



AUSTRALIAN MISSION TO THE UNITED NATIONS

E-mail [australia@un.int](mailto:australia@un.int)

150 East 42<sup>nd</sup> Street, New York NY 10017-5612 Ph 212 - 351 6600 Fax 212 - 351 6610 [www.AustraliaUN.org](http://www.AustraliaUN.org)

## **Report of the International Law Commission on the Work of its Sixty-Ninth Session, Cluster II (Agenda Item 81)**

**Sixth Committee**

**24 October 2017**

**Statement by Ms Sue Robertson, Acting First Assistant-  
Secretary, Office of International Law, Attorney-General's  
Department**

**(Check against delivery)**

---

Thank you for a further opportunity to comment on the work of the International Law Commission. We will focus our comments on the issue of the immunity of State officials from foreign criminal jurisdiction.

State immunity is a basic principle of the international legal order, derived from the even more foundational principle of the sovereign equality of States. The immunity of State officials from foreign criminal jurisdiction is a corollary of State immunity. Australia appreciates the efforts of the Commission to bring greater clarity to this important area of international law. Australia recognises that the Commission has already made a valuable contribution to discussions on the topic, including through the adoption of a number of draft articles.

Australia regrets, however, that the Commission was unable to resolve the issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction by consensus, and that draft article 7 was provisionally adopted by vote. That draft article identifies a list of international crimes in respect of which immunity *ratione materiae* is said not to apply. Australia shares the concerns of those members who voted against the provisional adoption of the draft article that, in its current form, does not reflect any real trend in State practice, still less existing customary international law. Australia recognises that the Commission has a dual mandate of codification and progressive development of the law. It is, however, vital that where the Commission

elects to advance a proposal that does not reflect existing law, that proposal be clearly identified as such. Australia regrets that this has not always occurred in the Commission's work on this topic.

Australia also emphasises the procedural nature of immunity *ratione materiae* and underscores the need for immunity not to be equated with impunity. Immunity *ratione materiae* operates to prevent the prosecution of State officials for international crimes in some, but not all, circumstances in some, but not all, forums. This does not mean that State officials enjoy impunity. State officials accused of international crimes may be prosecuted in their own State, before an international court with jurisdiction, or in the courts of a third party State after waiver of immunity.

Australia recognises that the international community can and must do more to ensure that State officials who commit international crimes are held to account. Australia does not, however, agree that draft article 7 represents an appropriate means of addressing this issue. Australia notes with interest the proposal by some members of the Commission that a treaty-based obligation to 'waive or prosecute' be established. Australia suggests that this is a concept deserving of further consideration by the Commission.