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**Immunity of State officials from foreign criminal jurisdiction**

Statement of the Chairperson of the Drafting Committee, Mr. Mario Oyarzábal

23 May 2025

Mr. Chair,

It is my pleasure to introduce the first report of the Drafting Committee for the seventy-sixth session of the International Law Commission, which concerns the topic “Immunity of State officials from foreign criminal jurisdiction”. The report, which is to be found in document [A/CN.4/L.1017](#), was issued on 15 May 2025. It contains the texts and titles of draft articles 7, 8 and 9, as provisionally adopted by the Drafting Committee on second reading at the present session.

Before commencing with the introduction of the draft articles, allow me to pay tribute to the Special Rapporteur, Mr. Claudio Grossman Guiloff, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee on the second reading of the draft articles. I also would like to thank the members of the Committee for their active participation, constructive spirit and significant contributions to the successful outcome. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

As a result of the reduced session, the Drafting Committee was only able to devote five meetings to this topic, from 6 to 12 May, for the consideration of draft articles 7 to 18 and the draft

annex, as proposed by the Special Rapporteur in his second report.<sup>1</sup> These provisions were referred to the Drafting Committee by the Commission at the conclusion of the Plenary debate at its 3707th meeting, on 5 May 2025. The Committee was able to adopt three draft articles at the present session, namely draft articles 7 to 9. I should note that, in accordance with the normal practice on second reading and to avoid potential confusion, it is the intention of the Committee to address the renumbering of the draft articles at the end of the second reading.

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Mr. Chair,

I shall introduce in turn the draft articles provisionally adopted by the Drafting Committee. Let me turn first to draft article 7.

**Draft article 7 – Crimes under international law in respect of which immunity *ratione materiae* shall not apply**

The Drafting Committee modified the text of **draft article 7** from that adopted by the Commission on first reading in two respects. First, it adopted the proposal of the Special Rapporteur, reflected in his second report, to add three crimes to the list of crimes under international law in respect of which immunity *ratione materiae* shall not apply. Second, it consolidated the provision into a single paragraph, replacing the former paragraph 2 and the draft annex by adding new text at the end of what was previously paragraph 1. I shall address these two changes in turn.

Before I begin, allow me to emphasize that, throughout its discussion of the provision, the Committee was mindful of the sensitivity of the subject matter and the need to maintain a delicate

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<sup>1</sup> [A/CN.4/780](#).

balance between the principle of sovereign equality and the need for accountability for the most serious international crimes.

### **The list of crimes and additions thereto**

Mr. Chair,

With respect to the list of crimes in respect of which immunity *rationae materiae* shall not apply, the Drafting Committee adopted the proposal of the Special Rapporteur, as made in his second report, to add the crime of aggression, slavery and slave trade to the list. The Drafting Committee held a thorough discussion of the list.

Throughout the discussion, the Committee was motivated by two concerns: first, the need to provide a high degree of legal certainty, and second, a desire to avoid foreclosing possible future developments in international law. Concerning the former, it was noted that draft article 7 itself does not establish or define any crimes. Nevertheless, it was considered that legal certainty was desirable as the draft article dealt with criminal jurisdiction. It was observed that the provision would need to provide guidance not only to States, but also to prosecutorial and judicial authorities who might not be experts in international law.

To address the latter, the committee considered whether it would be better to delete the list and provide instead criteria for the identification of the crimes in respect of which immunity *ratione materiae* did not apply. Several proposals were considered that would have made clear in the text that the list of crimes was not exhaustive. These included the addition of the words “*inter alia*” or “including” to the chapeau, the addition of a sub-paragraph to the list referring to “other crimes under international law for which it is established under applicable rules of international that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply” and the addition of a new paragraph containing a without prejudice clause with respect to future developments. None of those proposals found general support in the Committee.

The Drafting Committee decided to keep the format adopted on first reading in the interests of providing legal certainty and of avoiding too large a change to the first reading text. It concluded that the possibility of future developments would be better addressed in the commentary. It was recalled that the Commission was preparing the draft articles to serve as a basis for the negotiation of a potential convention. States would therefore be in a position to consider them and amend them,

to the extent they felt necessary. It was also observed that the Commission's work on previous topics, for example the law of the sea,<sup>2</sup> did not have the effect of freezing the law in that field.

In considering both whether to keep the list of crimes and whether to add additional offenses to it, the Drafting Committee held a thorough discussion of the criteria that applied to the inclusion of crimes in draft article 7. It was agreed to strengthen the discussion of those criteria in the commentary, both to explain the present text and to guide States should they consider whether further crimes might also be included within the exception in the future. Several relevant criteria were discussed. It was considered that a crime should be included only if it was clearly recognized as a crime under international law, whether through widely ratified treaties or established rules of customary international law. Particular attention was drawn to the Rome Statute of the International Criminal Court,<sup>3</sup> which several members regarded as the most comprehensive and widely accepted expression of the core international crimes. At the same time, it was also emphasized that States were bound by different treaty obligations and cautioned against relying on instruments that had not achieved universal ratification, such as the Rome Statute and its Kampala Amendment.<sup>4</sup>

In addition to recognition under international law, it was stressed that only crimes for which international law itself imposed direct individual criminal responsibility should be included in draft article 7. This stood in contrast to crimes that international law merely obliged States to suppress through domestic criminalization. It was emphasized that immunity *ratione materiae* was grounded in the attribution of acts to the State. Where international law directly held individuals responsible, such acts were no longer regarded solely as official acts, and thus functional immunity did not apply. It was observed that where international law conferred extraterritorial jurisdiction over certain crimes and expressly permitted the prosecution of individuals for acts committed in an official capacity, it would be logically inconsistent to permit the invocation of functional immunity to block such proceedings.

The Drafting Committee considered that the crimes listed must be clearly and precisely defined under international law, in line with the principle of legality—*nullum crimen sine lege*. This, they noted, was essential to ensure predictability and legal certainty for national authorities.

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<sup>2</sup> See *Yearbook ... 1956*, vol. II, document A/3159, p. 225, para. 33.

<sup>3</sup> Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

<sup>4</sup> Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (Kampala, 11 June 2010), United Nations, *Treaty Series*, vol. 2922, No. 38544, p. 199.

It was, accordingly, important to include only those crimes for which treaties or customary law provided well-established and elaborated definitions.

The Drafting Committee also considered whether the inclusion of crimes in the draft article should also take into account their seriousness or gravity. It was noted that this criterion underpinned the structure of the Rome Statute and reflected the broad consensus around the core crimes under international law. Reference was made in particular to the preamble and Article 5 of the Rome Statute, which described such crimes as “the most serious crimes of concern to the international community”. However, it was pointed out that such characterization was inherently vague and subjective, and that past debates, such as those during the drafting of the Rome Statute, revealed indeterminacies as to whether certain crimes, such as corruption or drug trafficking, met this threshold.

Mr Chair,

I shall now address each of the crimes added to the list. The **crime of aggression** was included, as it met the criteria identified for inclusion. The Drafting Committee was of the view that the crime of aggression was a crime under international law for which individual criminal responsibility was clearly established, and which was typically committed by persons acting in an official capacity, thereby falling within the scope of draft article 7. The crime of aggression has been consistently recognized as a crime under international law in the Commission’s previous work, in particular the 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,<sup>5</sup> both the 1954 Draft Code of Offences against the Peace and Security of Mankind<sup>6</sup> and the 1996 Draft Code of Crimes against the Peace and Security of Mankind,<sup>7</sup> as well as the 1994 Draft Statute for an International Criminal Court.<sup>8</sup> The Committee also took into account the Rome Statute and its Kampala Amendment, which list the crime of aggression alongside genocide, crimes against humanity, and war crimes as one of the core international crimes. It was further noted that many States had called for the inclusion of the crime of aggression, and that doing so would demonstrate responsiveness to those views.

At the same time, the complexity and sensitivity of prosecuting the crime of aggression in domestic jurisdictions, especially in the absence of a prior international determination of State responsibility, was discussed. To address such concerns, the Drafting Committee considered a proposal to qualify the inclusion of the crime of aggression by specifying that it would apply only

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<sup>5</sup> *Yearbook ... 1950*, vol. II, para. 97.

<sup>6</sup> *Yearbook ... 1954*, vol. II, para. 54.

<sup>7</sup> *Yearbook ... 1996*, vol. II (Part Two), para. 50.

<sup>8</sup> *Yearbook ... 1994*, vol. II (Part Two), para. 91.

where a competent international court, tribunal, or organ had already determined that an act of aggression had occurred. While the concern was acknowledged, the proposed qualification was not retained in the text, as it was considered that to introduce such a condition would conflate two distinct legal questions, namely, the existence of jurisdiction and the applicability of immunity, respectively. Draft article 7 concerns the procedural bar of immunity *ratione materiae*, and not the basis for the exercise of jurisdiction by the forum State. It was noted that the non-application of immunity does not itself imply or create universal jurisdiction. The question of whether a court can exercise jurisdiction still has to be assessed separately in accordance with international law. The Special Rapporteur will further address the question of jurisdictional limits in the commentary. There was also a suggestion in the Committee that the matter might also be revisited in the context of draft article 14 on the determination of immunity.

**Slavery** and **slave trade** were also included in draft article 7. The Drafting Committee was of the view that those crimes were clearly established under international law and consistent with the criteria identified. Both crimes give rise to individual criminal responsibility and are recognized in multiple treaties as well as in customary international law. A further consideration was that slavery and the slave trade are clearly defined in international law and therefore satisfy the principle of *nullum crimen sine lege* and offered legal certainty for national courts. Furthermore, slavery is recognized as one of the crimes falling within the definition of crimes against humanity under international law. The addition of the two crimes also responds to concerns raised by a number of States during the first reading. Further clarification of the legal basis and definitional contours of the two crimes will be provided in the commentary.

The Committee also addressed the possibility of adding further crimes to the list. There was a view in the Drafting Committee that the crime of terrorism should be included, given its serious impact and the existence of numerous treaties treating terrorism as an international offence. However, the Drafting Committee decided against doing so, for the reason that the definition and legal basis of terrorism remains contested. In relation to piracy, the Drafting Committee took note of the fact that it was expressly defined under international law as conduct committed for private ends and, as such, fell outside the scope of immunity *ratione materiae*. Other crimes such as drug trafficking, corruption and extrajudicial killings were raised during the discussion, primarily to illustrate the lack of consensus or definitional clarity associated with their treatment as crimes under international law. It was recalled that earlier negotiations, including those on the Rome Statute, had not resulted in agreement on the inclusion of such crimes. Accordingly, the Drafting

Committee was of the view that the list should remain limited to crimes that met established legal and definitional thresholds.

Mr. Chair,

Allow me to briefly address to the order of the list of crimes. The Drafting Committee adopted the list of crimes as presented in the second report of the Special Rapporteur, which preserves the order adopted at first reading. It was generally recognized that each of the crimes included in draft article 7 was of a high gravity and that there was no hierarchy between them. The order was therefore essentially irrelevant. Several possible orders were considered. It was suggested that the crime of aggression could be first, recalling that the International Military Tribunal at Nürnberg had described it as the “supreme international crime”.<sup>9</sup> Another option proposed was to begin with the crimes in article 5 of the Rome Statute, followed by the others. While it was recognized that many States had agreed to that order, several others were not bound by the Rome Statute. Alphabetical order was rejected as a possibility because it was not the same in each official language.

Finally, the view was expressed that the first reading text of draft article 7, paragraph 1, with the addition of the three new crimes, was not grounded in international law and should not be maintained.

### **Changes to the chapeau and deletion of paragraph 2 and the draft annex**

Mr. Chair,

I turn now to the new text in draft article 7 and the deletion of the former paragraph 2 and the draft annex. The Drafting Committee had an extensive discussion of how best to address the need to define the crimes listed in draft article 7 for the purpose of delimiting when immunity *ratione materiae* does and does not apply. The text adopted on first reading did this by reference to definitions contained in the treaties contained in the draft annex. The Drafting Committee decided to delete former paragraph 2 and the annex and to amend the former paragraph 1 so as to indicate that the crimes are to be understood “as defined according to the applicable rules of international law”.

The change was motivated by a number of difficulties with the approach taken on first reading. The Drafting Committee took note of the fact that many States were not party to some of

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<sup>9</sup> International Military Tribunal, Judgment, 30 September 1946, *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings*, vol. 22, p. 427.

the treaties referred to in the former draft annex, for example the Rome Statute of the International Criminal Court. It is not the intention behind draft article 7 to impose the obligations of such treaties on States not party to them, nor to compel States to ratify those treaties. It was also noted that the annex, as adopted on first reading, had excluded certain relevant treaties. Those included the 1949 Geneva Conventions,<sup>10</sup> which were universally ratified and defined certain war crimes; Additional Protocol I thereto,<sup>11</sup> which was raised in connection with both war crimes and the crime of *apartheid*; and the 1956 Supplementary Convention on the abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.<sup>12</sup> Nonetheless, it was considered difficult to identify which version of a treaty would be the appropriate one to include in the annex. For example, a number of amendments to the definition of war crimes in article 8 of the Rome Statute have been adopted, but not all have been widely ratified by the States parties to Rome Statute.

Furthermore, the Drafting Committee took into account the fact that it was not only treaties that were relevant to the definitions of the crimes contained in draft article 7. Each of the crimes also has a definition under customary international law, which applies as between States not bound by a relevant treaty and could also apply to events which occurred before the entry into force of a treaty for the relevant State.

The possibility of including the definitions of the crimes in the text of the draft articles themselves was considered. However, such approach would be outside the scope of the Commission's work on the topic and would make the draft articles excessively long.

The phrase "according to" was chosen instead of the word "by" to accommodate the possibility that States might consider their definitions under domestic law to be relevant. It is intended to emphasize that the normative source of a definition is less important than its conformity with the definition of the crime applicable under international law as between the States concerned.

The approach taken by the Drafting Committee avoids the difficulties mentioned earlier by making it clear that it is the applicable international law that provides the definitions that limit the exception to immunity *ratione materiae*. It is intended to point the reader to the commentary, in which the factors I have mentioned will be addressed. I should add that, overall, the sense of the Drafting Committee was that, should States proceed to the negotiation of a treaty on the basis of

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<sup>10</sup> Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

<sup>12</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), United Nations, *Treaty Series*, vol. 266, No. 3822, p. 3.

the draft articles, they will be in a position to resolve the question of definitions in an appropriate and mutually agreeable way.

**Proposal for paragraph 3**

Mr. Chair,

I should also mention that the Drafting Committee also considered the possibility of adding an additional paragraph containing a without prejudice clause to draft article 7. The proposed paragraph would have specified that draft article 7 is without prejudice to the application of immunity *ratione materiae*, if provided for in an international treaty, as between States parties to such treaty, or under customary international law. The addition of such a paragraph was considered unnecessary, because any immunity of State officials provided for by special rules of international law agreed to between States fell within the scope of draft article 1, paragraph 2. This will be made clear in the commentary to draft article 1. It was also suggested that amendments to draft article 14, paragraph 3, could be considered in due course to emphasize the need for the forum State to take any relevant special rules into account when determining the existence of immunity.

Mr. Chair,

To conclude, the Drafting Committee adopted draft article 7 as amended. Permit me to mention also that some members expressly disassociated themselves from draft article 7 indicating that it did not reflect customary international law and did not join the consensus for its adoption.

The title of draft article 7 remains “**Crimes under international law in respect of which immunity *ratione materiae* shall not apply**”, as adopted on first reading.

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Mr. Chair,

I now turn to draft article 8.

### **Draft article 8 – Application of Part Four**

The Drafting Committee provisionally adopted **draft article 8** with some modifications to of the text of the provision adopted on first reading. The provision, now structured in two paragraphs, as was proposed by the Special Rapporteur in his second report, clarifies the temporal and substantive scope of Part Four of the draft articles, which contains the procedural provisions and safeguards governing the application of immunity of State officials from foreign criminal jurisdiction. The formulation of the two paragraphs is based on the first reading text.

#### **Paragraph 1**

Paragraph 1 of draft article 8 addresses the situations in which the procedural provisions and safeguards in Part Four apply. It was revised in three respects. The first two aimed at streamlining the text: the formulation was streamlined by the replacement of “shall be applicable” with “shall apply”, and the phrase “current or former” was deleted, as the inclusion of former State officials was already covered by the definition contained in draft article 2, paragraph (a), which presently remains in the Drafting Committee. The third changes was the replacement of the phrase “in relation to any exercise of criminal jurisdiction” by “in any situation that may involve the exercise of criminal jurisdiction”. Those modifications were guided by the desire to maintain a broad yet precise formulation that ensures procedural safeguards apply at all relevant stages of criminal proceedings and with respect to all draft articles under Parts Two and Three of the draft articles.

The Committee’s discussions reflected a careful effort to strike an appropriate balance in the scope of application of Part Four, avoiding an unduly expansive or restrictive approach that could give rise to unintended consequences. A central issue raised during the debate was whether the language proposed sufficiently encompassed the application of Part Four to situations covered by draft article 7.

The Drafting Committee was confronted with the possibility that a reference to situations that may “affect the immunity of an official” could be interpreted as excluding cases in which immunity is deemed inapplicable *ab initio*, thus potentially allowing a forum State to disregard the procedural safeguards on the basis of a unilateral determination that draft article 7 is engaged. Various proposals were put considered to address such concern. One suggestion was to eliminate

the reference to immunity altogether, replacing it with broader formulations such as “may affect an official of another State,” in order to ensure that the provision would also encompass scenarios in which immunity does not apply. A different proposal sought to introduce a more specific reference to the “existence or application” of immunity, so as to make it clear that Part Four would apply not only in cases where immunity is confirmed but also where it is subject to determination or ultimately denied.

At the same time, the Drafting Committee was cognizant of the need to avoid excessive broadening of the scope of the provision. An overly expansive formulation could lead to procedural safeguards being triggered in circumstances not contemplated by the draft articles, such as when a State official is contacted merely as a witness. This concern was particularly linked to the risk of inadvertently extending the procedural framework to situations falling outside the concept of immunity from foreign criminal jurisdiction.

To mitigate such concerns, the text adopted preserves a nexus with the exercise of criminal jurisdiction, while remaining broad enough to encompass cases involving draft article 7. It retains a functional connection to jurisdictional action while reflecting the contingency and preliminary nature of many of the procedural safeguards envisioned under Part Four.

Another important point considered in the discussions in the Drafting Committee concerned delineating a scope of application under draft article 8 broad enough to cover all the provisions under Part Four. The Committee considered that provisions such as draft articles 10 and 14 refer to obligations arising before or during early stages of proceedings, and, as such, draft article 8 should be read as a general rule establishing the applicability of the procedural framework in all such instances. The Drafting Committee sought coherence and internal consistency, with the general scope set out in draft article 8 being at least as broad as the most expansive provision of Part Four. Each provision of Part Four would, in any event, apply on its own terms, and will be subject to further clarification in the commentary.

Various suggestions were considered with respect to the term used to frame the scope of application. Alternatives such as “case”, “circumstance” or “situation” were proposed in lieu of “instance”. After considering the implications of each, the Committee agreed that “situation” was preferable, as “instance” was viewed by some as too formal or obscure, while “case” risked suggesting a formal legal proceeding, which might unduly narrow the scope.

## **Paragraph 2**

Paragraph 2 addresses the applicability of Part Four to the articles in Parts Two and Three, concerning immunity *rationae personae* and immunity *rationae materiae* respectively. It largely

reflects the first-reading text, which was retained with only minor adjustments, in particular, the replacement of the phrase “that concerns any” by “[t]he present Part is applicable to”, so as to enable the division of the provision, as adopted on first reading, into two paragraphs, and the deletion of the words “any of” before “the draft articles contained in Part Two and Part Three”.

### **Possible paragraph 3**

A proposal was made to include a third paragraph containing a “without prejudice” clause intended to safeguard treaty obligations of States arising from other international instruments, in particular obligations of mutual legal assistance or the obligation to extradite or prosecute (*aut dedere aut judicare*), as found in international conventions.

While the Drafting Committee recognized the merit of addressing such concerns, it was decided to leave the consideration of the issue to the discussion on draft article 15, paragraph 5, which contains a similar clause in the context of the transfer of criminal proceedings. The decision to defer the matter to that discussion, which will take place in the Drafting Committee next year, was also motivated by the realization that a more thorough discussion might be warranted on the issue of immunities and obligations to prosecute or extradite before deciding whether to include a new paragraph and, if so, where it would be best placed in the draft articles.

The title of draft article 8 remains “**Application of Part Four**”, as adopted on first reading.

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Mr. Chair,

I now turn to draft article 9.

### **Draft article 9 – Examination of immunity by the forum State**

The Drafting Committee provisionally adopted **draft article 9** with a minor revision to the first reading text. Specifically, the words “against an official of another State” were added at the end of paragraph 2, subparagraph (a) to add clarity and to provide for a parallel structure with subparagraph (b). The Drafting Committee also considered a proposal by the Special Rapporteur in his second report, and inspired by the comments of a Member State, to add the words “as far as

practicable” to paragraph 1. The Drafting Committee acknowledged that the forum State would require a degree of flexibility in implementing its obligation under draft article 9 and considered that the text of the provision adopted on first reading already afforded such flexibility to States. There was also a concern that the additional text would *a contrario* imply the existence of situations where the forum State was not obligated to examine immunity because it was not practicable, which would weaken the provision. Paragraph 1 was therefore left unchanged.

The title of draft article 9 remains “**Examination of immunity by the forum State**”, as adopted on first reading.

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Mr. Chair,

This concludes my introduction of the first report of the Drafting Committee for the seventy-sixth session. Let me clarify that the Commission is being requested, at this stage, to take note of draft articles 7, 8 and 9. In accordance with our established practice, the draft articles will be adopted next year, so as to allow for the preparation of the corresponding commentaries.

Thank you, Mr. Chair.

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