



ESPAÑA

STATEMENT

BY THE AMBASSADOR, PERMANENT REPRESENTATIVE OF SPAIN
TO THE UNITED NATIONS

H.E. Mr. Agustín Santos Maraver

AT THE SIXTH COMMITTEE
OF THE 76th SESSION OF THE GENERAL ASSEMBLY

**Agenda item 82: Report of the International Law Commission
on the work of its seventy -second session – CLUSTER II**

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Mr./Ms. Chair,

It is an honor to address this Sixth Committee on the work of the International Law Commission at its seventy-second session. Before commenting on the work of the Commission on the topics introduced in Cluster 2, I would like to thank the Chairman of the ILC, Ambassador Mahmoud Hmoud, for presenting the Report for this session. The ILC was unable to meet in 2020 as a result of the restrictions imposed by the COVID 19 pandemic. This year, the Commission has been able to continue its work under difficult conditions, for which we wish to express our appreciation to its members, all of whom are committed to providing international law in this third decade of the 21st century with a higher level of certainty to address the major challenges facing the contemporary world. We would also like to thank the Secretary of the Commission and the incoming and outgoing Chairmen for the great efforts they made so that the Commission could carry out its work under these circumstances.

Having said that, I will now turn to the following topics: Immunity of State officials from foreign criminal jurisdiction, and Sea level rise in relation to international law.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr./Ms. Chair,

I will begin by referring to the topic contained in Chapter VI of the Report. Allow me, first of all, to draw attention to the enormous efforts that the International Law Commission has devoted to examining the topic of Immunity of State Officials from Foreign Criminal Jurisdiction in the last two quinquennia, under the leadership of the Special Rapporteur, Professor Concepción Escobar Hernández. Following the great progress that the work of the Commission has made during the present session, the adoption of Draft Articles on this topic is getting closer and closer. The adoption of six new draft articles is undoubtedly good news in view of the great practical relevance of this topic for States and for the international community as a whole. And for that reason, we wish to congratulate most sincerely the International Law Commission as a whole and, in particular, the Special Rapporteur for the work done so far.

As my delegation has already expressed its views on previous occasions on draft articles 1 to 7 provisionally adopted by the Commission, I shall now focus my statement on the procedural aspects of immunity to which the six new articles are devoted. With regard to these articles, I should like to point out, first of all, the importance that my delegation attaches to the incorporation of a procedural dimension into the work of the Commission. In that regard, we fully share the Special Rapporteur's assessment of the importance of procedural provisions for the purpose of promoting confidence-building among the States concerned and for objectifying the treatment of the question of immunity in each specific case. Along with this, Spain also considers that the procedural provisions and guarantees also contribute significantly to establishing a necessary balance between the interests of the various States concerned and will make it possible to respond to the legitimate concerns of several States, expressed in this Chamber, regarding the risks of politicization that could be generated in the event that the immunity of State officials from foreign criminal jurisdiction were not applied by the State's domestic organs and courts, in particular as a result of the possible application of the exceptions to immunity contained in draft article 7, provisionally adopted by the Commission in 2017. In our view, the wording given to draft article 8 ante, undoubtedly contributes to achieving these objectives.

In the context of procedural provisions, we very much welcome the adoption of draft articles 8, 9 and 12, devoted to the consideration, notification and exchange of information. The statement that the authorities of the forum must consider the question of immunity as soon as possible and always before exercising their jurisdiction or taking coercive measures against the official of another State is undoubtedly an essential element that should guide the actions of those authorities and constitute a guarantee for the State of the official. The same is true of the definition of a duty to notify the State of the official when the authorities of the forum State intend to exercise their criminal jurisdiction or take the aforementioned coercive measures. This duty to notify reinforces the guarantees of the official's State and ensures that no measures are taken that might subsequently make it impossible to enforce the immunity from criminal jurisdiction of the State's officials. In addition, the definition of a (basic but necessary) system for the mutual request for information between the authorities of the two States concerned completes very well this first block of procedural provisions facilitating the building of trust between the forum State and the State of the official. My delegation is aware that the proposals contained in draft articles 8, 9 and 12 represent a clear innovation in the field of immunities and should therefore be understood as proposals for progressive development. This, however, does not deprive them of their value. On the contrary, they represent a good example of the Commission's comprehensive fulfillment of its mandate.

With regard to draft articles 10 (invocation of immunity) and 11 (waiver of immunity), my delegation considers that both are sufficiently consistent with international practice. With regard to the question of the irrevocable nature of the waiver of immunity, my delegation wishes to express its support for the provisions of paragraph 6 of draft article 11, which is - moreover - consistent with the provisions of our domestic legal system, in particular article 28 of Organic Law 16/2015 on privileges and immunities of foreign States, international organizations and international conferences and meetings held in Spain.

Mr./Ms. Chair,

My delegation is fully aware that important draft articles of a procedural nature are still pending consideration by the Commission, in particular articles 13, 14, 15 and 16. We note the relevance of these draft articles, especially the one on the determination of immunity which is essential to establish a proper balance between the guarantee of immunity and the protection of other values of the international community, in particular the fight against impunity for the most serious crimes under international law to which Spain continues to be closely linked. We are confident that, with the leadership of the Special Rapporteur and the contributions of the other members of the Commission, the adoption of these drafts will be able to take into account all the sensitivities and interests involved.

Turning to the two draft articles presented by the Special Rapporteur in her last report, my delegation would like to make two brief comments. First, with regard to draft article 17, Spain considers that the inclusion of a clause on dispute settlement has an added value for the Commission's work on this topic. However, we share the view that the actual wording of this draft article will depend to a large extent on the final form that the Commission wishes to give to the draft articles.

Finally, we support the inclusion in the draft articles of a reference to international criminal tribunals. If, as we are convinced, the fight against impunity for the most serious crimes under international law is an essential element of modern international law, the role of international criminal tribunals in this context should be recognized in the Draft Articles. As to the manner in which this should take place, my delegation is

flexible and could support either the maintenance of a stand-alone draft article or its inclusion in draft article 1 on the scope of application of the Draft Articles.

In summary, Mr. In summary, Mr. Chairman, my delegation would like to conclude by once again reiterating its appreciation to the Commission and the Special Rapporteur for their tireless work on this topic. We will continue to closely examine the work of the Commission and trust that the Commission will be able to adopt the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction on first reading in 2022.

Sea Level Rise in Relation to International Law

My delegation would now like to refer to the work contained in Chapter IX of the Report, concerning the consequences of sea level rise in relation to international law. We must begin by congratulating the co-chairs of the Study Group, in particular for the presentation of the interesting study that has served as the basis for the ILC's discussions, which focused on the implications of this phenomenon for the Law of the Sea. We would also like to thank the other members of the Commission who contributed to the discussions in the Working Group for their hard work.

Sea level rise poses major legal challenges. Spain is concerned about the consequences of this phenomenon for the international community and wishes to point out that this is an issue of great relevance, which presents diverse profiles and requires a clear response from international law. In particular, Spain shows its solidarity with those States that are more directly affected by this new situation, especially the Small Island Developing States. In this regard, Spain understands and positively values the statement made by the "Pacific Islands Forum". This delegation considers that it is essential to continue the work of the Commission on this topic in a way that guarantees respect for and integrity of the United Nations Convention on the Law of the Sea, recognized as "the Constitution of the Oceans", and that - at the same time - allows us to identify special formulas that take into consideration the extraordinary circumstances that several States, especially the aforementioned Small Island Developing States, are suffering as a result of the process of sea level rise caused by climate change. We trust that the International Law Commission will be able to offer solutions that take into account both legal stability and justice.

Mr./Ms. Chair

To conclude my remarks, allow me to make a brief but important reflection on the composition of the International Law Commission from a gender perspective. As other delegations have already pointed out, we cannot fail to draw attention to the fact that the ILC only includes a small number of women among its members (4 at present) and that the number of women candidates in the current electoral process is also very small (only 8 candidates). It is obvious that the composition of the Commission does not reflect the reality of the group of jurists specialized in International Law and we can only express our wish that this inadequacy be progressively reduced. For this reason, Spain has once again decided to present the candidacy of Professor Concepción Escobar Hernández and trusts that the Member States will be able to support her in order to allow her to complete her work as Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction.

Thank you very much for your kind attention.