as crimes under international law. It would be beyond the scope of this advisory report to elaborate on this idea, but for such indications one could for instance look to authoritative international bodies (such as the UN General Assembly (UNGA)).[153] For example, when crimes under international law are identified by UNGA resolutions and condemned by a large number of members, it is reasonable to assume that national courts that establish jurisdiction over those suspected of these crimes are acting on behalf of the international community as a whole. It should be noted that this does not mean that the CAVV considers that the exercise of universal jurisdiction as such should be restricted in this way. This only concerns the specific circumstance where universal jurisdiction is exercised over current or former State officials in respect of whom the home State has invoked functional immunity. In this context, the CAVV would also note that draft article 18 contains a dispute settlement clause that gives the ICJ jurisdiction over disputes concerning the interpretation and application of the present draft articles. Discussion of that draft article will also include brief consideration of whether the ICJ should have a role in settling disputes over whether there are 'substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7.'

— 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.*

Draft article 15 regulates the transfer of criminal proceedings from the forum State to the sending State of the official. The CAVV has no further comments on this provision.

— 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.*

Draft article 16 provides that a foreign State official over whom criminal jurisdiction is, or could be exercised abroad must be guaranteed full protection of their (procedural) rights under both international law and the national law of the forum State. Paragraph 2 adds that a State official who is in custody also has the right to communicate without delay with a representative of the home State.

The provision is an odd one out as it formulates procedural rights of the suspect that are separate from the issue of immunity. It mainly affirms rights of individuals that are also protected under international human rights conventions and apply to all individuals, not just foreign State officials. Moreover, the right to consular assistance[154] is slightly expanded as access to the suspect is not restricted to consular officials and State officials do not necessarily have the nationality of the home state. The CAVV considers that in any event paragraph 1 is out of place in a treaty on the immunity of State officials.

— 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.

In keeping with similar provisions in other conventions, the ILC added in Part Four of the draft articles an obligation for the forum State and the State of the official to hold consultations on matters relating to the official's immunity. This provision is part of the procedural safeguards of Part Four and constitutes an obligation, as represented by the use of the term 'shall'. However, the draft article does allow a flexible interpretation, as is apparent from the use of the phrase 'as appropriate'. Consultations

may concern immunity *ratione personae* and functional immunity as well as procedural safeguards. Although the obligation to consult differs from requests for information as provided for in draft article 13, it may involve obtaining information, for example to ascertain how the other State interprets the scope of immunity.[155]

— 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.

Draft article 18 provides for a dispute settlement mechanism and was added to the text of the draft articles only later during the first reading. It gives the ICJ jurisdiction over disputes concerning the interpretation or application of the draft articles, unless both States agree to use some other binding dispute resolution mechanism. The addition of the provision is noteworthy; the decision on whether or not to include a dispute settlement clause is generally left to States, unless it is clear that the ILC's work will eventually be submitted to States as a draft convention, as was most recently the case with the *Draft Articles on Prevention and Punishment of Crimes against Humanity.*[156] However, the ILC has not yet decided whether the *Draft Articles on the Immunity of State Officials From Foreign Criminal Jurisdiction* will eventually also be submitted to the General Assembly as a draft convention. According to the ILC itself, it has included the clause mainly to encourage States to express their views on the desirability of such a provision.[157] Moreover, the commentary indicates that an article on dispute resolution is in keeping with the logic underpinning Part Four.[158] The provision does not contain an opt-out clause of the kind the ILC proposed, for example, in the *Draft Articles on Prevention and Punishment of Crimes against Humanity.*[159] The commentary explains that States can, however, unilaterally derogate to exclude being bound by draft article 18.

Special Rapporteur Escobar Hernández had proposed that proceedings in the forum State should be suspended pending the hearing before the ICJ or an arbitration tribunal, but the majority of the ILC was against this as there are no precedents for such a suspension and it would create problems in some national legal systems. The CAVV agrees with this decision and points out that a suspension can always be part of any provisional measures which the ICJ may take under Article 41 of the Statute of the Court.[160]

Finally, the CAVV would point out that draft article 18 also confers jurisdiction on the ICJ (or another binding mechanism) concerning a dispute on the issue of whether there are 'substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7', as provided for in draft article 14, paragraph 3 (b) (i). Although this issue may perhaps lie more in the field of international criminal law than in that of public international law, the CAVV believes that in cases such as *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*[161] the ICJ has already shown that it is capable of dealing with such matters.

Conclusion and recommendations

contents

The CAVV wishes to express its appreciation for the work undertaken by the ILC in the long period leading up to the adoption, on first reading, of the draft articles on immunity of State officials from foreign criminal jurisdiction. As the ILC's members are divided on a number of central issues, the task facing it was by no means simple. The main point of disagreement was (and is) draft article 7, according to which functional immunity does not prevent the exercise of criminal jurisdiction over foreign State officials suspected of committing certain crimes under international law. The CAVV welcomes the ILC's decision to meet the objections, particularly to draft article 7, by developing procedural safeguards in Part Four of the draft articles. Nonetheless, the CAVV believes that on certain points the draft articles and the commentary lack persuasiveness and require clarification. In this advisory report, the CAVV has made various recommendations for revision of the text. Those recommendations are summarised in these concluding remarks.

1. The CAVV believes that the ILC should extend the scope of its work beyond immunity from jurisdiction to include immunity from execution and the issue of inviolability (p. 7).

2. The CAVV thinks that the conflict clause in draft article 1, paragraph 3 concerning the relationship between the draft articles and the rights and obligations of States in relation to international criminal courts and tribunals should be clarified (p. 8).

3. The CAVV considers that it would be desirable to have definitions of the terms 'immunity *ratione materiae*' and 'immunity *ratione personae*' at the start of the draft articles. At present, these terms are only implicitly defined where the content and scope are described (p. 11).

4. The CAVV invites the ILC to make the normative basis for the functional immunity rule more explicit. The CAVV is of the opinion that functional immunity is an independent rule of international law and not an integral part of the State immunity rule (pp. 9-11).

5. The CAVV believes that the definition of State official in draft article 2 (b) should be reconsidered (p. 10, 11).

6. The CAVV considers that the argument that functional immunity does not apply to crimes under international law for which individual criminal responsibility and universal jurisdiction are accepted under customary international law is still legally convincing. The CAVV therefore also believes that presenting the exception to functional immunity as a desirable direction for development of the law fails to do justice to the complex State practice regarding the prosecution of crimes under international law committed by foreign State officials (p. 16, 17).

7. The CAVV would point out that there is resistance from a considerable number of States to certain applications of the exception to functional immunity. This resistance is not unfounded. It is therefore important for the ILC to work to achieve a solution by making the normative basis for the exception to functional immunities more explicit and including sufficiently strong procedural safeguards (pp. 17-19).

8. In the CAVV's view, working towards the adoption of a treaty text is the best way to bridge the fundamental differences of opinion within the ILC and within the international community (p. 19).

9. The CAVV is of the opinion that the current list of crimes in respect of which functional immunity does not apply gives rise to much unnecessary uncertainty and debate. The CAVV would favour a more generally formulated rule providing for the limitation of functional immunity to be based on the factors of individual criminal responsibility and universal jurisdiction. The CAVV therefore believes that draft article 7 should be worded in such a way that functional immunity is declared not applicable to crimes

under international law to which universal jurisdiction applies (p. 19).

10. The CAVV is of the opinion that a subject deserving more attention and discussion is the applicability of functional immunity to crimes of corruption and to territorial crimes committed without the forum State having given consent to enter its territory or to perform within its territory the sovereign activity in the context of which the crime was committed. The CAVV considers it advisable for separate draft articles to be devoted to these two types of crimes and for the ILC's position to be set out in greater depth (pp. 19-21).

11. The CAVV considers it important for the safeguards and procedural rules with regard to invoking and applying personal and functional immunity to be further strengthened and for certain points to be clarified (pp. 21-29).

12. The CAVV is of the opinion that the wording of draft article 8 needs further delimitation in order to define the exact scope of the procedural safeguards (p. 21).

13. The CAVV recommends, in the context of safeguards, that the examination and determination of immunity should be treated as a continuous process and regulated in a single draft article (p. 22, 23).

14. The CAVV considers that the scope of the measures States can still take from the moment when the question of immunity comes under examination should be clarified, for example in the context of the duty of notification ('measures the absence of which would preclude subsequent criminal proceedings against the official') (p. 23, 24).

15. The CAVV considers that the requirements for invoking immunity require further explanation and justification (p. 24).

16. The CAVV considers that in exceptional cases it should be possible for a waiver of immunity to be revocable (p. 25).

17. The CAVV thinks that the continuance of the measures of a precautionary nature (coercive measures) envisaged by draft article 14, paragraph 4 (b) after a positive determination of immunity would be problematic (p. 27).

18. The CAVV wonders whether draft article 14, paragraph 5 takes sufficient account of the interests of victims of alleged crimes (p. 27, 28).

19. The CAVV considers that a rule assigning primary jurisdiction to the State of the official in respect of crimes under international law merits serious consideration, albeit only in combination with robust procedural safeguards that guarantee confidence in the effective and serious exercise of jurisdiction by the that State and with the possibility that the primary jurisdiction of the State of the official will not be recognised if it is not certain that it will exercise jurisdiction (p. 29).

20. The CAVV considers that draft article 16, particularly the requirement in paragraph 1 that a fair trial be guaranteed, is not really in keeping with the subject and scope of the draft articles and could better be omitted here (p. 30).

Endnotes

1 For the text of the draft articles and the commentary on them, see ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022) [referred to below as ILC Report 2022], pp. 194-286.

2 https://www.adviescommissievolkenrecht.nl/publicaties/adviesaanvragen/2022/11/7/adviesaanvraag-over-ontwerpartikelen-international-law-commission-inzake-strafrechtelijke-immuniteit-van-staatsambtenaren.

3 CAVV, *Advisory report on the immunity of foreign State officials*, Advisory Report no. 20, 2 May 2011.

4 CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022.

5 Article 31, paragraph 1 of the Vienna Convention on Diplomatic Relations (this also applies in transit States in so far as necessary; see article 40, paragraph 1). This concerns jurisdiction in both criminal cases and other matters, although immunity in criminal matters is absolute.

6 UN Convention on Special Missions, New York, 8 December 1969, 1400 United Nations *Treaty Series* No. 1-23431, (referred to below as: 'the Convention on Special Missions'). Article 1 (a) defines a special mission as a 'temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.' As regards the inviolability and immunity of members of the special mission, see articles 29 and 31 of the Convention. Although only 40 States are party to the Convention (the Netherlands is not one of them), important parts of the Convention, including articles 29 and 31, reflect customary law (see the letter of the Minister of Foreign Affairs of 26 April 2012, https://zoek.officielebekendmakingen.nl/kst-32635-5.pdf, which sets out the conditions that an official mission must fulfil. See also A. Sanger and S. Wood (2019). 'The Immunities of Members of Special Missions.' In T. Ruys, N. Angelet, & L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (pp. 452-480). Cambridge: Cambridge University Press, p. 416, who note that 'the outstanding issues' are mainly immunity in civil actions. For the differences between the scope of protection under the convention and under customary law, see M. Wood, 'The Immunity of Official Visitors', 16 *Max Planck Yearbook of United Nations Law* 2012, pp. 35-98, and CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, endnote 54.

7 ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 55.

8 Ibid., para. 58.

9 *Yearbook of the International Law Commission, 2007*, Vol. II, Part Two, UN Doc A/CN.4/SER.A/2007/Add.1, p. 98, para. 376.

10 ILC, 10 June 2010, Second report on immunity of State officials from foreign criminal jurisdiction, by R.A. Kolodkin, Special Rapporteur, UN Doc A/CN.4/631, p. 425, para. 90.

11 ILC, 14 June 2016, Fifth report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/701, p. 78, para. 189. For an explanation of the difference between the concepts of 'exception' and 'limitation', see p. 70, para. 171.

12 ILC, 10 June 2010, Second report on immunity of State officials from foreign criminal jurisdiction, by R.A. Kolodkin, Special Rapporteur, UN Doc A/CN.4/631, p. 406 ('The Special Rapporteur is proceeding on the assumption that it is enjoyed by the so-called threesome (Head of State, Head of Government and Minister for Foreign Affairs), as well as by certain other high-ranking State officials.').

13 ILC, 4 April 2013, Fifth report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/661, p. 47.

14 See article 1, paragraph 1 of the ILC Statute (in which 'progressive development' actually comes first, followed by codification) and article 13 of the UN Charter.

15 For an overview of the plenary debates on this topic, see: R. van Alebeek, 'The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction:

Two Steps Back?', *AJIL Unbound*, Vol. 112 , 2018, pp. 27-32.

16 ILC, Report on the work of the sixty-ninth session, UN Doc. A/72/10 (2017), para. 74.

17 See ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to Article 7, p. 231, para. 3.

18 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), p. 196, para. 13.

19 See also UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statement by Germany (III), p. 3 ('any substantial change of international law in this area proposed by the Commission would have to be agreed upon by States by treaty').

20 M. Bossuyt and J. Wouters, *Grondlijnen van Internationaal Recht*, Antwerp – Oxford, Intersentia, 2005, pp. 387-391. [CAVV's own translation.]

21 Incidentally, at the start of her mandate Special Rapporteur Escobar Hernández was already aware that a number of States had suggested in the Sixth Committee that the issue of inviolability should also be addressed. ILC, 31 May 2012, Preliminary report on the immunity of State officials from foreign criminal jurisdiction, prepared by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/654, p. 46. (See also UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statement by Israel (III), p. 8. Israel 'would advise to tread carefully with regard to the Special Rapporteur's observations with regard to the distinction between immunity and inviolability as well as a distinction between the person of the State official and the assets that might be sought for seizure as part of the criminal proceedings against him or her.').

22 Vienna Convention on Diplomatic Relations, 18 April 1961, Dutch Treaty Series 1962, 101.

23 Vienna Convention on Consular Relations, 24 April 1963, Dutch Treaty Series 1965, 40.

24 UN Convention on special missions, New York, 8 December 1969, 1400 United Nations *Treaty Series* No. 1-23431.

25 Institute of International Law, 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' (Vancouver Session, 2001). Article 1 provides as follows about inviolability: 'When in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form or arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity.' Article 2 concerns immunity from jurisdiction and article 4 immunity from execution.

26 See also UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statement by the Netherlands (III), p. 3 ('The Netherlands supports the position that persons enjoying immunity *ratione materiae* do not enjoy inviolability. After all, the immunity applies to the functioning of an official and the question whether his or her acts may be subjected to criminal jurisdiction. The immunity does not apply to the person as such.').

27 See also UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statement by Romania (III), p. 4 ('We encourage the Commission to further look into this subject and further consider the question of the inviolability in this context.').

28 See UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statement by the Netherlands (III), p. 4, in which the Netherlands points out that, under the rule codified in the UN Convention on Jurisdictional Immunities of States and their Property (New York, 2004), documents which are state-owned may enjoy immunity from jurisdiction and pre- and post-judgment enforcement measures in so far as they are used for non-commercial purposes.

29 ILC, 29 May 2008, 'Preliminary report on immunity of State officials from foreign criminal jurisdiction', by R.A. Kolodkin, Special Rapporteur, UN Doc A/CN.4/601 p. 172, p. 175 ('The exercise of criminal jurisdiction also includes the adoption of interim measures of protection or measures of execution.');

ILC, 10 June 2010, 'Second report on immunity of State officials from foreign criminal jurisdiction', by R.A. Kolodkin, Special Rapporteur, UN Doc A/CN.4/631, p. 402 ('The Special Rapporteur does not yet see the need to consider immunity from pretrial measures of protection and immunity from execution separately from immunity from criminal jurisdiction as a whole.'); ILC, 4 April 2013, 'Second report on the immunity of State officials from foreign criminal jurisdiction', by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/661, p. 39 ('Other interim measures—such as passport confiscation, house arrest and the obligation to appear before a judicial authority at regular intervals—are common in the exercise of criminal jurisdiction.').

30 For a discussion of the difference between immunity and inviolability, see: T. Weatherall, 'Inviolability not Immunity: Re-evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States', 17 *Journal of International Criminal Justice*, 2019, pp. 45-76.

31 Naturally, State officials, current and former, can be sued in civil proceedings in their personal capacity and held personally liable. The immunity of State officials against whom civil proceedings are instituted in their official capacity is dealt with in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (not yet entered into force), Dutch Treaty Series 2010, 272, article 2, paragraph 1 (b) (iv). According to a general understanding reached by the Sixth Committee of the UN General Assembly, the convention relates to civil proceedings but not to criminal proceedings. See Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (General Assembly, GA Res. 55/150 (Dec. 12, 2000)), final report March 5, 2004 (UN Doc. A/59/22) ('the Ad Hoc Committee noted the general understanding that the draft articles do not cover criminal proceedings').

32 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975, *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12).

33 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, Dutch Treaty Series 1960, 33.

34 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, Dutch Treaty Series 1949, J 67.

35 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 1, p. 1, paras. 12-14.

36 ILC, Draft Articles on the Law of Treaties with commentaries 1966, *Yearbook of the International Law Commission, 1966, vol. II.*

37 Rome Statute of the International Criminal Court, 17 July 1998, Dutch Treaty Series 2000, 120. See, in particular, ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, para. 113, in which the Court held that, under customary international law, Heads of State of States that are not party to the Statute do not enjoy personal immunity. The CAVV critically discussed this position in an earlier advisory report on immunity in relation to the crime of aggression, although it did consider it possible that the law on this point might develop. CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 16. Evidence of the backing for such a development of the law would seem to be provided by the widespread support for the arrest warrant issued by the International Criminal Court on 17 March 2023 against Vladimir Putin, the President of the Russian Federation (not a party to the Statute). See https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

38 The Appeals Chamber of the International Criminal Court held in the judgment in the *Jordan Referral re Al-Bashir Appeal* that the personal immunity of a Head of State of a State that is not a party to the Statute also does not apply in the horizontal relationships between States in cases where the jurisdiction is being exercised in order to arrest an individual and surrender him to the International Criminal Court, ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, paras. 127 -131.

39 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 1, p. 201, para. 26.

40 ILC, Report of the International Law Commission,

seventy-third session, UN Doc A/77/10 (2022), commentary to article 2, p. 203, para. 5, and p. 205, para. 11.

41 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 2, p. 206, para. 13.

42 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 26, article 5.

43 C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), pp. 2605-2606 (with references).

44 UK House of Lords, 14 June 2006, *R. v. Jones*, [2006] UKHL 16; European Court of Human Rights, 14 January 2014, *Jones v. the United Kingdom, (Applications nos. 34356/06 and 40528/06).*

45 ICTY, 29 October 1997, *Prosecutor v. Blaskic*, IT-95-14-PT. 7, paras. 38 and 41. However, it cannot be inferred from the principle of sovereignty that States and their officials enjoy immunity at all times. For example, when considering article 4 of the Palermo Convention (the United Nations Convention against Transnational Organized Crime, 15 November 2000), the International Court of Justice rejected the argument that the customary international rules on immunity had been incorporated in that article by virtue of its reference to the principles of sovereign equality and non-intervention. See ICJ, 6 June 2018, *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment*, ICJ Reports 2018, p. 292, para. 96 ('The Court concludes that, in its ordinary meaning, Article 4, read in its context and in light of the object and purpose of the Convention, does not incorporate the customary international rules on immunities of States and State officials.'). Article 4 of the Palermo Convention provides as follows: 'States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.'

46 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 2, p. 208, paras. 24 and 25.

47 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 26.

48 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 2, p. 208, para. 25.

49 C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), p. 2605 (with references).

50 UN Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, article 2, paragraph 1 (b) (iv).

51 Compare US Supreme Court, *Underhill v. Hernandez*, 168 U.S. 250 (1897); Attorney General, *Israel v. Adolf Eichmann* (1968) 36 ILR 18, pp. 277 and 309-310 ('The theory of 'Act of State' means that the act performed by a person as an organ of the State ...must be regarded as an act of the State alone. ... [T]here is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of 'crimes against Humanity').

52 H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. 2015 OUP) pp. 54 ff. and 62 ff.

53 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, p. 43, para. 392: 'persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.'

54 ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 53.

55 ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 53.

56 ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 3, pp. 217 and 218, para. 11.

[57] ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 51 [emphasis added].

[58] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 3, p. 218, para. 13, footnote 977.

[59] See also CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, pp. 10, 11.

[60] Ibid.

[61] ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, para. 70.

[62] Article 40 of the Vienna Convention on Diplomatic Relations.

[63] See article 7, para. 2 (a) of the Vienna Convention on the Law of Treaties concerning the full powers of the troika. See also article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, which entered into force on 20 February 1977, 1035 United Nations Treaty Series 167 and distinguishes between the members of the troika, all of whom are 'internationally protected persons', and other State officials who have that status only when they are entitled to special protection pursuant to international law.

[64] ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paras. 54 -61.

[65] ICJ, 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 58.

[66] Wood, M. (2019). Lessons from the ILC's Work on 'Immunity of State Officials': Melland Schill Lecture, 21 November 2017, 22 *Max Planck Yearbook of United Nations Law* 2018, 34, 55.

[67] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, pp. 232-234, paras. 9 and 10.

[68] The ILC notes rather cryptically that 'In light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method.', ibid., para. (11).

[69] See also R. van Alebeek, 'The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?', *AJIL unbound*, volume 112, 2018, pp. 27-32.

[70] In the 1946 judgment of the International Military Tribunal of Nuremberg, *re Goering and others*, 13 ILR 203, p. 221. Also: 'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law'. See also the Charter of the International Military Tribunal, 1945, 280 United Nations *Treaties Series*, no. 251, article 7: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

[71] Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I), 11 December 1946, UN Doc A/RES/1/95. See also General Assembly resolution 488(V), 12 December 1950, UN Doc A/RES/488 (V).

[72] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, vol. II.

[73] Draft Code of Offences against the Peace and Security of Mankind, 1954, *Yearbook of the International Law Commission* 1954, Vol. II, pp. 112-122, Article 3. The commentary to article 1 makes clear that the ILC 'did not specify whether persons accused of crimes under international law should be tried by national courts or by an international tribunal', thereby indicating that the distinction is not relevant to the applicability of the principles.

[74] Including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, 10 December 1984; the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

75 C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), p. 2610. See also US Military Tribunal, *US v. List and others*, 19 Feb. 1948, (1950) 11 LRTWC 1233, 1241 ('An international crime is such an act universally recognized as criminal, which is a grave matter of international concern and for some valid reason cannot be left to the exclusive jurisdiction of the state that would have control over it under normal circumstances.').

76 D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' in: *European Journal of International Law*, 21(4) 2010, p. 848; B. Ntahiraja, 'The Legality and Scope of Universal Jurisdiction in Criminal Matters', *Nordic Journal of International Law*, 91(3), 2022, p. 417 ('the international legality of universal jurisdiction is clearly established' and 'the politics of enforcement are not determinative as far as the legal determination of the existence of a state's right is concerned'). As regards the legal basis of universal jurisdiction, see also L. Reydams, *Universal Jurisdiction: International and Municipal Perspectives*, Oxford University Press, 2003.

77 Israel Supreme Court, 1962, *Attorney-General of Israel v. Adolf Eichmann*, 36 ILR 277, pp. 309-310.

78 ILC, 14 June 2016, Fifth report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/701, para. 190.

79 Ibid., para. 217 [emphasis added].

80 United Kingdom, Supreme Court, 18 October 2017, *Benkharbouche v. Embassy of Sudan*, [2017] UKSC 62, para. 52.

81 House of Lords, Judgment, 24 March 1999, R. v. *Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)*, 2 All ER 97, at 169–170 (Lord Saville).

82 House of Lords, Judgment, 24 March 1999, *R. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)*, 2 All ER 97, at 179a (Lord Millett).

83 CAVV, *Advisory report on the immunity of foreign State officials*, Advisory Report no. 20, 2 May 2011, pp. 21,22.

84 Ibid., p. 24.

85 Ibid., p. 19. The CAVV spoke of a 'development in international law [that] has not yet fully crystallised' and, on p. 26, of the existence of 'a marked trend'.

86 Government response to the CAVV advisory report on the immunity of foreign State officials, Advisory Report no. 20, 2 May 2011, *Parliamentary Papers, House of Representatives*, 2011-2012, 33000-V, no. 9, p. 3.

87 ILC, Immunity of State officials from foreign criminal jurisdiction, Comments by governments, 67th Session (2015), Information submitted by the Netherlands, p. 2.

88 ILC, Immunity of State officials from foreign criminal jurisdiction, Comments by governments, 68th Session (2016), Information submitted by the Netherlands, p. 1, citing Amsterdam Court of Appeal, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395 *(Bouterse)*; UNGA Sixth Committee, 72nd Session, Report of the International Law Commission on the work of its sixty-ninth session (Agenda item 81), 2017, Statement by the Netherlands (II), p. 2, para. 4 ('It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity.'); ILC, Immunity of State officials from foreign criminal jurisdiction, Comments by governments, 71st Session (2019), Information submitted by the Netherlands, p. 2: 'The Netherlands recognizes that immunity *ratione materiae* is not absolute, and that exceptions exist to immunity *ratione materiae*. This would be the case with the commission of international crimes.'

89 CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 12.

90 Broadly speaking, the following authors agree with this assessment, although their precise analysis may vary in respect of certain minor points. A. Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on *The Congo v. Belgium Case*', *European Journal of International*

Law, 13(4) 2002, pp. 864–865, D. Akande, S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law*, 21 (4) 2010, pp. 815–852; C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Beck, 2022, p. 2610; R. van Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts', in: T. Ruys, N. Angelet and L. Ferro, *The Cambridge Handbook of Immunities and International Law*, CUP, 2019, pp. 496 and 518-523; H. Ascensio & B. Bonafè, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?', RGDIP, 122 (4) 2018, pp. 821-850; P. Šturma, 'How to Limit Immunity of State Officials from Foreign Criminal Jurisdiction', in: *How International Law Works in Times of Crisis*, edited by: G. Ulrich and I. Ziemele, Oxford University Press, 2019.

91 Institute of International Law, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Vancouver Session 2001, article 13(2) ('the former Head of State … may be prosecuted and tried when the acts alleged constitute a crime under international law'); Institute of International Law, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Naples Session, 2009, article III(1) ('No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.').

92 ICTY, 29 October 1997, *Prosecutor v. Blaskic*, Case no. T-95-14-PT. 7, para. 41 [emphasis added].

93 House of Lords, judgment, 24 March 1999, *R. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)*, [1999] 2 All ER 97.

94 See, for example, N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, University of Pennsylvania Press, 2005; Amnesty International, *Universal Jurisdiction. Strengthening the Essential Tools for International Justice*; TRIAL International, *Universal Jurisdiction Annual Review 2022*.

95 C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), p. 2623.
Kress gives an overview of the extensive pre-1990 case law in support of this principles and notes as follows: 'With respect to the national case law in criminal proceedings since 1990, a number of proceedings instituted and a number of judgments delivered after 1990 confirm the inapplicability of functional immunity for crimes under CIL.' In December 2022, an investigation was instituted in Spain against a number of State officials from Equatorial Guinea, including the head of its security service, following allegations of kidnapping and torture of Spanish and Equatorial Guinean nationals in Equatorial Guinea, see: https://www.france24.com/en/live-news/20230228-spain-court-summons-e-guinea-president-s-son-for-questioning.

96 Amsterdam Court of Appeal, 20 November 2000, ECLI:NL:GHAMS:2000:AA8395.

97 Supreme Court of Italy, 24 July 2008, *Lozano (Mario Luiz) v. Italy*, Case No. 31171/2008.

98 Federal Criminal Court of Switzerland, 25 July 2012, *A. v. Ministère Public de la Confédération*, Case No.BB.2011.140

99 German Federal Court of Justice *(Bundesgerichtshof)*, 28 January 2021, 3 StR 564/19.

100 M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', *European Journal of International Law*, 30(3) 2019, pp. 779, 809 and 815. The German Federal Court of Justice also did not seem to fully embrace the exception in the above-mentioned cases as it emphasised that the case concerned 'the functional immunity of lower-ranking government officials', Federal Court of Justice, 28 January 2021, 3 StR 564/19, para. 39. However, it could also be argued that the Federal Court of Justice only used the term in order to distinguish this group from the members of the troika. See C. Kress, 'On Functional Immunity of Foreign Officials and Crimes under International Law', *Just Security*, 31 March 2021, at : https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/.

101 ICJ, 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 22.

102 Chambre Africaine Extraordinaire D'Assises, 30 May 2016, *Ministère public c. Hissein Habré*, 'Jugement'.

[103] In the Barbie case, the Court of Cassation held that the official capacity in which Barbie had acted '[has] no effect in law upon his responsibility'. Cour de cassation (France), Barbie, (1995) 100 ILR 330, 336.

[104] Cour de Cassation, Chambre criminelle, 13 janvier 2021, n° 20-80.511, ECLI:FR:CCASS:2021:CR00042: *'La coutume internationale s'oppose à ce que les agents d'un Etat, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, puissent faire l'objet de poursuites, pour des actes entrant dans cette catégorie, devant les juridictions pénales d'un Etat étranger. En l'état du droit international, ces crimes, quelle qu'en soit la gravité, ne relèvent pas des exceptions au principe de l'immunité de juridiction'*. For criticism of this judgment, see: K. Mariat, 'La torture, cette politique d'État couverte par l'immunité', AJ Pénal 2021 p. 158 ('Nous ne pouvons ici que réitérer notre étonnement face à la frilosité de la Cour.').

[105] Cour de Cassation, Assemblée plénière, 12 mai 2023, n° 22-80.057 et 22-82.468 B, ECLI:FR:CCASS:2023:PL90669.

[106] See, for example: International Military Tribunal (Nuremberg), 14 April 1949, *re Weizsäcker and others (Ministries Trial)*, 16 ILR 344, 349; Cour de cassation (France), Barbie, (1995) 100 ILR 330, 336.

[107] Whether article 46A bis of the Malabo Protocol should also be regarded as part of this State practice is unclear since it is uncertain whether the article extends to functional immunity or concerns only personal immunity. See D. Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', *Journal of International Criminal Justice*, 13(1) 2015, pp. 5-8. See A/C.6/73/SR.21 and also, for example, UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statements by Australia (III): 'Australia remains unable to support draft article 7, and continues to share the concerns of those members who voted against the provisional adoption of the draft article that, in its current form, the draft article does not reflect any real trend in State practice, still less existing customary international law', Azerbaijan: 'We are not fully confident that the work of the Commission on the topic is an appropriate way of addressing this issue. It rather opens an opportunity for misinterpretations and politically motivated actions, in contravention of the principle of sovereign equality of States and the interest of stability of international relations', the United States of America: 'Draft Article 7 creates the false impression that the exceptions are sufficiently established in State practice such that they form customary international law—and they simply do not' and Germany (III):: 'Any substantial change of international law in this area proposed by the Commission would have to be agreed upon by States by treaty.'

[108] See A/C.6/73/SR.21 and also, for example, UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statements by Italy (II): 'At this stage, Italy would also like to reiterate its support for the text of draft Article 7 […]', Portugal (III): 'We take this opportunity to reiterate our satisfaction with the adoption, of draft article 7 by the Commission, concerning international crimes in respect of which immunity *ratione materiae* does not apply' and Sweden, on behalf of the Nordic countries (III): 'We wish to reiterate our support for draft article 7 […].'

[109] See A/C.6/73/SR.21 and also, for example, UNGA Sixth Committee, 73rd Session, Report of the International Law Commission on the work of its seventieth session (Agenda item 82), 2018, Statements by Switzerland: 'We encourage the Commission to provide stronger evidence that draft article 7 represents customary international law or to indicate clearly to which extent it falls within the area of progressive development' and Spain (III): 'Hence, the Commission fulfilling its responsibility of codification and progressive development of International Law, should approve (…) Article 7'.

[110] C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), p. 2624.

[111] Draft article 7 provides that functional immunity does not apply in the cases mentioned, thereby leaving it open whether this is an exception to the rule or a limitation inherent in the application of the rule itself.

[112] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 237, para. 20 (see also para. 18).

[113] ILC, 14 June 2016, Fifth report on the immunity of

State officials from foreign criminal jurisdiction / Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/701, p. 95, para. 248.

[114] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 240, para. 24.

[115] Ibid., para. 26.

[116] Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004.

[117] ILC, 10 June 2010, Second report on immunity of State officials from foreign criminal jurisdiction, by R.A. Kolodkin, Special Rapporteur, UN Doc A/CN.4/631, para. 85.

[118] Ibid., para. 27.

[119] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 233, para. 12: 'the Commission did not find it necessary to come down in favour of one or the other of these interpretations.'

[120] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 7, p. 240, para. 26.

[121] The CAVV would point out, for example, that the Netherlands, in its communications with the ILC and also in the Sixth Committee of the UN, has argued that espionage in the territory of the forum State should not be an exception to functional immunity (ILC, Immunity of State officials from foreign criminal jurisdiction, Comments by governments, 71st Session (2019), Information submitted by the Netherlands: 'the Netherlands does not consider the commission of espionage to constitute an accepted exception, that is, an exception accepted as a rule of customary international law'), whereas it is a territorial crime committed without the consent of the forum State.

[122] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), Part Four, p. 241, para. 3.

[123] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 9, p. 244, para. 2.

[124] Ibid., para. 5.

[125] Ibid., par. 6.

[126] Ibid.

[127] ICJ, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment*, ICJ Reports 2008, p. 177, para. 170: 'a constraining act of authority'.

[128] Ibid., para. 174. See also J.L. Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', in *Columbia Law Review,* 86(1) 1986, pp. 169 and 196: 'Courts should conduct pretrial discovery in a manner consistent with the dignity of the office of the head of state.'

[129] ICJ, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment*, ICJ Reports 2008, p. 177, para. 175.

[130] G.P. Buzzini, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case', in *Leiden Journal of International Law* 22(3) 2009, p. 480.

[131] The ICJ has created some confusion about this: 'The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned.', ICJ, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment*, ICJ Reports 2008, p. 177, para. 196.

[132] The ICJ did not specify these requirements in *Djibouti v. France*, ibid., para. 196, and in ICJ, 6 June 2018, *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment*, ICJ Reports 2018, p. 292, para. 25, the ICJ observed that the immunity of the second Vice-President of Equatorial Guinea had been invoked orally by the Ambassador of Equatorial Guinea to France.

[133] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 12, p. 261, para. 15.

[134] E. Denza, *Diplomatic Law (4th edition), Commentary on the Vienna Convention on Diplomatic Relations*, OUP, 2016, p. 278.

[135] *Yearbook of the International Law Commission*, 1958, vol. II, UN Doc A/CN.4/SER.A/1958/Add.l, p. 99, Commentary on draft articles on diplomatic intercourse and immunities, article 30, para. 5.

[136] ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, 2006*, (A/61/10), Commentary to Guiding Principle 10, p. 380, para. 3.

[137] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 12, p. 261, para. 15.

[138] Ibid., para. 18: 'In view of the discussion summarized in the preceding paragraphs and the practice generally followed in similar cases where there is a divergence of views among the members during the first reading of a draft text, the Commission decided to retain paragraph 5 in draft article 12, thus enabling States to become duly aware of the debate and to provide comments.'

[139] E. Denza, *Diplomatic Law (4th edition), Commentary on the Vienna Convention on Diplomatic Relations*, OUP, 2016, pp. 283-284.

[140] Ibid., p. 284.

[141] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 14, p. 264, para. 1.

[142] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 14, p. 271, para. 34.

[143] Ibid.

[144] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), Commentary Article 14, p. 272, para. 39.

[145] The CAVV would refer to section 3 (a) of the Court Bailiffs Act *(Gerechtsdeurwaarderswet)*, which gives the Minister for Legal Protection the authority to serve notice on a court bailiff in cases where certain official acts are in conflict with rules of international law.

[146] See, for example, H. Huang in: ILC, Summary record of the 3605th meeting, 2022, A/CN.4/SR.3605, p. 11; Sir Michael Wood in: ILC, Summary record of the 3586th meeting, 2022, A/CN.4/SR.3586, pp. 16-17.

[147] UNGA Sixth Committee, 77th Session, Report of the International Law Commission on the work of its seventy-third session (Agenda item 77), 2022, Statement by the United States of America (II), p. 1.

[148] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 14, p. 270, para. 26.

[149] C. Ryngaert, 'Horizontal Complementarity', *Max Planck Encyclopedia of International Procedural Law*, 2018.

[150] ILC, 69th session 2017, Summary record of the 3365th meeting, UN Doc A/CN.4/SR.3365, pp. 6 and 7.

[151] C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck 2022), 2625.

[152] The safeguard provided for in draft article 15, paragraph 4 is insufficient in this respect because it is often not possible to exercise jurisdiction after the suspect has left the territory: '[t]he 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.'

[153] See also C. Kress, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Beck, 2022, p. 2625, where reference is made to R. van Alebeek, *The Immunity of States and Their Officials in International Human Rights Law and International Criminal Law*, Oxford University Press, 2008 pp. 263 and 264.

[154] Article 36, paragraph 1 (b) Vienna Convention on Consular Relations.

[155] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 17, p. 280, para. 1.

[156] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 18, p. 280, para. 2; Draft Articles on Prevention and Punishment of Crimes against Humanity, 2019, *Yearbook of the International Law Commission, 2019, vol. II, Part Two*.

[157] ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), commentary to article 18, p. 281, para. 3.

[158] Ibid., para. 4.

[159] Draft Articles on Prevention and Punishment of Crimes against Humanity, 2019, *Yearbook of the International Law Commission, 2019, vol. II, Part Two*, draft article 15.3: 'Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.'

[160] Statute of the International Court of Justice, 26 June 1945, *Bulletin of Acts and Decrees* 1946, F 321.

[161] ICJ, 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment*, ICJ Reports 2012, p. 422.

List of abbreviations

CAVV
Advisory Committee on Issues of Public International Law

ICTY
International Criminal Tribunal for the former Yugoslavia

ICJ
International Court of Justice

ILC
International Law Commission

VCCR
Vienna Convention on Consular Relations

VCDR
Vienna Convention on Diplomatic Relations

UN
United Nations

UNGA
United Nations General Assembly