Permanent Mission
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Statement by the delegation of Ukraine

on the agenda item 79

the Report of the International Law Commission on the work of its seventy-third and seventy-fourth sessions

Cluster I

Mr. Chair,

Ukraine welcomes the report of the Commission.

In June 2022 the Commission adopted on first reading the Draft Articles on Immunity of State officials from foreign criminal jurisdiction. The topic holds fundamental importance to the prosecution of crimes under international law as it addresses the relationship between those crimes and immunity from foreign prosecution. In that regard, the ILC adopted Draft Article 7, which provides for exceptions to immunity *ratione materiae* (also known as functional immunity). Draft Article 7 accurately reflects customary international law insofar as it embodies the non-applicability of immunity *ratione materiae* to the crime of genocide, crimes against humanity and war crimes. But Draft Article 7, as currently drafted, fails to include the crime of aggression into the list of crimes to which functional immunity does not apply.

As stated in the commentary to Draft Article 7, the main reason for the inclusion of the relevant crimes in the scope of the provision was that those "are the crimes of the greatest concern to the international community as whole" and "are included in article 5 of the Rome Statute"[1]. Inconsistently with this reasoning, however, the ILC decided to exclude the crime of aggression from the list of crimes of Draft Article 7.

The Commission justified this decision when provisionally adopted Draft Article 7 in 2017, by asserting in the commentary to said provision that (i) the International Criminal Court's (ICC) jurisdiction over the crime of aggression had yet to be activated; (ii) as a leadership crime, the crime of aggression involved a

[1] *Yearbook of the International Law Commission*, 2017, vol. II, part two, p. 127, para. 17.

political dimension; (iii) and that the inapplicability of functional immunity to the crime of aggression would "require national courts to determine the existence of a prior act of aggression by a foreign State"[2]. However, none of those arguments convincingly explains the distinction made to the application of functional immunity to the crime of aggression as opposed to other crimes under international law.

Firstly, the ICC's jurisdiction over the crime of aggression has now been activated for over five years, fact that had been recognized by the ILC through the deletion of the aforementioned argument from the commentary to Draft Article 7 during the adoption of the Draft Articles on first reading. However, no modifications to the scope of the provision followed the activation of the jurisdiction over the crime of aggression by the ICC.

Secondly, although it is true that the crime of aggression involves a political dimension, the same assertion can be made in relation to any crime under international law. Those crimes are often, if not typically committed by State officials, and in all those cases, the proceedings will likely involve a political dimension.

As for the leadership requirement of the crime aggression, this entails that the commitment of this crime will be restricted to individuals who are "in a position effectively to exercise control over or to direct the political or military action of a State"[3], such as Heads of State and other State officials of the highest level. While this means that the prosecution of the crime of aggression by foreign criminal jurisdiction may sometimes not be possible due to the application of personal immunity, it does not explain why such acts, which constitute one of the most serious crimes of international concern, shall be barred from prosecution before foreign jurisdictions, after those individuals are no longer in office. In this context, it is worth recalling that contrary to personal immunity, functional immunity does not have a temporal limit, protecting acts performed in an official capacity from prosecution even after the individuals no longer occupy an official position.

Regarding the concern that the absence of functional immunity over the crime of aggression may lead to a situation where national courts have to evaluate the legality of the use of force by another State, it must again be emphasized that such a possibility is by no means a special feature of the crime of aggression. To the contrary, it has often been the case and will often be the case in the future, that national courts, in order to answer preliminary questions in the context of

[2] *Ibid*, para 18.
[3] Rome Statute, Article 8 *bis* (1).

proceedings for genocide, crimes against humanity or war crimes, will reach conclusions on the legality of State conduct, such as conclusions on the genocidal policy of a State or a State policy to carry out a systematic or widespread attack on civilian population.

Whereas the Commission was thus unable to present compelling reasons to exclude the crime of aggression from the scope of Draft Article 7, there are strong arguments in favour of recognizing – as a matter of existing customary international law – the non-applicability of functional immunity to crimes under international law, including the crime of aggression.

To recognize the absence of immunity *ratione materiae* in relation to the crime of aggression would be in conformity with the teleology behind the criminalization of a certain type of conduct directly under international law and the practice concerning the inapplicability of immunity to those crimes. Since its early stages, international criminal law has provided for the absence of functional immunities in respect to all crimes under international law. A key precedent in that regard is the Nuremberg Charter and the findings of the Nuremberg Tribunal. Article 7 of the 1945 London Charter stated that the "official position of defendants […] shall not be considered as freeing them from responsibility". The principle enshrined in the Charter was endorsed by the Nuremberg Tribunal which further declared that "[t]he principle of International Law, which under certain circumstances protects the representatives of State, cannot be applied to acts which are condemned as criminal by International Law". […] [I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual State. 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."[4] As for the crime of aggression, here designated as crime against peace, the Nuremberg Tribunal considered it to be the "supreme international crime"[5].

The Nuremberg precedent on the inapplicability of functional immunity in proceedings for crimes under international law, including the crime of aggression, was confirmed in 1946 by the adoption by the United Nations General Assembly of a resolution on the "affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal"[6]. In

[4] *Ibid* 448.

[5] International Military Tribunal, Judgement of 1 October 1946 in: The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August ,1946 to 1st October, 1946), p. 422.

[6] United Nations General Assembly Resolution 95(I), "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal", UN Doc n. A/RES/1/95, 11 December 1946.

1948, the Tokyo Tribunal followed the same approach of its predecessor, applying the principle of irrelevance of the official position to the prosecution of crimes under international law.

In 1962, in the case against Eichmann, the Supreme Court of Israel rejected functional immunity for crimes under international law by stating that those who commit such heinous crimes "cannot seek shelter behind the official character of their task or mission"[7]. Grounded in the Nuremberg precedent, which it considered to have already become "part parcel of the law of nations" [8], the Supreme Court upheld that the "Act of State theory" could not be used as a defence in respect to crimes under international law.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has also emphatically rejected the application of immunity *ratione materiae* to crimes under international law through its case law. In the Blaškić judgement of 1997, the ICTY's Appeals Chamber recognized an exception to immunity arising from the norms of international criminal law. According to this exception functional immunity cannot be invoked before *national* or international jurisdiction for crimes under international law, even if the perpetrators had acted in their official capacity[9]. This view was confirmed by decisions issued in other cases before the ICTY, such as the Karadžić case[10], the Milošević case[11], to cite a few. In the latter case, when pronouncing on the validity of Article 7(2) of the ICTY Statute - which determined the irrelevance of the defender's official position for purposes of criminal accountability – the Trial Chamber categorically affirmed that said provision reflected a rule of customary international law which traced back to the emergence of the doctrine of individual criminal responsibility under international law[12].

In 2019, the ICC also concluded for the inexistence of immunity for crimes under international law in the Jordan Appeals Judgment in the Al Bashir case. Although the findings of the Appeals Judgement refer mostly to the application of immunity before an international court, the judges also reflected on some foundational questions related to immunity. For instance, in their joint concurring opinion to

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[7] *Attorney-General of the Government of Israel v. Eichmann*, Record of Proceedings in the Supreme Court of Israel, Appeal session 7, Appeal Session 7, p. 29.
[8] *Ibid* 31.
[9] *Prosecutor v. Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of the trial chamber II of 18 july 1997, Appeals Chamber, Case no. IT-95-14, 29 October 1997, para. 41.
[10] *Prosecutor v. Karadžić et al*, Decision on the application by the Prosecution for a formal request for deferral by the government of Bosnia and Herzegovina of its investigations and criminal proceedings in relation to Radovan Karadzic, Ratko Mladic and Mico Stanisic, Trial Chamber, Case no. IT-95-5-D, 16 May 1995, para. 23-24.
[11] *Prosecutor v. Milošević*, Decision on preliminary motions, Trial Chamber, Case no. IT-02-54, 8 November 2001, para. 26-34.
[12] *Ibid* 28.

the decision, judges Eboe-Osuji, Morrison, Hofmański and Bossa recognized that the inquiry regarding limitation to immunity involved the reconciliation of certain interests within international law, particularly the stability of international relations, on one hand, and ensuring that such stability is not reached by means of impunity, on the other hand. Before engaging in an exercise of resolving the conflict between those interests, the judges made it clear that their considerations on the matter at hand did not concern a multitude of ordinary crimes, but rather "violations of the most serious crimes known to international law", namely genocide, crimes against humanity, war crimes and the crime of aggression[13], without distinction.

The case law reviewed above, unequivocally supports the view that, as a matter of customary international law, State officials do not enjoy functional immunity for crimes under international law and that no differentiation in that regard shall be made in respect to the crime of aggression.

The most recent addition to the relevant body of State practice consists of the accountability efforts with respect to Russia's war of aggression against Ukraine and this practice of States directly relates to the crime of aggression. In the past year, numerous States have supported the establishment of a Special Tribunal for the crime of aggression against Ukraine. Hereby, – at least by implication – the view is taken that Russian suspects would not enjoy functional immunity before such a tribunal no matter which model will be used for its establishment.

The inclusion of the crime of aggression in the list of crimes of Draft Article 7 would also be in conformity with the previous work of the ILC. In the past, the Commission has consistently rejected the application of immunity to crimes under international law. Principle III, of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the ILC in 1950, reaffirmed Article 7 of the Nuremberg Charter, by determining that "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 them from responsibility under international law". Similarly, Draft Article 3 of the 1954 Code of Offenses against the Peace and Security of Mankind and Draft Article 7 of the 1996 Code of Crimes Against Peace and Security of Mankind, both recognized the irrelevance of the official position for the prosecution of crimes under international law.

[13] *The Prosecutor v. Al Bashir*, Joint Concurring Opinion, Jordan Appeals Judgment, ICC-02/05-01/09-397-Corr. OA 2, 6 May 2019, para. 196.

Therefore, if the ILC chooses to maintain its decision to omit the crime of aggression from the scope of Draft Article 7 of the Draft Articles on Immunity of State officials from foreign criminal jurisdiction, it will be deviating from its historical position regarding the inapplicability of immunities to crimes under international law, at least in respect to the crime of aggression.

In this context, it is worth noting that the absence of the crime of aggression from paragraph 1 of Draft Article 7 was a matter of disagreement within the Commission. Following the provisional adoption of Draft Article 7 in 2017, a considerable number of members expressed concerns that the crime of aggression had not been included among the crimes to which functional immunity does not apply. One member[14] compellingly argued that to permit the application of immunity to the crime of aggression while, at the same time, excluding its application to the crimes of genocide, war crimes and crimes against humanity would risk undermining the Kampala Amendments and creating an unjustifiable hierarchy between the crimes provided for in Article 5 of the Rome Statute.

Such is also the position widely held in international legal scholarship, including most recently, a statement issued by the Dutch Advisory Committee on Public International law[15].

While the Commission has for the time being decided not to include the crime of aggression within the scope of Draft Article 7, this remains a point in special need of reconsideration, including in view of the written comments of States. In order to avoid a serious inconsistency in the treatment of crimes under international law and in order to confirm the principle of accountability for all crimes under international law, the ILC must confirm the inapplicability of functional immunity in proceedings for crimes under international law, without exception and hence encompassing the crime of aggression. This crime must therefore be included in the list of Draft Article 7.

Thank you.

[14] *Yearbook of the International Law Commission*, 2017, vol. 1, p. 139.
[15] Advisory Committee on Public International Law (CAVV), *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory report no. 40, 12 September 2022, p. 11-12.