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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

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

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 recPrb P! "

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] , 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.

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