



GLOBAL INSTITUTE FOR THE
PREVENTION OF AGGRESSION

LETTER TO THE INTERNATIONAL LAW COMMISSION REGARDING DRAFT ARTICLE 7 OF THE DRAFT ARTICLES ON IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

May 6, 2025

Dear Members of the International Law Commission,

1. On the occasion of the Seventy-sixth Session of the International Law Commission (ILC) beginning on 28 April 2025, the Global Institute for the Prevention of Aggression (GIPA) is pleased to provide brief comments to the ILC on **article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction** (Draft Articles). This is without prejudice to the views of individual members of GIPA,¹ as academics and practitioners, on personal immunities (immunities *ratione personae*), or other distinct forms of state or diplomatic immunities.

2. GIPA brings together some of the world's foremost experts on the crime of aggression. GIPA supports efforts undertaken by the international community, states, and non-state actors for the prevention and punishment of the crime of aggression.

3. GIPA welcomes the formulation of article 7 of the Draft Articles as proposed in the “*Second report on immunity of State officials from foreign criminal jurisdiction by Claudio Grossman Guiloff, Special Rapporteur*” dated 29 January 2025 (Second report). We commend the addition of the crime of aggression, as well as slavery and the slave trade, to the list of crimes enumerated under the proposed revision of paragraph 1 of draft article 7.

4. GIPA experts are firmly of the view that the crime of aggression is a crime under existing customary international law.² No convincing reason has been advanced to distinguish the crime of aggression from other crimes under international law in the context of immunities. As illustrated by the ILC report adopted on first reading on this agenda-item, the crime of aggression also fulfils a key criterion identified by the ILC as justifying the inclusion of certain crimes of

¹ ILC Member Charles Jalloh took no part in the drafting, consideration, or issuance of this letter.

² See for example: Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2nd ed. Cambridge University Press, 2021), 168-200; Claus Kreß, ‘The State Conduct Element’ in Claus Kreß & Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), vol. I, 412, 526-537; Astrid Reisinger Coracini, ‘Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute’s Complementarity Regime’ in Carsten Stahn & Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009), 725.

international concern in the list of those exempted from the applicability of functional immunities, namely that they derive from *jus cogens* prohibitions.³

5. The attachment of individual criminal responsibility to certain State acts of aggression under customary international law reflects the importance attached to the prohibition of the use of force by States, and their desire to ensure the enforcement of the prohibition. The prohibition of the illegal use of force is the keystone of the existing international order and the Charter of the United Nations. Whatever pressure that order is currently under, and whatever revisions might properly be made to existing international law rules to ensure that the order is inclusive, it is in the interest of all States that the prohibition remain a central tenet of international law. All possible efforts should be made to reinforce the prohibition, including through international criminal law. To single out the crime of aggression in the context of the Commission's work on immunities would undermine, rather than reinforce, this fundamental norm of international law.

6. Leaving the crime of aggression out of the list of crimes to which functional immunities do not attach would result in inconsistency and a risk of double standards. This could potentially fragment international law. Introducing a hierarchy between the crime of aggression and other serious crimes under international law is inconsistent with precedent, including the characterisation of the crime of aggression by the International Military Tribunal as “the supreme international crime”⁴ and the Rome Statute of the International Criminal Court, which includes the crime of aggression as one of the most serious of crimes of concern to the international community as a whole.⁵

7. In order to help ensure that there is no impunity for the crime of aggression, and that those most responsible for the crime are instead held to account, it must be recognised that immunity *ratione materiae* does not apply. This is especially significant considering that the crime of aggression is inherently a leadership crime, limited to “those in a position effectively to exercise control over or to direct the political or military action of a State” —individuals who would otherwise benefit from functional immunity before domestic courts.

8. GIPA finally notes, as recorded in paragraphs 41–42 and 72–74 of the Second Report of the Special Rapporteur,⁶ that since the adoption on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction and commentaries thereto, there have been significant developments in the practice of States in relation to immunity *ratione materiae*, including in relation to the crime of aggression. GIPA shares the view of the Special Rapporteur that this further supports the need to review draft article 7.

³ The International Court of Justice, in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 (Merits), [190], held that the prohibition of the unlawful use of force is a *jus cogens* norm.

⁴ IMT, Judgment 1946, 421.

⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (as amended), preamble.

⁶ UN Doc. A/CN.4/780, 29 January 2025, <https://documents.un.org/doc/undoc/gen/g25/012/32/pdf/g2501232.pdf>.