

Translated from Spanish

Comments on the draft articles on immunity of State officials from foreign criminal jurisdiction

These comments and observations are being submitted in accordance with paragraph 66 of the report of the International Law Commission on the work of its seventy-third session, as well as with paragraph 6 of the General Assembly resolution contained in document A/C.6/78/L.12.

Mexico wishes to begin by expressing its appreciation to the Commission for the draft articles adopted on first reading and for the work carried out in that regard.

Overall, Mexico considers the text of the draft articles to be adequate. It contains provisions that are relevant for the development and codification of international law regarding the criminal immunity of officials of foreign States.

Mexico reiterates its view concerning the relevance of the draft articles. It reaffirms the need for the community of States to have a binding legal instrument that regulates immunity from criminal jurisdiction and lays the groundwork for the development of the law in this area. This will undoubtedly provide greater legal certainty and enhance access to international justice.

Specific comments by article

With regard to the list of crimes in article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), Mexico agrees with the Commission that there is a need to contemplate how immunity from criminal jurisdiction shall apply in respect of the alleged commission of certain specific crimes.

This is because the international community has expressed particular concern about these crimes, as reflected in numerous binding and non-binding instruments, and international and domestic courts have emphasized their seriousness and reiterated that they are prohibited. Mexico also agrees that the commission of some of the crimes listed in this article may constitute a violation of peremptory norms of general international law (*ius cogens*).

With regard to article 14 (Determination of immunity), paragraph 3 (a), which provides that when the forum State is considering the application of draft article 7 in making the determination of immunity, the authorities making the determination shall be at an appropriately high level, Mexico considers that the interpretation provided in the commentary is confusing.

According to the commentary, this criterion was included taking into account the seriousness of the crimes alleged to have been committed by the official. Mexico agrees with this approach.

However, the statement that “appropriately high level” does not necessarily mean “hierarchically superior”, given the different organizational systems of States, results in a lack of clarity that could undermine the usefulness and necessity of the criterion, or even the entire paragraph.

In this regard, Mexico recommends that the question of how the “appropriately high level” should be determined be addressed. Failing that, it should be clarified that hierarchical superiority may be an element in the determination of the level of authority but should not be considered the sole or determining criterion.

With regard to article 14, paragraph 4 (b), Mexico considers the wording of the last sentence, “This subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official”, to be imprecise.

As recognized in the commentary, the absence of the measures provided for in this part of the article would not, in practice, prevent the initiation of criminal proceedings against an official. It would complicate or delay the process, but that does not mean that proceedings would be impossible or could not be conducted in absentia.

In this regard, it would be preferable to remove the last sentence of the subparagraph, since rather than clarifying matters, it is imprecise and unnecessary. Alternatively, in order to provide greater precision, the article could include an indicative, non-exhaustive, list of measures that may be adopted or maintained by the forum State.

Mexico considers the content of Part Four, entitled “Procedural provisions and safeguards “, to be highly pertinent and relevant. In particular, the provisions contained in article 10 (Notification to the State of the official) could be extremely useful for interpretation and the general practice of States regarding the methods of notification or service to be used in judicial proceedings against States or State officials.
