



AUSTRALIA



AUSTRALIAN MISSION TO THE UNITED NATIONS

E-mail australia@un.int

150 East 42nd Street, New York NY 10017-5612 Ph 212 - 351 6600 Fax 212 - 351 6610 www.australia-unsc.gov.au

**UNITED NATIONS GENERAL ASSEMBLY SIXTH COMMITTEE:
Report of the International Law Commission, Cluster II
(agenda item 77)
28 October 2022**

**Statement by Mr Adam McCarthy, Chief Legal Officer,
Department of Foreign Affairs and Trade**

Check against delivery

Thank you, [Mr/Madam] Chair.

Australia thanks the International Law Commission for its important work on the procedural aspects of the immunity of State officials from foreign criminal jurisdiction, and the two Special Rapporteurs who have contributed to this work.

Australia acknowledges that there has been much work and debate on the draft articles over a considerable period, including to reflect a range of views of Member States.

We reiterate our request that the commentaries to the draft articles clearly state where the Commission has sought to codify an existing rule of customary international law and where it has engaged in progressive development of the law.

Where the Commission's intention is codification, we would welcome the Commission continuing its efforts to identify the relevant State practice and *opinio juris* in support of the draft articles.

In addition, Australia encourages the Commission to consider the extent to which Part Four on Procedural Provisions and Safeguards of the draft articles:

- mirrors States' existing obligations
- is consistent with existing State practice, and
- allows for differences in that practice, noting States' discretion in implementing their international obligations.

Australia would welcome further consideration of the level of detail required in codifying the procedural aspects of immunity, allowing for a diversity of State practice in upholding immunity from criminal jurisdiction.

Criminal justice is of the utmost importance and it is critical to maintain the delicate balance established by our existing international obligations.

Australia further notes that the Commission in its seventy-third report recognises the debate on draft article 7 since 2016, namely the existence or non-existence of limitations and exceptions to immunity *ratione materiae*. This includes the question of whether there has been a discernible trend in State practice or existing customary international law to support any such conclusion.

Unfortunately, it appears this debate remains unresolved.

Australia has previously expressed its regret at the provisional adoption by the Commission of draft article 7 and the related annex by recorded vote during its sixty-ninth session in 2017. Draft article 7 and the related annex were adopted without a vote during the seventy-third session in 2022. But we note that some members stated that this did not mean that either the law or their legal positions had in any way changed.

Australia reiterates its appreciation for the Commission's important work in seeking to bring clarity to a complex legal issue, and the opportunity for states to provide any further comments and observations on the draft articles by 1 December 2023.

[Mr/Madam] Chair,

We welcome the Second Issues Paper by the Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law, canvassing issues around statehood and the protection of persons, and the Commission's continued active consideration of this topic.

As an island continent, Australia looks out upon the Indian, Pacific and Southern Oceans. We have one of the largest marine jurisdictions in the world.

As such, we are all too aware that sea-level rise, and other climate change impacts, raise a multitude of complex and novel international law issues.

Climate change is an existential threat for the Pacific region. Some members of the Pacific family have lands largely comprised of low-lying atolls. There has been some speculation they could potentially lose their statehood if their islands become completely inundated.

Before this happens, many people living in these and other island States in the Pacific face difficult choices as rising sea levels inundate land, erode coastlines and saltwater ruins arable land and freshwater sources.

Impacts such as these threaten people's ability to remain where they currently live. In some cases, communities have had to relocate already.

Issues around the continuity of statehood in the face of sea-level rise and protection of persons are politically and legally complex.

Similarly, as the Second Issues Paper shows, sea-level rise has potential impacts on the enjoyment of a range of human rights, including the rights to life, property, adequate food and water, health, adequate housing and cultural identity.

However, the existing international law applicable to persons affected by sea-level rise is fragmented and does not clearly envisage scenarios involving any potential loss of statehood due to sea-level rise.

We note the Study Group will revert to considering issues raised by sea-level rise in relation to the law of the sea in 2023.

Since the Study Group released its first Issues Paper in early 2020, state practice has continued to develop in this area.

In 2021, the Leaders of the Pacific Islands Forum, of which Australia is a member, adopted the ground-breaking *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise*.

The Declaration upholds the integrity of the UN Convention on the Law of the Sea (UNCLOS) while clarifying its interpretation, so as to preserve maritime zones established in accordance with the Convention in the face of sea-level rise.

The Declaration's interpretation of UNCLOS is supported by the Alliance of Small Island States, the Climate Vulnerable Forum and the Organisation of African, Caribbean and Pacific States, and it has been noted by Commonwealth Heads of Government.

We look forward to the Commission's continued consideration of this important topic.

Thank you.