

Statement by Mario Oyarzábal*

**on the Second Report on the Immunity of State Officials from Foreign Criminal
Jurisdiction by Claudio Grossman Guiloff, Special Rapporteur
(A/CN.4/780, 29 January 2025)**

**International Law Commission – 76th Session
29 April 2025**

Original: Spanish

Mr. Chair,

As this is my first intervention in the plenary, I wish to congratulate you and the rest of my colleagues on the Bureau for their election to lead our work during the current, unfortunately shortened session. I also wish to thank all the members of the Commission for their confidence in me as Chair of the Drafting Committee, which I shall carry out with all the responsibility that this entails.

Mr. Chair,

Let me start by thanking and congratulating the Special Rapporteur (SR) for his excellent second report which provides useful comments and balanced suggestions, and whose thrust I overall agree with.

For sake of brevity, I will address only some main issues raised by draft articles 7 through 18, but not before stressing that my comments are based on the premise that the Commission will recommend to the General Assembly that the draft articles be considered as a basis for the negotiation of a treaty, as proposed by the SR,¹ since the draft articles contain *de lege ferenda* provisions which, if misunderstood, could cause serious harm to international relations on a highly sensitive matter.

Mr. Chair,

On that understanding, I agree with the new **draft article 7** as proposed by the SR with the addition of the crimes of aggression, slavery and slave trade to which immunity *ratione materiae* shall not apply.²

* I thank Tanisha Singh, Cosmo Reitzig and Olivia González for their research assistance.

¹ Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Claudio Grossman Guiloff, Special Rapporteur (A/CN.4/780) para. 17.

² A/CN.4/780 para. 79.

Draft article 7 lists some of the most serious crimes of concern to the international community.³ This Commission's draft conclusions on peremptory norms of international law include the prohibition of aggression and slavery;⁴ the crime of aggression is further identified as a crime over which the International Criminal Court may exercise jurisdiction;⁵ and the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery have seen widespread accession.⁶ Therefore, while it would have been desirable that the SR substantiated further in his Report the reasons for including such three important crimes, I find their inclusion within the ambit of draft article 7 appropriate.

Retaining draft article 7 as amended would send a powerful message that State officials may be held accountable for their crimes, even if the relationship between international criminal law and the law of immunity is unsettled.

In view of this, it is of paramount importance that the commentaries adequately reflect the State practice — both of the jurisdictions where an exception to immunity *ratione materiae* has been affirmed like Argentina and other mostly European countries, and of the majority of jurisdictions where foreign State officials enjoy absolute immunity. Moreover, emphasis on judicial practice tends to overshadow the fact that judicial decisions are not a source of international law, and that the jurisprudence in some countries like my own — which the SR cites at length — remains for the most part in the lower courts and there have been no pronouncements by the Supreme Court on the matter. Particular weight should be given to the positions expressed by governments in the UNGA Sixth Committee and elsewhere with regard to a question which is deemed to have an impact on inter-State relations.

Furthermore, I would caution against elaborating in the commentaries that crimes committed by foreign officials in the territory of the forum State are not covered by immunity,⁷ as these revisions have the potential to dramatically impact the substance and reach of draft article 7.

Mr. Chair,

I will move now to the procedural safeguards which are extremely important to balance out the lifting of immunity foreseen in draft article 7, in such a way that the universal quest for accountability for the most serious crimes does not come at the cost of the maintenance of friendly relations among States and the also fundamental principle of respect for sovereign equality.⁸

³ See Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10) p. 234 (commentary to draft article 7).

⁴ International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens)* (2022).

⁵ Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (11 June 2010) art. 8 *bis*

⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3.

⁷ A/CN.4/780 para. 81.

⁸ A/CN.4/780 para. 75.

Overall, I commend the SR for his constructive engagement with the State's comments. Many of the proposed amendments reflect a clear effort to enhance clarity, flexibility, and the practical operability of the draft articles. That said, further refinement is needed, particularly through the commentaries, to address unresolved concerns and ensure coherence in application.

Mr. Chair,

Very briefly, on **draft article 8**, I am concerned that the application of Part IV to cases where a State official enjoys immunity *ratione personae* may raise questions about the absoluteness of such immunity. In any event, not *all* the provisions of Part IV are applicable to Part III, and therefore I cannot support paragraph 2 as proposed. For the most part, the examination and determination of immunity *ratione personae* by the forum States begins and ends with the question whether the official in question is a head of State, a head of government or a minister of foreign affairs.

On a different note, I recommend that, to the extent possible, the commentaries clarify the relationship between procedural safeguards and different forms of immunity and jurisdictional action —such as witness testimony or investigative measures by providing illustrative examples.⁹

Mr. Chair,

Draft article 12 is central to Part IV and, more broadly, to the legitimacy and credibility of the entire procedural framework. The SR reaffirms that waivers must be irrevocable, drawing on the principle of good faith and the interest of legal certainty. While this approach has doctrinal support, it has been contested by a significant number of States¹⁰ which advocate for the possibility of revocation under narrow and exceptional circumstances, such as the emergence of new facts or the breakdown of due process guarantees.

The SR's response, referring to general grounds of invalidity under the Vienna Convention on the Law of Treaties, is conceptually sound but remains too vague to serve as a meaningful procedural guide.¹¹ I would therefore recommend incorporating a narrowly tailored exception into the draft article, allowing States to revoke the exercised waiver.

In addition, I suggest that in regard to waivers of immunity it should also be possible to make a distinction between immunity from prosecution and immunity from enforcement. States may be willing to waive immunity for trial purposes while still retaining the right to withhold consent for enforcement. Thus, I suggest that the distinction should be either recognized in draft article 12 itself or in the commentaries, to retain doctrinal consistency with State immunity.

⁹ Para. 91.

¹⁰ E.g. Singapore, Brazil, the Netherlands, and the United Kingdom in A/CN.4/780 paras. 177-178.

¹¹ A/CN.4/780 para. 185.

Mr. Chair,

Together, draft articles 9 and 10 provide the essential front-end procedural safeguards before any coercive measures are undertaken against a foreign official.

In **draft article 9**, I welcome the addition of the phrase “*as far as practicable*,” which responds to calls for procedural flexibility in urgent situations.¹² I support the retention of a distinct separation between draft articles 9 and 14, as these provisions govern different procedural phases — preliminary consideration versus formal determination.¹³

In **draft article 10**, I note the SR’s proposal to introduce an exception to notification obligations where it would compromise confidentiality or ongoing criminal proceedings.¹⁴ I support this pragmatic and appropriate response to concerns raised by some States.¹⁵ I also suggest that further clarification is needed in the commentary on how this exception interacts with the general obligation to notify “*before initiating criminal proceedings*.” A more precise formulation could help ensure consistency across jurisdictions and enhance legal certainty.

I also wish to highlight the importance of clarity in **draft article 14**. Several States raised concerns about whether the list of criteria provided in paragraph 2 is mandatory or advisory.¹⁶ This point is critical, as it shapes how forum States are expected to approach immunity determinations in practice. I recommend that the commentaries explicitly distinguish between criteria that must be applied as a matter of legal obligation and those that are merely illustrative or recommendatory. This would avoid confusion and contribute to a more predictable application of the draft articles.

The notification obligations in turn pose the questions of the lack of invocation of inviolability, an important issue which is not addressed in **draft article 11**. To me, that there is no requirement for invocation and that invocation cannot and should not be considered as a prerequisite for immunity is a sufficiently important matter to be stated expressly in the draft article instead of being relegated to the commentaries.

Mr. Chair,

Draft article 18 is one of the most contentious provisions in Part IV. While some States welcomed the inclusion of a dispute settlement clause in principle, many voiced concerns about the automatic submission of disputes to the International Court of Justice.¹⁷ These concerns include the absence of opt-out clauses, the lack of alternative or non-binding mechanisms,¹⁸ and the unclear relationship with ongoing domestic criminal proceedings.¹⁹

¹² A/CN.4/780 para. 126.

¹³ A/CN.4/780 para. 145.

¹⁴ A/CN.4/780 para. 145.

¹⁵ France, the United States, and Switzerland in A/CN.4/780 para. 144.

¹⁶ Particularly Colombia and France in A/CN.4/780 para. 220.

¹⁷ A/CN.4/780 paras. 270-273.

¹⁸ A/CN.4/780 paras. 275, 278, 281.

¹⁹ A/CN.4/780 paras. 274, 285.

The silence of the Report on such an important point is unfortunate. I recommend including in draft article 18 an opt-out clause, to address States' concerns, create flexibility for States and enhance support for the draft as a whole.

Suggested opt-out clause to be included as paragraph 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.”*

Mr. Chair,

The SR's decision to retain the discretionary character of any requests for information in draft article 13 is appropriate.²⁰ However, I encourage further engagement in the commentary concerning two aspects:

First, the confidentiality of shared information — particularly in relation to personal data and national security — should be explicitly addressed in the commentary.²¹

Second, the commentary should clarify that a refusal to provide information cannot be construed as prejudicial to the recognition of immunity.²²

Mr. Chair,

Draft article 15 is preserved as a mechanism to balance the interests of the forum State and the State of the official. That said, calls from States to make transfer of proceedings mandatory were not substantively addressed.²³ Even if the SR does not accept a mandatory approach — which I agree with — the commentary should clearly explain why discretion is preserved and under what conditions a transfer would be appropriate.

On **draft article 16**, I agree with the SR's proposal to retain it. While States pointing out that procedural rights are a separate question from the immunity issue²⁴ and that these rights are already protected under existing international instruments²⁵ are technically correct, draft article 16 may play an important hortatory role.

Finally, **draft article 17** retains a mandatory formulation of consultations, despite well-founded opposition from many States.²⁶ Given this lack of support, I would recommend either revising the provision to adopt a non-binding or recommended formulation, or, at a minimum, clarifying in the commentary the basis and intended flexibility of such consultations.²⁷

²⁰ A/CN.4/780 para. 198.

²¹ A/CN.4/780 para. 195.

²² As suggested by Israel in A/CN.4/780 para. 194.

²³ E.g. Israel and Cameroon in A/CN.4/780 para. 230.

²⁴ View of the Netherlands in A/CN.4/780 para. 251.

²⁵ A/CN.4/780 paras. 251-256.

²⁶ Including the United States and the Netherlands in A/CN.4/780 paras. 263-264.

²⁷ A/CN.4/780 para. 267.

In closing, I thank again the SR for his work on such an important topic. My thanks also go to you, Mr. Chair, and to the other members of the Commission for a rich and fruitful debate.

My full statement will be sent to the Secretariat shortly for circulation.