

 Permanent Mission
of Austria to the
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Sixth Committee

**Agenda item 77: Report of the International Law Commission on the work of
its seventy-third session**

**Cluster II – Chps: VI (Immunity of State officials from foreign criminal jurisdiction) and IX
(sea-level rise in relation to international law)**

Statement by

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Chairperson,

Allow me to address the topic “**Immunity of State officials from foreign criminal jurisdiction**” and to express Austria’s appreciation to Special Rapporteur Escobar Hernández and the Commission for the completion of the first reading of the text of the draft articles. We believe that the Commission has made important progress on this topic and is moving towards a well-balanced outcome. Although there will be an occasion for governments for comments and observations, Austria would like to present some comments already at this stage.

As to draft article 1, paragraph 3, the “without prejudice” clause for international courts and tribunals, Austria welcomes that this clause was moved from draft article 18 to draft article 1. However, there is still the question to what extent the phrase “international criminal courts and tribunals” also encompasses hybrid or internationalised criminal courts and tribunals. The commentary mentions in paragraph 25 courts and tribunals created by UN Security Council resolutions under Chapter VII of the UN Charter and hybrid or internationalised tribunals created by domestic law, including as a result of initiatives originating from universal or regional international organisations. However, the commentary lacks a clear indication as to which of these institutions are encompassed by article 1, paragraph 3.

The definitions in draft article 2 are limited to “State official” and “act performed in an official capacity”. Austria suggests to include a definition of the term “State of the official” as well, especially since this term is often used in the text. It needs to be clarified that the state meant in this wording is not necessarily identical with the state of nationality of the official. For Austria, the definition of an “act performed in an official capacity” raises questions, as it differs from the terminology used by the Commission in the context of the Articles on Responsibility of States for internationally wrongful acts. There, reference is made to “exercising elements of governmental authority”, while draft article 2 speaks of “exercise of State authority”. We would favour to return to the terminology established in the context of state responsibility.

As to draft article 5 on persons enjoying immunity *ratione materiae*, it is Austria's view that the reference to “State official acting as such” is too broad. This definition could also include activities which are to be qualified as unlawful in the forum state or which exceed the competences of the official in the forum state.

Austria would prefer a more restrictive definition, adding a limitation which could read “to the extent that the action undertaken in the forum State is in conformity with international law.”

Austria appreciates draft article 7 on crimes under international law in respect of which immunity *ratione materiae* shall not apply. It regards this central provision of the draft articles as a compromise which is destined to contribute to combatting impunity. Like many others, we see a close link between this article and the procedural provisions and safeguards contained in Part Four of the draft articles. While we understand the background for the compromise on draft article 7, it is Austria’s position that also the crime of aggression should have been included in this list.

In draft article 10, paragraph 1, on notification to the state of the official, the wording “coercive measures that may affect an official of another state” seems to be too broad. Notification should only be required if the measures may affect the immunity of an official. In addition, there shall always be an obligation to notify if an official claims immunity.

In draft article 11 on invocation of immunity, it should be added that in the interest of all parties concerned the invocation should be made as early as possible.

As to draft article 12 on waiver of immunity, Austria proposes to insert a clause reminding forum states of their right to request a waiver of immunity. The simplest way would be reformulating paragraph 1 of draft article 12 to read: “The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official either *proprio motu* or upon request by the forum State.”

The procedural provisions and safeguards should also provide for the right of representatives of the state of the official to be present in the relevant judicial proceedings of the forum state. For this purpose, additions should be introduced into both draft article 14 on determination of immunity and draft article 16 on fair treatment of the state official, which address different stages of the proceedings. These clauses could read: “In any of these proceedings, a representative of the State of the official shall be entitled to be present to support the State official concerned.”

In Austria’s view, the procedure for the transfer of the criminal proceedings laid down in draft article 15 must be understood as being without prejudice to applicable treaties on judicial cooperation or extradition.

Austria welcomes the insertion of draft article 18 on the settlement of disputes. However, once the draft articles will be turned into a convention, which we hope will soon be the case, we shall have to provide for time limits regarding any dispute settlement in relation to pending criminal proceedings. We shall also have to address the need and the criteria for a suspension of the relevant national proceedings during an ongoing international dispute settlement.

Chairperson,

Allow me to now turn to the topic of “**Sea-level rise in relation to international law**”. Austria has followed the Commission’s work on this topic with great interest and aligns itself with the statement made on this topic on behalf of the European Union. The issues discussed by the study group on this topic will contribute to increasing awareness of the various, also legal implications and problems created by the phenomenon of sea-level rise that are of existential importance to a number of states, but also to the international community as a whole.

This year’s second issues paper contained two new aspects in addressing issues regarding statehood as well as protection of persons. We take note of the fact that this paper, just like the first issues paper presented by members in 2020, has again led to a rather controversial discussion during the session of the Commission.

On “reflections on statehood”, the second issues paper rightly indicated the difficulties of considering a continuation of statehood in cases where the territory of a state is completely covered by sea or rendered uninhabitable due to sea-level rise. It also shows that attempts to draw parallels to special entities considered to enjoy international legal personality, such as the Holy See or the Sovereign Order of Malta, may be of limited use for states with a regular population. Similarly, governments in exile would provide a useful comparison only to a limited extent. Therefore, it seems that the modalities outlined in paragraph 169 of the report, referring, among others, to ceding or assigning segments or portions of territory in other states, association with other states, establishment of confederations or federations, may prove to be a more promising guide in the search for legal options to cope with the phenomenon of sea-level rise.

On “protection of persons affected by sea-level rise”, Austria notes that there are many fundamental questions concerning the applicability of human rights obligations that need to be addressed.

With regard to the further working methods of the study group, we believe it would be quite a challenge to tackle the broad array of topics listed in paragraphs 235 and 236 of the report alongside the other topics on the work programme of the Commission. In any event, Austria welcomes that the Commission and its study group are addressing the important topic of sea-level rise and is certain that the Commission also in its new formation will significantly contribute to clarifying international law in relation to this phenomenon.

Thank you.