

 **Permanent
Mission
of Austria**

to the United Nations
in New York

**76th Session of the General Assembly
Sixth Committee**

**Agenda item 82: Report of the International Law Commission on the work of
its seventy-second 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,

Austria expresses its appreciation for the work of Special Rapporteur Concepción Escobar Hernández and for her eighth report on the topic “**Immunity of State officials from foreign criminal jurisdiction**”. We also welcome that the Commission at its 72nd session was able to provisionally adopt six new draft articles and the commentaries thereto. However, my delegation notes that the delay in the deliberation of the draft articles as proposed by the Special Rapporteur already in 2019 has led to an unfortunate situation: while the Commission in this year’s general debate considered the new questions examined by the Special Rapporteur in her recent report, the Drafting Committee was still discussing the issues that were debated by the Commission two years ago. We trust that this divide will be overcome to allow for an efficient work of the Commission. This intervention will first focus on the debate of the Special Rapporteur’s eighth report as reflected in the Commission’s report and then comment on the new draft articles provisionally adopted.

Since it is Austria’s position that the Commission should continue to prepare draft articles and that they should lead to a convention, we support the proposed inclusion of a dispute settlement clause which is a necessary element completing the other procedural safeguards. However, regardless of the nature of the final outcome of the work of the Commission, we would prefer stronger, unequivocal language in such a provision. We therefore suggest that if differences between the forum state and the state of the official remain even after negotiations, draft article 17 should state that the dispute “shall” be referred to the International Court of Justice or to arbitration.

As regards draft article 17 paragraph 3 proposed by the Special Rapporteur, it is unclear why the forum state should only suspend the exercise of its jurisdiction if the dispute was referred to a judicial organ. It would be more appropriate to suspend the national proceedings already at the moment when the parties start their endeavour to solve the dispute through negotiations or any other means of international dispute settlement.

Lastly, it would be helpful if the draft articles provided more guidance on the deadlines for a rapid dispute settlement and the consequences of such proceedings for the individual concerned, *e.g.* on the permissibility and duration of investigative custody or other coercive measures.

Concerning the relationship of the draft articles with international criminal courts and tribunals, we welcome the proposal of the Special Rapporteur to include in draft article 18 a “without prejudice” clause that settles any doubts about the scope of the present draft articles. We concur with the view that the legal regimes governing the functioning of international criminal courts and tribunals are independent, each with its own norms regulating the jurisdiction of the particular court or tribunal, and separate from national criminal jurisdictions. However, we believe that the term “international criminal tribunals” used in draft article 18 as proposed by the Special Rapporteur must be further defined by the Commission. In particular, it must be clarified to what extent this term also encompasses hybrid or internationalised criminal courts and tribunals.

We have seen a proposal in the report of the ILC to reformulate the proposed draft article 18 to state that the present draft articles are without prejudice to the applicability of immunity before international criminal tribunals. We are not in favour of such wording, as the irrelevance of an official capacity before an international court or tribunal should be expressed in terms of a non-existing exemption from jurisdiction and not as immunity, a term reserved for exemption from national jurisdiction.

With regard to the structure of the draft articles, we agree with the conclusion of the Special Rapporteur that the content of the proposed draft article 18 would fit well as a new draft article 1 paragraph 3. [In paragraph 108 of the report, there is an erroneous reference to draft article 3 paragraph 1 instead of draft article 1 paragraph 3.]

Chairperson,

Let me now turn to the draft articles provisionally adopted by the Commission this year.

Regarding draft article 8 *ante* as well as draft article 8, we would like to underline once again that issues of immunity from criminal jurisdiction may also arise in the context of administrative acts and proceedings. Therefore, the terms “criminal proceeding” and “criminal jurisdiction” must be understood to encompass also administrative criminal proceedings. In addition, we would like to point out a possible inconsistency concerning the term “criminal proceeding” in these two draft articles.

The commentary to draft article 8 *ante* states that this term includes “both acts of the executive and acts performed by judges and prosecutors”, while the commentary to draft article 8 explains that “‘criminal proceedings’ refers to the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual”. We recommend that the broader understanding of “criminal proceedings”, comprising also acts of the executive, should be maintained throughout the whole commentary.

Concerning draft article 9 on “Notification of the State of the official”, we agree that the notification must be provided at an early stage. However, there might be circumstances in which a notification, before coercive measures are taken, is not possible or feasible for reasons of the effectiveness of the criminal proceedings. We would prefer to use a wording inspired by Article 42 of the Vienna Convention on Consular Relations, such as:

“When the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall promptly notify the State of the official of that circumstance.”

As regards draft article 9 paragraph 3, we welcome that diplomatic channels are now foreseen as the primary means for the communication of the notification. Concerning the structure of draft article 9, we propose to switch paragraphs 2 and 3, since paragraphs 1 and 3 are very much related. Additionally, the second sentence of paragraph 1 could be deleted in light of paragraph 3.

With regard to draft article 10 on “Invocation of immunity”, we welcome that the Commission took note of comments by states that the invocation of immunity is a matter of discretion for the state of the official, and that the Commission left the questions of the competent authority for the invocation and the waiving of immunity to the domestic law of the state concerned.

With regard to draft article 11 on “Waiver of immunity”, we note that the Commission did not find it necessary to include criteria for the content of such a waiver. The commentary to draft article 11 states in its paragraph 11 that “the content of the waiver should be clear enough to enable the State before whose authorities it is submitted to identify the scope of the waiver without ambiguity”. In our opinion, a normative determination to that effect should be included in the text of the draft article.

Finally, on draft article 12 on “Requests for information”, we would suggest to add, in paragraph 5, a temporal condition in view of the urgency and sensitivity of the matter. Thus, paragraph 5 could read:

“The requested State shall consider any request for information promptly and in good faith.”

Chairperson,

Let me now move to the topic of “**Sea-level rise in relation to international law**”. Austria congratulates the Commission on starting its considerations regarding this topic in the framework of a Study Group created in 2019. We take note of the fact that the first issues paper presented by members of the Study Group already in 2020 has led to a rather controversial discussion during the last session of the Commission. Austria shares the concern that papers and outcomes of Study Groups, just like reports of Special Rapporteurs, may be mistaken as a result of the work of the Commission as a whole, and while this may indeed be “a recurring problem”, as stated in paragraph 265 of the report, Austria hopes that the Commission and in particular the Study Group will take measures to prevent such confusion in the future.

Austria acknowledges that there is a considerable overlap with the work of the International Law Association on the topic of sea-level rise. While we equally acknowledge that the Commission may have its own distinctive approach, we continue to have doubts about the usefulness of discussing topics closely resembling those that have already been dealt with either in the International Law Association or the Institut de droit international.

With regard to the specific problems addressed in the first issues paper of the Study Group, Austria considers that a more encompassing, in-depth analysis on the core question whether baselines are to be regarded as ambulatory or permanent should indeed be conducted; the same is true in regard to the effect of sea-level rise on the extension of the exclusive economic zone and the continental shelf. Austria would also welcome further study in regard to the applicability of Article 62 of the Vienna Convention on the Law of Treaties to the phenomenon of sea-level rise.

As far as the future work of the Study Group is concerned, Austria would seek clarification about the overall aim and purpose of the output of the Study Group, in particular, whether it intends to merely study the *lex lata*, or whether and, if so, to what extent it aims at proposing changes to the existing legal framework.

In addition, we encourage the Study Group to explore ways of cooperation with the future Special Rapporteur of the UN Human Rights Council on Climate Change.

Thank you.