

Statement of Australia

Sixth Committee Agenda Item 82: Report of the International Law Commission

Statement on the immunity of State officials from foreign criminal jurisdiction

October 2018 (Cluster III)

Chair

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.

Australia welcomes the discussions of the Commission on the procedural aspects of the immunity of State officials from foreign criminal jurisdiction.

We believe that the ‘classical’ procedural aspects of the immunity of State officials relating to timing, invocation and waiver should be the primary focus of the Special Rapporteur’s seventh report.

Australia considers that the draft articles on this topic should codify customary international law, and should therefore be distilled from relevant state practice and *opinio juris*.

Australia emphasises the procedural nature of the immunity of State officials. As noted in Australia’s remarks on peremptory norms of general international law in Cluster II, Australia 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 regrets the continued focus in the report on the proposed exception to the immunity of foreign State officials from foreign criminal jurisdiction in draft article 7.

Australia recalls that the Commission was unable to resolve this issue by consensus at its sixty-ninth session, and that draft article 7 was provisionally adopted, by vote.

Australia remains unable to support draft article 7, and continues to share the concerns of those members who voted against the provisional adoption of the draft article that, in its current form, the draft article does not reflect any real trend in State practice, still less existing customary international law.

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.

We consider that any draft articles on the procedural aspects of the immunity of State officials will be of most value to States where they flow from rules on this immunity that reflect existing customary international law.

Australia expresses its concern that a focus on draft article 7 may risk a distraction from the Commission's valuable work in codifying customary international law.

It is vital that if draft article 7 is advanced in the Commission's future work, it should be clearly identified as progressive development in the law, and should not be the focus of the Special Rapporteur's forthcoming seventh report.

Thank you, Chair.