

International Law Commission

Report on the Work of its sixty-eighth Session

Chapter III on “Specific issues on which comments would be of particular interest to the Commission”

Written comments by Austria

Ad para 35.:

In order to supplement Austria’s comments on Chapter III on „Specific issues on which comments would be of particular interest to the Commission” of the Report of the International Law Commission (ILC) on the Work of its sixty-eight Session, submitted in 2016, Austria would like to provide the following additional information on Chapter “**C. Immunity of State officials from foreign criminal jurisdiction**”:

(a) invocation of immunity: The Austrian Code of Criminal Procedure (*Strafprozessordnung*; StPO) establishes that criminal investigation proceedings concerning a person whose prosecution cannot be initiated or continued due to a legal impediment (such as immunity under international law) have to be discontinued (Section 197 (2a) StPO).

(b) waivers of immunity: Before taking a decision to discontinue the proceedings against persons enjoying immunity in Austria under international law, it is examined whether it should be suggested to the competent (sending) state, through the Ministry of Foreign Affairs, to issue a waiver of immunity.

There is no general rule determining the requirements under which Austria would waive the immunity of its own state officials, if they were involved in criminal proceedings in a foreign state. Such a decision would be taken on a case by case basis, taking the particular factual and legal circumstances of the situation into consideration. As regards the practice of waiving the immunity of Austrian state officials in foreign criminal proceedings, no such incidents occurred in the recent past.

(c) the stage at which the national authorities take immunity into consideration: The immunity of state officials in criminal proceedings based on international law becomes effective as soon as criminal proceedings are initiated, i.e. when the criminal investigation department or the public prosecution department, while aiming at resolving a suspected crime, investigate or exercise measures of enforcement against a person. The preliminary inquiries to clarify the circumstances of a case, to identify the specific suspect and to establish the facts the suspicion is based upon, do not yet constitute acts of prosecution and therefore immunity cannot be invoked against them. However, such inquiries have to be conducted in compliance with other provisions relating to immunity, for example Article 22 of the Vienna Convention on Diplomatic Relations of 1961.

(d) instruments available to the executive: The Regulation on Extradition and Mutual Assistance in Criminal Matters (*Auslieferungs- und Rechtshilfeverordnung*; ARHV) specifies the proceedings to be applied in cases in which immunity may be or has to be considered:

- If a court has doubts whether a person enjoys immunity from national criminal jurisdiction, it has to obtain the opinion of the Ministry of Justice (Section 57 ARHV), which will clarify the status of the person in consultation with the Ministry of Foreign Affairs.
- If a person enjoying immunity is suspected to have committed a criminal act, the public prosecution department, after completing the permitted preliminary inquiries, has to report the facts of the case and the intended measures to the Ministry of Justice (Section 56 ARHV).

(e) mechanisms for international legal assistance, cooperation and consultation: The Ministry of Justice notifies the Ministry of Foreign Affairs, as soon as it is informed about criminal proceedings involving a person enjoying immunity under international law (Section 56 ARHV). The latter then informs the state of the person concerned about the issue and inquires, as appropriate, about that state's intentions regarding a waiver of immunity. Furthermore, the submission of the case records according to Section 56 ARHV may also lead to the initiation of a mutual judicial assistance procedure according to Section 74 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters (*Auslieferungs- und Rechtshilfegesetz*; ARHG). The Ministry of Justice may therefore request the state of the person concerned to initiate criminal proceedings against this person, if that state appears to have jurisdiction.

As regards the national Austrian practice, there are no cases or decisions which have not already been reported in recent years.