

Immunity of State officials from foreign criminal jurisdiction (ILC): A critical review of the compilation of recent State practice *re* immunity *ratione materiae*

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1. Since 2007, the International Law Commission (**ILC, the Commission**) has been working on the topic “Immunity of State officials from foreign criminal jurisdiction”. In 2022, it adopted the draft articles and commentaries on that topic on first reading and is currently considering them on second reading – including at its seventy-sixth session in 2025.
2. The draft articles provide that “State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity”.¹ Draft article 7 states that immunity *ratione materiae* (functional immunity) does not apply to the crimes under international law listed therein (**DA 7, the exception**). As adopted on first reading, these comprise the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.²
3. In 2025, the ILC considered DA 7 in light of States’ comments and observations, and subsequent developments in international law since the adoption of the draft articles on first reading. The Commission had before it the Second report of Mr Claudio Grossman Guiloff, Special Rapporteur (**Second report**),³ in which he introduced a survey of recent State practice that, in his opinion, “reaffirmed the existence of exceptions to immunity *ratione materiae* in cases involving crimes under international law”, that is DA 7.⁴
4. As the Commission prepares to finalize its work on the draft articles, it is important to ensure the application of rigorous standards in the analysis and assessment of any State practice that may – or may not – evidence the existence or development of a certain norm. In this respect, caution is warranted when drawing conclusions from the compilation of State practice presented in the Second report.
5. Upon closer inspection, the collected examples are far from offering clear support to the existence of the exception, or any trend towards the formation of such exception. The compilation, as it is presented, does not demonstrate that the limitation of immunity *ratione*

¹ Draft article 5, paragraph 1, provisionally adopted by the ILC at its seventy-sixth session (28 April – 30 May 2025). [URL](#)

² Immunity of State officials from foreign criminal jurisdiction. Texts and titles of the draft articles adopted by the ILC on first reading (2022). [URL](#)

³ Second report on immunity of State officials from foreign criminal jurisdiction by Mr Claudio Grossman Guiloff, Special Rapporteur, [A/CN.4/780](#), 29 January 2025, paras 53–74. In 2025, the ILC considered, *inter alia*, the Special Rapporteur’s proposal regarding DA 7 and the draft annex to add to the list of crimes under international law the crimes of aggression, slavery and the slave trade. The ILC referred both DA 7 and the draft annex to the Drafting Committee. Following their consideration by the Drafting Committee, DA 7 was amended and provisionally adopted. The draft annex, which listed treaties setting out the definitions of those crimes, was deleted. The Commission then took note of DA 7 as provisionally adopted by the Drafting Committee. It now additionally includes the crimes proposed by the Special Rapporteur and refers to the crimes under international law mentioned therein “as defined according to the applicable rules of international law”. The text of DA 7, as amended and pending the ILC’s adoption on second reading, is available at: [URL](#)

⁴ Second report, paras 53–74.

materiae, as envisaged in DA 7, is rooted in State practice. Nor is it showing any discernible trend in State practice consistent with DA 7.

6. The Second report provides examples from eight States listed below and includes twenty cases⁵ at various stages of criminal investigation or proceedings.⁶ The most recent procedural steps in most of these cases, as cited in the Second report, took place in the period 2023–2024:
 - Argentina – 5 cases;
 - Belgium – 1 case;
 - France – 2 cases;
 - Germany – 3 cases;
 - Italy – 2 cases;
 - Sweden – 2 cases;
 - Switzerland – 2 cases;
 - the United States – 3 cases.
7. What follows is a critical review of this survey, assessing whether the cases – primarily as described and explained in the Second report⁷ – can be relied on in order to substantiate the exception in DA 7 (**see Annex below**).⁸

1. In most cases, it remains unclear how the immunity of State officials was handled

8. The sub-section “Recent State practice” in DA 7 section of the Second report introduces the listed cases as cases in which “immunity *ratione materiae* was not a bar to the prosecution”.⁹ Similar language is used for individual examples.¹⁰ This can be understood to mean that the proceedings did take place, but it sheds no light on the relevance of immunity at issue in every individual situation. Yet, this implies many possibilities that might affect the potential of such cases to support the DA 7 exception, for example: that immunity was not invoked in those cases, or it was waived, or found to be inapplicable for reasons that may not be connected to the ones provided in DA 7 (for example, based on the non-official capacity in which the act was committed). The majority of the cases, however, are not accompanied by analysis or explanations, which makes the relevance of these cases questionable.
9. It is only in relation to German sentences (against former Syrian officials) that the Second report explains, with reference to primary materials, that the German courts did consider the question of immunity and found immunity *ratione materiae* to be non-applicable in relation to

⁵ This note uses “case” as shorthand for both formal court proceedings and investigative actions. This usage does not imply that every item of recent State practice discussed here has reached the trial stage. In this version of the note, the number of cases was corrected (20 instead of 21) to reflect that two of three decisions from Sweden concern the same case.

⁶ Case counts follow the grouping used in the Second report. Certain separate prosecutions relating to a single situation – for example, the United States’ proceedings against Venezuelan officials, per footnote 117 of the Second report – are treated as one case. The Second report also cites recent legislation of two States, Austria and Germany (which falls outside the scope of this note). Of these countries, judicial practice is provided only for Germany (Second report, paras 73–74).

⁷ Subsequent developments in the surveyed cases fall outside the scope of this note.

⁸ In this version of the note, the Annex was added.

⁹ Ibid., para. 54.

¹⁰ Ibid., paras 56, 60, 70. This is how the presentation of practice is summarised for: Italy in relation to the Operation Condor case; France in relation to three senior Syrian officials (Ali Mamlouk, Jamil Hassan, Abdel Salam Mahmoud); and the United States in relation to cases against officials of Iran and Syria.

crimes under international law.¹¹ A similar level of detail is provided for one case from France, also against a former Syrian official, although the only source cited is an NGO press release.¹²

10. In all other cases, it is said that immunity was not a bar to the prosecution without indicating reasons for that.
11. However, in order to establish the relevance and significance of the identified cases to the question of the (non-)applicability of immunity, it would be essential to ascertain at least the following:
 - Whether the official's State invoked immunity of the accused (no such information is provided for any case in the survey);
 - Had there been grounds for immunity in the first place (in some instances, details are missing on the actual status of the accused at the time of the acts, including their connection to entities that may not have operated in an official capacity within the meaning of the ILC's draft articles on this topic). In this regard, the case of *Argentina v Ahmad Vahidi* is noteworthy: Mr Vahidi, now Iran's Minister of the Interior, is accused of acts allegedly committed in 1994. According to the Second report, he headed the Quds Force then. The relationship of that entity, at that time, to Iran's system of State organs is not self-evident and would require explanation, which the Second report does not provide;¹³
 - Had the reasons for the non-application of immunity been articulated and whether those corresponded to the proposed exception in DA 7. The descriptions of most cases do not make it possible to ascertain why immunity *ratione materiae* was not applied, including whether, in fact, the authorities were guided by the considerations that underpinned the development of DA 7;
 - Had an individual decision been final or eligible to be reviewed and amended. For example, the survey includes judgments delivered *in absentia*. This is explicitly noted in the Second report concerning the examples from Belgium¹⁴ and France.¹⁵ A judgment *in absentia* was also delivered in one of the Italian cases – in the case against 14 State officials from Chile and Uruguay in respect of all but one accused.¹⁶ Such judgments typically guarantee the convicted person a retrial in their presence – which may provide another, or even a first, opportunity to invoke immunity. There is therefore a non-negligible possibility that the examples currently presented as supporting the DA 7 exception may ultimately point the other way. In any event, these nuances call for explanations that the Second report does not supply;
 - Had there been a severance of ties between the individual in question and their State, possibly preventing the forum State from establishing the individual's status. There is a

¹¹ Second report, para. 55, fns 99-101 referring to Germany, Koblenz Higher Regional Court, Case No. 1 StE 3/21, Judgment, 24 February 2021, Germany, Federal Court of Justice, Case No. AK 4/24, Decision, 21 February 2024, para. 53 and Germany, Federal Court of Justice, Case No. 3 StR 454/22, Decision, 20 March 2024, para. 32.

¹² Ibid., para. 63.

¹³ Ibid., para. 69.

¹⁴ Ibid., para. 59 on the case of Belgian missionaries in Guatemala where five members of the junta were sentenced to life imprisonment.

¹⁵ Ibid., para. 60 on the case against three former Syrian officials.

¹⁶ Ibid., para. 56.

case in which, given the official's relationship with his State, it is unlikely that the State would have invoked or confirmed his immunity. In 2024, a Swedish court acquitted Gen Mohammed Hamo, a former Syrian army general.¹⁷ One of the sources cited in the Second report states that the accused at some point joined the anti-government side.¹⁸ Losing the status of the State's official in circumstances when that State would not be reasonably willing to invoke or confirm his status might be the reason for non-application of immunity in this instance. In any event, no explanation is provided as to whether an immunity claim was made in that case and how it was decided.

12. Accordingly, most cases require further careful analysis to determine whether they truly fall within the scope of the DA 7 exception. It is also important to rely on primary sources (warrants, indictments, court orders, judgments, verdicts and similar materials) in such verification.

2. Assessment of cases is complicated or impossible where only secondary or no sources are provided

13. While various examples are supported by primary sources (judicial or investigative decisions), in six cases the only source is a news item or press release by an NGO such as TRIAL International or the International Federation for Human Rights.¹⁹ In one further case – *Argentina v Ahmad Vahidi*, the reference is to an official press release of Argentina's MFA together with a news agency report (BBC).²⁰
14. The survey additionally features the resumption in 2024 of an investigation in Argentina into Nicolás Maduro and other Venezuelan officials – this time without a reference to any sources (primary or secondary), citing a case from the United States instead.²¹
15. Conclusions on complex legal questions cannot safely be made based only on secondary sources without verifying the primary materials. Until then, such cases – about one third of those surveyed – cannot reasonably be advanced as evidence of any particular course of action or approach.
16. It will be noticed that removing such cases from the list provided in the Second report would exclude practice from some States completely (Belgium²² and France²³) while narrowing the practice from others (Argentina²⁴ and Switzerland²⁵), thus reducing even more the

¹⁷ Ibid., para. 62.

¹⁸ JURIST. Syrian former general cleared of war crimes in Swedish court. 20 June 2024. [URL](#). The report states, in particular: "Hamo deserted from the Syrian army in June 2012 and joined opposition forces fighting against the Syrian government. He was granted asylum in Sweden in 2015."

¹⁹ Second report, fns 109, 110, 111, 114, 116, 118.

²⁰ Ibid., fn. 119; BBC. Vanessa Buschschlüter. Argentina seeks arrest of Iranian minister over 1994 bombing. 24 April 2024. [URL](#)

²¹ Second report, para. 67, fn. 117.

²² Ibid., para. 59 on the case of Belgian missionaries in Guatemala where five members of the junta were sentenced to life imprisonment.

²³ Ibid., paras 60, 63 on cases in relation to three senior Syrian officials (Ali Mamlouk, Jamil Hassan, Abdel Salam Mahmoud) and to a former Syrian official (the former governor of Syria's Central Bank).

²⁴ Ibid., paras 66, 68–69 on cases regarding crimes against humanity committed in 2018 in Nicaragua; extrajudicial executions and enforced disappearances known as "false positives"; and on the *Argentina v Ahmad Vahidi* case.

²⁵ Ibid., para. 58 on the case in relation to Yuri Harauski regarding the enforced disappearances of Yuri Zakharenka, Viktor Hanchar and Anatoly Krasouski.

representativeness of the compilation of cases (**see section 4 below**) and weakening the overall persuasive value of those.

3. The surveyed cases have significant limitations as evidence for the DA 7 exception

17. The following reasons preclude treating certain cases in the survey as suitable to support the DA 7 exception.
18. *Different crimes.* At least in some of the cases, as per information provided in the Second report or otherwise available, the crime in question was not one of the crimes enumerated in DA 7, including those proposed for the inclusion therein (the crimes of aggression, slavery and the slave trade):
 - In a trial related to “Operation Condor”, **one of the two surveyed cases from Italy**, the crime was voluntary and aggravated multiple homicide. The Second report does not specify which crimes were the subject of the other case from Italy (a second trial related to “Operation Condor” concerning Jorge Nestor Troccoli). It relates to one of the accused in the first case and is based on new evidence apparently increasing the number of victims; there is no confirmation that he is tried for a crime within the scope of DA 7.²⁶ It is noted in the Second report that “the individuals were prosecuted for homicide due to the fact that torture and enforced disappearance were not criminalized under Italian law. However, the judgments contain numerous references to those crimes”.²⁷ This information does not appear to be sufficient to support the specific exception under DA 7;
 - In **one case from the United States**, the indictment sets out crimes such as murder-for-hire, conspiracy to commit murder-for-hire, money laundering conspiracy, attempted murder in aid of racketeering, firearm use, carrying, and possession during and in relation to attempted murder, and conspiracy to violate sanctions laws, none of which seeming to fall under the list of crimes in DA 7.²⁸
19. *Different reasons.* In several other cases, it is quite likely that immunity did not bar the proceedings for reasons other than the exception in DA 7, such as non-recognition of the relevant office-holder or the exercise of territorial jurisdiction:
 - In **one case**, it is possible that immunity was not applied because the forum State did not recognize the relevant office-holder as the legitimate Head of State: the United States did not apply the immunities of Venezuela’s President and officials in narcoterrorism cases. The indictments cited in the Second report (from 2020) do not explain the non-application of immunity; scholarship referring to the US Attorney General links the position to the United States’ non-recognition of that person as the legitimate Head of State.²⁹ Moreover, insofar as it relates to the President of Venezuela, this example may also implicate a

²⁶ Ibid., para. 56, fn. 104. See also JusticeInfo.Net. Operation Condor: what to expect from the second trial in Rome. 15 May 2023. [URL](#)

²⁷ Second report, fn. 103.

²⁸ Ibid., para. 70 citing United States, United States v. Rafat Amirov et al., No. 1:22-cr-00438-CM (S.D.N.Y), Superseding Indictment, 17 October 2024.

²⁹ Ibid., fn. 117. See U.S. Department of Justice Indicts Venezuelan Leader Nicolás Maduro on Narcotrafficking Chargers. American Journal of International Law. Volume 114, Issue 3. 2020. P. 2020: “Attorney General Barr indicated that Maduro did not qualify for head-of-state immunity because the United States does not recognize him as the president of Venezuela.”

different type of immunity – immunity *ratione personae*, making it potentially more instructive for that type of immunity than for immunity *ratione materiae*;

- In **several other cases**, the conduct investigated took place in whole or in part in the territory of the forum State, with effects also occurring there – for example, *Argentina v Ahmad Vahidi* (the attack/terrorist act)³⁰ and a United States case involving eight individuals, including an Iranian official (murder-for-hire).³¹ In the absence of authoritative clarifications in the Second report or elsewhere, one possible explanation could be that these cases concern acts performed by officials of one State in the territory of another without an invitation or specific arrangements to that effect. In such situations, immunity may not be applicable for reasons other than the DA 7 exception.³²
20. *Questionable grounds.* There are also cases in which immunity may not have attached in the first place. If there were no grounds for immunity *ab initio*, non-application of immunity in those cases cannot support the DA 7 exception:
- There is **a case** in which the person's status as a (former) State official was not established. In Switzerland, Yuri Harauski was acquitted of the enforced disappearance of three persons allegedly committed in Belarus in 1999.³³ The Second report cites an NGO press release (TRIAL International), in which there is no mention of immunity – as the reason for acquittal (or an obstacle to prosecution), it states that “the judges were not convinced of the involvement of the defendant in the events”.³⁴ An official press release published on the website of the canton of St. Gallen to which the respective court belongs is available online. This press release indicates that, although it was considered highly likely, the accused's status as an official of another State was not established;³⁵
 - In **one** French case – against the former governor of Syria's Central Bank, the accused held dual nationality including that of the forum State.³⁶ This may also be the case for the second trial related to “Operation Condor” in Italy concerning Jorge Nestor Troccoli.³⁷ The Second report does not address this aspect, but it appears potentially significant and in need of explanation.
21. *Measures in question, by their nature, are not precluded by immunity.* There is also **a case** in which grounds to apply immunity may not have arisen, meaning the situation is not one of non-applicability. According to the Second report, Argentina is investigating acts committed in the territory of Colombia. The Second report refers to the investigation as concerning Colombia's former President. However, the NGO overview on which this reference rests indicates that the former President of Colombia is not an accused.³⁸ That source does not indicate that any

³⁰ Second report, para. 69.

³¹ Ibid., para. 70.

³² See Second report on immunity of State officials from foreign jurisdiction by Mr Roman Anatolevich Kolodkin, Special Rapporteur, [A/CN.4/631](#), 10 June 2010, paras 81–86, 90, 94 (p).

³³ Second report, para. 58.

³⁴ Ibid., fn. 109. TRIAL International. Belarus: Acquittal of Lukashenka Regime Henchman in Switzerland. 29.09.2023. [URL](#)

³⁵ Kanton St. Gallen. Freispruch von der Anklage des Verschwindenlassens und der Irreführung der Rechtspflege mit Urteil des Kreisgerichts Rorschach vom 28. September 2023. 28.09.2023. [URL](#)

³⁶ Second report, para. 63. In this version of the note, the number of French cases in which the accused held dual nationality was corrected (one instead of two).

³⁷ JusticeInfo.Net. Operation Condor: what to expect from the second trial in Rome. 15 May 2023. [URL](#)

³⁸ Universal Jurisdiction Annual Review 2024, Trial International 19 (2024). [URL](#)

coercive measures have been taken against him or are considered to be taken.³⁹ One may therefore assume that immunity is not currently at issue in that case, and this instance does not correspond to DA 7.

22. The recent State practice presented in the Second report includes no cases concerning the crimes proposed at the seventy-sixth session of the ILC for inclusion in DA 7 (the crimes of aggression, slavery and the slave trade).

4. Limited representativeness of the compilation

23. The cases presented originate from eight States, predominantly within a single region: six European countries, the United States, and Argentina. Applying the filtering criteria, as explained and proposed above, to exclude irrelevant cases would further reduce the regional representation.
24. Moreover, the compilation's overall representativeness is weakened by the absence of a realistic sense of the scope of State practice in which immunity *ratione materiae* was upheld and effectively prevented prosecution. The difficulty of identifying such practice – which may largely remain outside the public domain – continues to pose a significant methodological challenge.

³⁹ Second report, para. 68.

Annex. (Non-)application of immunity *ratione materiae* in the surveyed cases, as per information in the Second report or otherwise available

State	Case reference (in Second Report)	Year	Stage / Decision type	Source (type)	Crime(s)	Status of the person (non-)official	Issues related to immunity (per review)
Argentina	Nicolás Maduro and other Venezuelan officials (para. 67)	2024	Investigation resumed	n/a	Crimes against humanity	Officials, including President	no info on immunity; ⁴⁰ no source; ⁴¹ immunity <i>ratione personae</i> ⁴²
Argentina	Acts committed in the territory of Colombia (implicating its former President) (para. 68)	2024	Admission of complaint	NGO (secondary)	Extrajudicial executions, enforced disappearances	Former President	no info on immunity; only secondary source; ⁴³ measures potentially not precluded by immunity by their nature ⁴⁴

⁴⁰ Here and further as explained in paras 8–12 above.

⁴¹ Here and further as explained in paras 13–16 above.

⁴² Here and further as explained in para. 19 above.

⁴³ Here and further as explained in paras 13–16 above.

⁴⁴ As explained in para. 21 above.

Argentina	Ahmad Vahidi, former Quds force head (para. 69)	2024	Interpol red notice	MFA press release + news item (mixed)	Aggravated homicide	Status unclear	no info on immunity; unclear if official; ⁴⁵ only secondary source; non-DA 7 crimes; ⁴⁶ potential reasons other than DA 7 (acts in the forum State's territory) ⁴⁷
Argentina	Crimes against humanity committed in 2018 in Nicaragua (implicating its President, Vice- President, other members of the Government) (para. 66)	Case open since 2022	Arrest warrant	News items (secondary)	Crimes against humanity	Officials	no info on immunity; immunity <i>ratione personae</i>
Argentina	Former official of the Uruguayan military and other individuals, part of Operation Condor (para. 65)	2018 / 2016	Sentence (second/first instance)	NGO (secondary)	Unlawful deprivation of liberty, unlawful association, infliction of torture (non- specified for the convicted)	Former official	no info on immunity; only secondary source; non-DA 7 crimes

⁴⁵ As explained in para. 11 above.

⁴⁶ Here and further as explained in para. 18 above.

⁴⁷ Here and further as explained in para. 19 above.

Belgium	Belgian missionaries in Guatemala (para. 59)	2023	Judgment <i>in absentia</i>	NGO (secondary)	Crimes against humanity	Former officials	no info on immunity; only secondary source; judgment <i>in absentia</i> ⁴⁸
France	Three senior Syrian officials (Ali Mamlouk, Jamil Hassan, Abdel Salam Mahmoud) (para. 60)	2024	Judgment <i>in absentia</i>	NGO (secondary)	Crimes against humanity, war crimes	Former officials	no info on immunity; only secondary source; judgment <i>in absentia</i>
France	Former governor of Syria's bank (para. 63)	2024	Investigation	NGO (secondary)	War crimes, crimes against humanity, money laundry	Former official	only secondary source; dual nationality, incl. of the forum State ⁴⁹
Germany	Member of Syrian intelligence services (para. 55)	2024 / 2022	Sentence (appeal/judgment)	Judicial decision (primary)	Crimes against humanity	Former official	—
Germany	Member of the Syrian National Defence Forces (para. 55)	2024	Interim ruling	Judicial decision (primary)	Crimes against humanity	Former official	—

⁴⁸ Here and further as explained in para. 11 above.

⁴⁹ Here and further as explained in para. 20 above.

Germany	Another member of Syrian intelligence services (para. 55)	2021	Sentence	Judicial decision (primary)	Crimes against humanity	Former official	—
Italy	Operation Condor (Jorge Nestor Troccoli case) (para. 56)	Trial	Separate trial (new evidence)	n/a	Multiple homicide	Former official	no info on immunity; no source; non-DA 7 crimes; dual nationality, incl. of the forum State
Italy	Operation Condor (14 officials from Chile and Uruguay) (para. 56)	2021	Judgment <i>in absentia</i> (but for one accused)	Court judgment (primary)	Multiple homicide	Former officials	no info on immunity; judgment <i>in absentia</i> ; non-DA 7 crimes
Sweden	Mohammed Hamo (Syria) (para. 62)	2024	Acquittal judgment	Investigative document + news item (mixed)	War crimes	Former official	no info on immunity; the official's State unlikely to confirm status ⁵⁰
Sweden	Hamid Nouri (Syria) (para. 57)	2023	Sentence	Judicial decision (primary)	War crimes / homicide	Former official	no info on immunity
Switzerland	Ousman Sonko (Gambia) (para. 61)	2024	Sentence	Judicial decision (primary)	Crimes against humanity	Former Minister of the Interior	no info on immunity

⁵⁰ As explained in para. 11 above.

Switzerland	Yuri Harauski (Belarus)	2023	Acquittal judgment	NGO (secondary)	Enforced disappearance	Not established	no info on immunity; potential reasons other than DA 7 (status not established) ⁵¹
The United States	Murder-for-hire plot (Iranian official) (para. 70)	2024	Indictment	Investigative decision (primary)	Murder-for-hire / conspiracy / money laundering / ... [no crime under DA 7]	Official	no info on immunity; non-DA 7 crimes; potential reasons other than DA 7 (acts in the forum States' territory)
The United States	Former intelligence officers of Syria (para. 71)	2024	Indictment	Investigative decision (primary)	War crimes	Former official	no info on immunity
The United States	Proceedings against Venezuelan officials, including Nicolás Maduro (fn. 117)	2020	Indictment	Investigative decision (primary)	Narco-terrorism, cocaine importation conspiracies	Officials, including President	no info on immunity; non-DA 7 crimes; immunity <i>ratione personae</i> ; potential reasons other than DA 7 (non-recognition) ⁵²

⁵¹ As explained in para. 20 above.

⁵² As explained in para. 19 above.