Statement by Mario Oyarzábal*

on the First Report on the Immunity of State Officials from Foreign Criminal Jurisdiction by Claudio Grossman Guiloff, Special Rapporteur (A/CN.4/775, 3 May 2024)

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Thank you very much, Mr. Chair,

Let me start my intervention by sincerely thanking and congratulating the Special Rapporteur (SR) on the topic of immunity of state officials from foreign criminal jurisdiction, Claudio Grossman Guiloff, for the excellent first report he produced, which provides an impressive basis to start our discussion on the topic.

I would also like to thank the Secretariat for its extremely useful Memorandum.

Like Mr. Ruda Santoria, I would like to pay tribute to the previous SR of the Commission on this topic, Concepción Escobar Hernández, who has provided an excellent basis for successfully concluding our work.

My intervention today will be structured as follows: To begin with, I will address the format of the Draft Articles' end product, then I will address the importance of today's discussion of the topic, and finally, I will proceed to make some non-exhaustive suggestions on each of the proposed draft articles.

Mr. Chair,

I would like to address the format of the end product of the Draft Articles first, as I consider it important to acknowledge that Draft Articles are a clear indicator that the ultimate aim is for a treaty to be concluded on their basis. Article 20 of the ILC Statute envisages that the Commission prepare its drafts in the form of articles, despite other forms being used at times. As the SR acknowledges in his report, the Draft Articles contain both elements of progressive development and codification of customary law. The Commission's recent practice has been to recommend the elaboration of a convention by the General Assembly and/or by an international conference of plenipotentiaries on the basis of the Draft Articles.

The 2001 Articles on State Responsibility for Internationally Wrongful Acts[1], the 2016 Draft Articles on the Protection of Persons in the Event of Disasters, and the 2019 Draft Articles

* I thank Liline Steyn and Olivia González for their research assistance.

[1] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp. IV.E.1, November 2001.

on Prevention and Punishment of Crimes Against Humanity serve as relevant examples of that practice and for good reasons. These examples reassure us that the conclusion of a treaty will be considered by States which will then have the last word to progressively develop international law or not, without precluding the emergence of customary international law as a consequence of State practice and *opinio iuris.*

Therefore, and for the reasons also expressed by Mr. Fatallah, I strongly support the SR's second option in paragraph 38 of his report, namely, to commend the Draft Articles to the attention of States to use them as the basis to negotiate a treaty on the topic.

I further believe that such a decision should be made by the Commission as a matter of priority in its current session as it would help us navigate the very sensitive issues that this topic involves.

Mr. Chair,

As regards the content of the Draft Articles generally, we should be mindful of the fact that the topic has been under consideration by the Commission since 2007, in the course of which States had ample opportunity to comment on the ongoing work. As we embark on the second reading, we should not aim at revisiting draft provisions that have been carefully crafted on the basis of thorough consideration and the comments received from States. At the same time, State practice and *opinio iuris* may have evolved since some of the Draft Articles were provisionally adopted several years ago, and this will be the first time that the majority of the current membership has an opportunity to address the Draft Articles. As a result, some changes may have to be introduced, including on the basis of what will be the format of the product that the Commission will recommend; and I believe that the Commission should not shy away from amending the Draft Articles adopted on first reading as may be necessary.

Mr. Chair,

With regard to **draft article 1**, I agree with and commend the SR's proposal to further clarify the difference between criminal jurisdiction and inviolability in the Commentaries. This distinction is crucial for a nuanced understanding of the Draft Articles.

Inviolability is commonly understood as the principle pursuant to which certain individuals, entities, or properties are immune from violation or interference, especially by State authorities. This concept is referred to in several international treaties and in the case law of the International Court of Justice.[2] It is directly mentioned in Article 29 of the Vienna

[2] It is referred to extensively in Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment of 4 June 2008. United Nations, International Law Commission. "Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction." By Concepción Escobar Hernández, Special Rapporteur. Document A/CN.4/661. Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013. United Nations, International Law Commission. "ILC Report." A/77/10, 2022, chap. VI, paras. 60–69.

Convention on Diplomatic Relations of 1961[3] and indirectly in other treaties.[4] The Institute of International Law has also referred to inviolability in some of its resolutions.[5] However, a discussion on its definition and scope is missing in the context of these Draft Articles and commentaries. One could argue that inviolability is a special form of immunity from the coercive exercise of enforcement jurisdiction. On the other hand, typically, inviolability is linked to diplomatic premises and their personnel[6], and the International Court of Justice has emphasised the fundamental character of the "principle of inviolability" in that context.[7]

In carrying out the clarification that the SR seeks to undertake, it would be advisable to consider the previous work of the Commission, where these concepts were defined, together with other materials that may be relevant.

On a different note, I agree and support, in principle, the new formulation of paragraph 3 proposed by the SR. On numeral (a) I only propose to replace the term "agreements" by "treaties". I also agree with the new numeral (b) that excludes from the Draft Articles' scope the rights and obligations of States under "binding resolutions establishing international criminal courts and tribunals". In this regard, I align myself with Mr. Galindo and Mr. Asada, and would suggest that reference is made to "legally binding United Nations resolutions" as only resolutions adopted by the competent organs of the world body in accordance with the UN Charter can have the effect of subjecting State officials to the criminal jurisdiction of another State absent a treaty or customary rule to that effect.

Mr. Chair,

With regard to **draft article 2**, I agree with the SR that no amendments seem necessary to the formulation adopted on the first reading and that any clarifications may be appropriately addressed in the Commentaries.

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[3] Vienna Convention on Diplomatic Relations (1961) Article 29 "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

[4] Vienna Convention on Consular Relations (1963) Article 31 states that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority." United Nations Convention on the Privileges and Immunities of the United Nations (1946) Article V states that "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." Convention on the Privileges and Immunities of the Specialized Agencies (1947) Article VI states that "Officials of the specialized agencies shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organizations."

[5] Article 6 of the resolution of the Institute of International Law states that "[t]he authorities of the State shall afford to a foreign Head of State the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them" (Yearbook of the Institute of International Law, vol. 69, p. 747).

[6] 1961 Vienna Convention on Diplomatic Relations, Arts 22 and 29.

[7] ICJ, International Court of Justice *United States Diplomatic and Consular Staff in Tehran*, p. 40. United Nations, International Law Commission. "Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction." By Concepción Escobar Hernández, Special Rapporteur. Document A/CN.4/661. Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013. United Nations, International Law Commission. "ILC Report." A/77/10, 2022, chap. VI, paras. 60–69.

While I agree on the futility of defining "State official", I also believe that clarifying the relationship between immunity *ratione materiae* and *ultra vires* acts would be warranted. It may be worth recalling Special Rapporteur García Amador's statement that an *ultra vires* conduct was attributable to a State "if the officials purported to be acting in their official capacity, and only if the conduct was not totally or manifestly outside the scope of their competence"[8]. Therefore, within the definition of "act performed in an official capacity", there should be an exception that excludes the cases in which a departure from their position as State officials is identified.

Mr. Chair,

Moving now to immunity *ratione personae,* I note that the Special Rapporteur has not proposed any modifications to the text of **draft article 3**, since he believes that there are no legal grounds to justify the inclusion of other actors beyond the troika in the draft article. I agree with this position.

While there is agreement that heads of State, heads of government and ministers of foreign affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction under customary international law, the extension of immunity *ratione personae* to other State officials is controversial. Draft article 3, as it stands, confirms the immunity enjoyed by the troika, without precluding law development or the possibility that by mutual agreement[9] or unilateral act States recognise immunity *ratione personae* to State officials other than the troika. Therefore, I am unable to subscribe to the proposals by some States supported by Mr. Patel and Mr. Nguyen to expand immunity *ratione personae* beyond the troika.

Mr. Chair,

With regard to **draft article 4**, paragraph 1, I see merit in replacing "term of office" with "period of office", as the current formulation adopts a formalistic approach that may give rise to confusion in the case of State officials without a pre-defined term of office or *de facto* regimes. Besides, "period of office" was the expression used by the International Court of Justice in the *Arrest Warrant* case[10].

While I take the point of the SR that the expression "term of office" can be clarified in the Commentaries, I believe that the Draft Articles would benefit from a clearer formulation of a key provision on which there is clear consensus: that once a State official leaves office, they may again be held criminally responsible by foreign forum States for the acts that they carried out before they took office or for acts they carried out while in office.

Finally, regarding the possibility to merge draft articles 3 and 4, I must say that I see great

[8] Tomonori, M., "The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct", Denver Journal of International Law and Policy, Vol. 29, 2001, pages 276 and 277.
[9] E.g. under the United Nations Convention on Special Missions (1969).
[10] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, p. 25, para. 61. United Nations, International Law Commission. "ILC Report." A/77/10, 2022, chap. VI, paras. 60–69.

merit in having a stand-alone provision that states with clear language that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction. The immunity of the State officials is rooted in fundamental principles of international law such as the principles of sovereignty, that *par in parem non habet imperium* and non-interference in the internal affairs of other countries. The importance for international relations of such a tenet warrants a sufficiently clear statement of the law in the Draft Articles.

Conversely, I do see merit in merging paragraphs 1 and 2 of draft article 4 without having an impact on the content as suggested by the SR in paragraph 125 of his report.

Mr. Chair,

With regard to **draft article 5**, I will only say that, for the reasons stated in the report, I support the new formulation proposed by the SR.

Also, for the same reasons stated above with regard to immunity *ratione personae,* I would favour keeping draft articles 5 and 6 as separate articles. Thus, I support the SR's recommendation in paragraph 161.

Mr. Chair,

Regarding **draft article 6**, I first acknowledge the SR's commendable efforts to respond to the concerns from States in relation to an important provision which enshrines the scope of immunity *ratione materiae*.

I support the SR's recommendation to clarify in the Commentaries that immunity *ratione materiae* persists after the cessation of immunity ratione personae for the troika. This clarification is essential to ensure a clear and precise understanding of the continuity of immunity. An act executed in an official capacity retains its official nature, and the State official responsible for the action is still entitled to immunity regardless of their current status as an official. The immunity is attached to the act itself. The enduring nature of immunity *ratione materiae*, previously acknowledged by the Commission in its examination of diplomatic relations,[11] remains unchallenged in practical application and is widely acknowledged in scholarly works.[12]

Finally, I agree that the draft article covers not only immunity from jurisdiction but also

[11] Paragraph (19) of the commentary to draft article 2, paragraph 1 (b) (v), of the Draft Articles on Jurisdictional Immunities of States and their Property, adopted by the Commission at its 44th session: *"The immunities ratione personae, unlike immunities ratione materiae which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated."*

[12] Institute of International Law, Resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", which sets out — a contrario sensu — the same position in its article 13, paragraphs 1 and 2 (Yearbook of the Institute of International Law, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and "Resolution on the immunity from the jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III, paras. 1–2 (ibid., vol. 73 (Session of Naples, 2009), p. 226, at p. 227).

immunity from execution and that this should be stated clearly in the Commentaries. As acts performed in an official capacity are acts attributed to the State, a State cannot adopt measures of constraint against a foreign State official when it was precluded from adjudicating in the first place.

Mr. Chair,

As we embark on the important task of finalizing the Draft Articles which, by the time they will be adopted, would have been on the agenda of the Commission for 20 years, it is paramount that we get it right, that any statement of the law is sufficiently substantiated, and that the relevant State practice, or lack of State practice, of the different regions is accounted for.

In this regard, and in line with Mr. Forteau and Mr. Galindo, I consider that commentary 9 to **draft article 7** in particular should be thoroughly reviewed so that it reflects the developments that have taken place in the jurisprudence in the different countries both with regard to the decisions of their highest courts and to the position of their governments.

Mr. Chair,

Our Commission always operates in a political context, which in the present case is aggravated by the sensitivity of the issue and the potential impact that our work will have on the functioning of State institutions and the maintenance of international relations. The Commission cannot ignore such sensitivities. The problem, however, is that if in the development of its work the Commission is not able to do it in a technical and apolitical way, it loses its added value. It is precisely in politically sensitive issues such as this one where the Commission must demonstrate that it is capable of presenting a quality product that, while reflecting customary law, does not hinder the future development of the law.

Mr. Chair,

This concludes my statement. I thank and congratulate, once again, Mr. Grossman for his work on such an important topic.

My congratulations also go to you, Mr. Chair, and to the other members of the Commission for a rich and fruitful debate.