

 Permanent Mission
of Austria to the
United Nations in New York

79th Session of the General Assembly
Sixth Committee

**Agenda item 79: Report of the International Law Commission on the work of
its seventy-fifth session**

**Cluster I - Chps: I, II, III, VII (Immunity of State officials from foreign criminal
jurisdiction), X (Sea-level rise in relation to international law) and XI (Other
Decisions and Conclusions)**

Statement by

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Chairperson,

At the outset, let me thank the Commission for another year of its very valuable contribution to the progressive development and codification of international law, which is once again well presented in the ILC's annual report. We particularly appreciate the novel approach taken in Chapter II of this year's report to provide an overview of the main issues that were discussed in the Commission. Such a summary is very useful for practitioners. However, the ease of use of the report would be increased if the practice were resumed to include all draft texts, even those emanating from the Drafting Committee and not yet adopted by the Commission, directly in the report.

Chairperson,

Allow me now to turn to the topic of "**Immunity of State officials from foreign criminal jurisdiction**". Austria wishes to express its appreciation for the work of Special Rapporteur Claudio Grossman Guiloff and for his first report on the topic containing proposals for consideration at second reading. We welcome that the Commission took note of draft articles 1, 3, 4 and 5, the latter being a merger between former draft articles 5 and 6, as provisionally adopted by the Drafting Committee. The Austrian delegation would like to thank the Chair of the Drafting Committee, Ms. Phoebe Okowa, for her diligent and efficient work.

With regard to draft article 1, paragraph 3, we welcome the broadening by the Drafting Committee of the provision so as to extend to rights and obligations of States not only under international agreements establishing international criminal courts and tribunals, but also to rights and obligations "relating to the operation of" such courts and tribunals. As pointed out in the statement of the Chair of the Drafting Committee, while such obligations ultimately always have their source in treaties, their specific determination may well be established by decisions of organs of international organizations, as in the case of referrals of situations by the Security Council to the International Criminal Court.

Austria would like to recall that the commentary to draft article 1, paragraph 3, lacks a clear indication as to the meaning of the term "international criminal courts and tribunals". In particular, it is unclear whether "hybrid or internationalized tribunals" as mentioned in paragraph 25 of the commentary are covered by draft article 1, paragraph 3. Austria agrees with the decision of the Drafting Committee not to single out international tribunals established by Security Council resolutions through a separate subparagraph. However, this decision does not address the distinct situation of hybrid tribunals, particularly given their different legal bases, and it does not answer the important question whether these come within the scope of draft article 1, paragraph 3.

Concerning the phrase "as between the parties to those agreements", we wish to emphasize that we do not see the need to retain it. As it stands, the phrase is a mere reiteration of the *pacta tertiis* principle enshrined in articles 34 and 35 of the Vienna Convention on the Law of Treaties. Austria fails to see how a deletion of the phrase could be perceived as taking sides in the discussions concerning the relationship between the International Criminal Court and States not parties to the Rome Statute, a fear expressed by some members of the Drafting Committee. If any such concern might exist, it could be dealt with in the commentary to draft article 1.

While the Drafting Committee has not made any modifications to draft article 2, Austria wishes to express its position that the Commission should refine the definition of the terms "State official" and "act performed in an official capacity". Austria suggests aligning the terminology used to that resorted to by the Commission in the Articles on responsibility of States for internationally wrongful acts which refer to "State organ" and exercise of "governmental authority". For reasons of consistency, it is advisable to use the same terminology in comparable situations. Furthermore, draft article 2 raises the question whether the person seemingly acting as a State official must be entitled under the law to exercise State functions or whether it suffices that the person does so in a *de facto* capacity. Finally, the phrase "who represents the State" is unfortunate

and does not add to the definition, as any State official who acts in that particular capacity will *ipso jure* represent the State.

With regard to draft article 3, Austria would like to support this article as it stands and that the immunity *ratione personae* not be extended to persons outside the so-called troika.

Concerning draft article 7, Austria invites the Commission to reconsider its position and to include also the crime of aggression in the list of crimes under international law in respect of which immunity *ratione materiae* does not apply. While Austria is aware of the differing views on that matter, it submits that not including aggression in the list of crimes in draft article 7 would jeopardize the genuine quality of aggression as a crime under international law. Not only is aggression a crime that, by its very nature, is international in character; it is usually also committed in situations and circumstances in which other international crimes mentioned in draft article 7 are perpetrated, such as war crimes, crimes against humanity, or torture.

For a successful conclusion of this topic the future Part Four containing procedural provisions and safeguards will be of special importance. In that context, it may be necessary to distinguish between rules that apply to all situations of immunity and rules specifically concerning the application of draft article 7.

Chairperson,

Permit me now to turn to the topic of “**Sea-level rise in relation to international law**”. We would like to thank the two co-chairs, Ms. Galvao Teles and Mr. Ruda Santolaria, who presented the results of the two discussions in the Study Group.

Mr. Santolaria presented the additional paper on the question of statehood, guided primarily by the idea of continuing statehood despite the effects of sea-level rise. In that context, the problem of the absence of one of the conditions of statehood

contained in the Montevideo Convention on the continued existence of an affected state was addressed in the discussion.

The example of the situation of the Baltic States from 1940 to 1990 mentioned in the discussion differs from the problem caused by sea-level rise insofar as in this case it was an issue of loss of effective governmental control over a State's territory caused by an occupation in violation of international law. In contrast, the problematic situation of the States affected by sea-level rise relates to the permanent partial or complete loss of territory.

Austria appreciates that the Study Group has examined in detail the various aspects of the problem of the continuation of statehood in relation to sea-level rise. In view of the enormous breadth of this subject, we believe that now the Commission should confine itself to defining several criteria for the continuation of statehood, drawing a clear distinction between situations of partial or complete loss of territory.

With regard to the second issue, the protection of persons affected by sea-level rise, Ms. Galvao Teles rightly noted a fragmented situation of the rules that might be applicable, which did not relate specifically to the context of sea-level rise. Austria shares the view that human dignity should be a guiding principle and that the rights-based and needs-based approaches should be combined when it comes to the protection of persons affected by sea-level rise. When this discussion surfaced in connection with the draft articles on the protection of persons in the event of disasters, the Commission concluded in support of the combination of both approaches and stated in the commentary on paragraph 1 of draft article 2 that „[t]he prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary”.

In Austria's view, the draft articles on the protection of persons in the event of disasters could provide an appropriate starting point for this discussion, subject to the particular situation in the present context and taking into account the other considerations discussed in the Study Group.

The broad spectrum of issues covered in both Study Group discussions raises the question on the appropriate outcome of the Commission's work on this topic as the drafting of articles or conclusions may be impossible. Austria supports the idea put forward by some Commission members of a final report covering the entire topic, which should present the current legal situation including the legal problems associated with this topic that have not yet been resolved.

This final report, as indicated in the report on the Study Group, could be limited to the topics of the law of the sea, the continuation of statehood and the protection of persons affected by sea-level rise. The Pacific Islands Forum Leaders' Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise would be a useful starting point for the drafting of this final report. However, Austria is not convinced that the issue of responsibility for sea-level rise should be addressed in the report, as this issue would extend the Commission's mandate beyond the immediate legal difficulties of sea-level rise.

Finally, we would like to raise a concern relating to the examination of a topic primarily in a Study Group and less in plenary. Such a working method is not very transparent because, unlike for the plenary, there are no minutes of the discussions in Study Groups. Such a working method may have been useful in the present case, but it should not become the general practice of the Commission.

Chairperson,

To conclude my statement, let me briefly express Austria's support for the two new topics included in the long-term programme of work of the Commission. Both topics are of practical relevance to States, and we believe that a thorough study by the Commission would be timely and valuable.

As concerns the topic of "**Due diligence in international law**", we believe that an in-depth engagement of the Commission is long overdue. Due diligence plays a role in various areas of international law, in particular international environmental law, and receives newly increased attention when it comes to the application of international

law to modern phenomena such as cyber operations or the use of artificial intelligence by States.

Regarding the topic “**Compensation for the damage caused by internationally wrongful acts**”, we agree that practice has considerably evolved since the adoption of the Articles on the responsibility of States for internationally wrongful acts by the ILC in 2001. We believe that it is a prudent approach to build upon previous work of the Commission, particularly when this previous outcome has been so broadly accepted in state practice. The relevance of this topic is also highlighted by the work of specialised international bodies such as UNCITRAL Working Group III, which is engaging with the issue of compensation for damages in the context of the ongoing reform of Investor-State Dispute Settlement. We believe that the identification of universal standards by the ILC would strongly benefit the legitimacy of damages awards rendered especially by investor-state tribunals.

We trust that the Commission will take up work on these topics as soon as its current programme of work so allows.

Thank you.