



International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction

Comments and observations of Australia

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Australia welcomes the opportunity to provide comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted by the International Law Commission (ILC), on first reading, at its seventy-third session.

We thank the ILC for its extensive work on the draft articles since 2007, which has allowed the discussion of this important topic to progress to this point.

Australia's observations focus on draft article 7 on the crimes under international law in respect of which functional immunity shall not apply, and draft articles 8 ante to 18 on procedural provisions and safeguards. However, as a broad comment, we consider it important that the Commentaries to the draft articles clearly state those articles in which the ILC has sought to codify an existing rule of customary law and where it has engaged in progressive development.

Australia is a strong proponent of accountability for serious international crimes. Such abhorrent crimes are contrary to the interests of all States. It is therefore in the interests of all States to ensure these crimes are prevented and their perpetrators prosecuted.

National courts play a critical role in the fulfillment of this goal, ensuring that there is no safe haven for individuals who commit crimes that breach the most fundamental norms of international law. Such exercise of jurisdiction may be particularly important in cases where the International Criminal Court (ICC) does not have jurisdiction, or in the absence of a referral by the UN Security Council of the most serious crimes under international law to the ICC or other relevant action, such as establishing an ad hoc international criminal tribunal.

Australia considers that draft article 7, as currently drafted, reflects the progressive development of international law. However, taking into account recent practice, including by national courts, Australia acknowledges that there is a discernible trend of the non-applicability of functional immunity for serious international crimes at the national level.

Australia considers that any exception to or limitation on functional immunity would apply to serious international crimes as a category, rather than developing in respect of particular crimes. In this regard, we consider the scope of crimes captured by any exception must be limited to the most serious international crimes.

Australia recalls that, since the provisional adoption of draft article 7 by the ILC in 2017, the ILC has adopted procedural safeguards in draft articles 8 ante, 8, 9, 10, 11 and 12. Australia welcomes steps towards the development of procedural safeguards as an important means to



protect State officials from any unsubstantiated and politically-motivated prosecutions in third States.

In Australia's view, however, further procedural safeguards are necessary. Australia considers that, in cases of competing claims of jurisdiction, the State of nationality or the State in whose territory the criminal conduct was alleged to have occurred shall have primary responsibility over third states to investigate and prosecute any alleged serious international crimes, but must do so in a genuine and independent manner. Further, any exception or limitation to functional immunity should not displace a relevant agreement or arrangement between the forum State and the State of nationality, which gives the latter primary jurisdiction over its officials deployed overseas, in order to allow the State of nationality to conduct its own genuine investigation and prosecution.