

**Written Comments by Austria on the ILC Draft Articles on Immunity of State
Officials from Foreign Criminal Jurisdiction**

December 2023

Austria appreciates the text of the draft Articles on immunity of State officials from foreign criminal jurisdiction adopted, on first reading, by the International Law Commission (ILC) and the significant progress on this topic achieved so far. In this context, Austria expresses its support for the balanced approach of the draft articles containing important procedural safeguards, which will make this endeavor more acceptable to the international community. Austria encourages the Special Rapporteur to pursue the finalization of the draft articles in this spirit.

As to **draft article 1, paragraph 3**, the “without prejudice” clause for international courts and tribunals, Austria welcomes that this clause was moved from draft article 18 to draft article 1. However, there is still the question to what extent the phrase “international criminal courts and tribunals” also encompasses hybrid or internationalized criminal courts and tribunals. The commentary on this draft article mentions in paragraph 25 courts and tribunals created by UN Security Council resolutions under Chapter VII of the UN Charter and hybrid or internationalized tribunals created by domestic law, including as a result of initiatives originating from universal or regional international organizations. However, the commentary lacks a clear indication as to which of these institutions are encompassed by article 1, paragraph 3.

The definitions in **draft article 2** are limited to “State official” and “act performed in an official capacity”. Austria suggests to include a definition of the term “State of the official” as well, especially since this term is often used in the text. It needs to be clarified that the state meant in this wording is not necessarily identical with the state of nationality of the official. For Austria, the definition of an “act performed in an official capacity” raises questions, as it differs from the terminology used by the Commission in the context of the Articles on responsibility of states for internationally wrongful acts. There, reference is made to “exercising elements of governmental authority” (see e.g. the title of article 5 of the Articles on state responsibility), while draft article 2 speaks of “exercise of State authority”. We

would favor to return to the terminology established in the context of state responsibility since, otherwise, it would not be clear which acts would be covered by the expression “exercise of State authority”

As to **draft article 5** on persons enjoying immunity *ratione materiae*, it is Austria's view that the reference to “State official acting as such” is too broad. This definition could also include activities which exceed the competences of the official in the forum state.

Austria welcomes **draft article 7** on crimes under international law in respect of which immunity *ratione materiae* shall not apply. Austria regards this central provision of the draft articles as a compromise, destined to contribute to combatting impunity. Like many others, Austria sees a close link between this article and the procedural provisions and safeguards contained in Part Four of the draft articles. While supporting article 7 as a central provision of the draft articles, Austria reiterates its position that the list of exceptions to functional immunity in draft article 7 is incomplete and should also contain a reference to the crime of aggression.

It is Austrian practice and *opinio iuris* that no functional immunity exists for international crimes, including the crime of aggression, by virtue of customary international law. In Austria's view, this exception also applies to the so-called “troika” after they have left office. This view is expressed in the “*Decree of the Austrian Ministry of Justice regarding jurisdiction for war crimes and other international crimes and immunities of highest officials of foreign states in Austrian criminal proceedings*” dated 5 July 2022, the concluding chapter of which reads as follows:

“3. Conclusion

Based on the above State practice, and in concurrence with the Office of the Legal Adviser of the Federal Ministry for European and International Affairs, the Federal Ministry of Justice holds the following legal view:

1. ***Incumbent heads of state, heads of government and foreign ministers of other States enjoy, by virtue of customary international law, absolute immunity ratione personae before Austrian criminal courts.***
2. ***All other officials of foreign states do not enjoy, by virtue of customary international law, functional immunity ratione materiae before Austrian criminal courts as concerns the crimes contained in the 25th Chapter of the***

*Austrian Criminal Code [i.e. genocide, crimes against humanity, war crimes and crime of aggression] as well as torture. **This exception also applies to heads of state, heads of government and foreign ministers of foreign States after they have left office.***

As to **draft article 11** on invocation of immunity, it should be added that in the interest of all parties concerned the invocation should be made as early as possible.

In **draft article 12** on waiver of immunity, Austria proposes to insert a clause reminding forum states of their right to request a waiver of immunity. The simplest way would be reformulating paragraph 1 of draft article 12 to read: “The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official either *proprio motu* or upon request by the forum State.”

The procedural provisions and safeguards should also provide for the right of representatives of the state of the official to be present in the relevant judicial proceedings of the forum state. For this purpose, additions should be introduced into both **draft article 14** on determination of immunity and **draft article 16** on fair treatment of the state official, which address different stages of the proceedings. These clauses could read: “In any of these proceedings, a representative of the State of the official shall be entitled to be present.”

In Austria’s view, the procedure for the transfer of the criminal proceedings laid down in **draft article 15** must be understood as being without prejudice to applicable treaties on judicial cooperation or extradition.

Austria welcomes the insertion of **draft article 18** on the settlement of disputes. However, once the draft articles will be turned into a convention, it will have to provide for time limits regarding any dispute settlement in relation to pending criminal proceedings. This convention will also have to address the need and the criteria for a suspension of the relevant national proceedings during an ongoing international dispute settlement.