Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Comments and observations by the Federal Republic of Germany on the draft articles on "Immunity of State officials from foreign criminal jurisdiction"

November 2023

1. The Permanent Mission of Germany to the United Nations presents its compliments to the Secretary-General of the United Nations. With reference to the decision by the International Law Commission (hereinafter referred to as "ILC" or "the Commission") taken at its 3609th meeting on 3 August 2022, Germany avails itself of the opportunity to submit the following comments and observations on the draft articles on Immunity of State officials from foreign criminal jurisdiction.

Introductory observations

2. Germany wishes to express appreciation for the work of the former Special Rapporteur Concepción Escobar Hernández and the Commission as a whole on this highly relevant topic and commends the Commission on having adopted the draft articles on Immunity of State officials from foreign criminal jurisdiction on first reading. The topic is of paramount importance to Germany. Germany will limit itself to some key points regarding the draft articles as developed by the ILC.

3. History has taught us that there are crimes where immunity cannot be upheld. Germany has been at the forefront of this historical experience – the Nuremberg trials being the starting point of the development of modern international criminal law. Hence, Germany has always been and will always be a staunch supporter of this development. International crimes are of such gravity that not to bring the perpetrators to justice is unacceptable and has the potential to undermine the credibility of the international legal order. Reports of atrocities committed in ongoing conflicts are a sad reminder of the fact how important it is to uphold the fight for accountability.

4. At the same time, it must be borne in mind that immunities, including those of State officials from foreign criminal jurisdiction, are a core element of protecting our international legal system which is based on the principle of sovereign equality. Immunities of State officials from foreign criminal jurisdiction constitute an elementary basis of stable and peaceful inter-state relations. It is imperative that the right balance be struck between the need for effective criminal proceedings and the need for stability in international relations. Given the sensitivity of the

issue, Germany wishes to reiterate its call for a cautious approach to the issue, which is warranted even more now that the project it nearing its end.

5. Germany would like to highlight the importance of clearly distinguishing between the various types of immunity under international law and, respectively, the different situations in which questions of immunity under international law might be pertinent. The draft articles as well as the concomitant debates and discourses should generally not be interpreted as carrying implications for other immunities such as, in particular, those of States in civil proceedings, etc. The need to differentiate scrupulously between the various types of immunity, that is in particular, between the immunity of States from foreign civil proceedings and the immunity of State officials from foreign criminal jurisdiction, and the situations in which immunities might be raised is well established in international case law and also reflected in the jurisprudence of German national courts.

Specific comments on the draft articles

Draft article 7: Crimes under international law in respect of which immunity *ratione materiae* shall not apply

6. To Germany, the question whether immunity *ratione materiae* does not apply to certain crimes it of utmost importance. Germany in this regard wishes to reiterate the need for the Commission to properly ground its work in the practice of States. Where the Commission wishes to go beyond the scope of what already has been recognized by States as applicable international law, this must be made explicit by designating the paragraph in question as lex ferenda. In our view, the Commission is well advised not to blur the lines between what the law is and what the law ought to be.

7. At the same time, the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed is a *conditio sine qua non* for the application of international criminal law in national courts, as such crimes are often committed by State officials. Apart from the post-WW2 Nuremberg and Tokyo trials, which were international in nature, there have been thousands of national court judgements against former Nazi officials, i.a. in Australia, France, the United Kingdom, Italy, Canada, the Netherlands, Poland or the Soviet Union. These proceedings were not once being hindered by the assumption that the existence of functional immunity *ratione materiae* would block the criminal proceedings. Another prominent demonstration of this understanding was the Supreme Court of Israel's Eichmann judgement in 1962, which was followed by a vast expansion of the application of the principle of universal jurisdiction for the most serious international crimes in various national laws. This trend was given new momentum when the Rome Statute of the International Criminal Court was concluded in 1998, which explicitly stresses its complementarity to national criminal jurisdictions. Just very recently, the United States of America amended its "War Crimes Act" in order to widen its scope of

application. Germany is therefore of the view that one might speak of a norm of customary international law "in status nascendi". Germany discerns a trend towards the acceptance of exceptions from immunity *ratione materiae* when it comes to the most serious crimes under international law.

8. Germany wishes to draw once again the ILC's attention to an important case in the German jurisprudence on immunities of State officials in criminal proceedings. On 28 January 2021, the German Federal Court of Justice (*Bundesgerichtshof*) decided on an appeals case that involved the prior conviction of a former first lieutenant of the Afghan armed forces *inter alia* for war crimes based on the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*). The Court found that according to customary international law, criminal prosecution by a domestic court for certain war crimes was not barred by immunity *ratione materiae,* if "the acts were committed abroad by a foreign state official of subordinate rank in the exercise of his sovereign functions against non-domestic persons". The judgment addresses the issue of immunity in criminal proceedings only with regard to certain war crimes. Nonetheless, the dictum has been interpreted as providing a basis also for German courts to deem immunity *ratione materiae* inapplicable in cases involving other crimes under customary international law, i.e. also crimes against humanity, genocide and the crime of aggression, all of which are punishable under the German Code of Crimes against International Law.

9. The judgment by the Federal Court of Justice is the highest-ranking judicial decision in Germany on the issue of immunities of State officials from foreign criminal jurisdiction in recent times. It constitutes important German State practice and has a significant bearing also on the German government's position on the present topic. Shortly afterwards, in February 2021 and January 2022, two former members of the Syrian intelligence service were convicted for crimes against humanity, respectively for the assistance hereto, by the Koblenz Higher Regional Court.

Part four - Procedural provisions and safeguards – General remarks

10. Germany welcomes the introduction of procedural safeguards. In particular, regarding any exceptions to immunity of State officials *ratione materiae* recognized under international law it is important to ensure that these are not misused by States for ulterior political purposes. The provisions and safeguards in part four may, in that sense, help to strike a balance between the conflicting interests underlying cases of state officials' immunities, i.e. between the interest of the forum State in prosecuting criminal wrongs committed by a State official on the one hand and the mutual respect for sovereign equality of States on the other hand.

11. At the same time, to Germany the draft articles on procedural provisions and safeguards (part four) seem to constitute, for the most part, propositions of what the law ought to be rather than provisions firmly grounded in the practice of States. Germany however believes that the provisions provide a useful starting point for harmonizing the application of the law on immunity by States and their domestic

courts. The Commission might therefore consider speaking rather of "guidelines" than "articles" in order to reflect properly the status of the provisions contained in part four.

Draft article 14 – Determination of immunity

12. Germany welcomes the fact that the determination as to whether immunity applies shall be made by authorities at an appropriately high level. It should be ensured that decisions are made by a domestic authority experienced in matters of international law. Often, only high-level authorities within the domestic administration will be able to assess the far-reaching implications of cases involving the immunity of foreign State officials. Also, the fact that a decision is made by a high-level authority may signal to the State of the official that the forum State is aware of the specific ramifications of the case for the sovereignty of the State of the official and may hence be perceived by the latter as a confidence-building measure.

Draft article 18 – Settlement of disputes

13. Regarding draft article 18 we wish to point out that, under German law, there is no provision that would allow a court to leave the legal assessment as to whether the requirements for immunity are given in a specific case to an intergovernmental mediation process *after* an indictment has been filed before the courts in criminal proceedings and then to take the results of any such process into account in these proceedings.

14. Furthermore, Germany wishes to point out that the jurisdiction of the International Court of Justice – or any other Court – may not be founded on customary international law. Rather, there is no obligation under general international law to submit a matter to the ICJ. To give effect to draft article 18 would therefore require that the articles be transformed into a treaty that is then ratified by States.