November 2024

Comments and observations by the Federal Republic of Germany

on the draft articles on "Immunity of State officials from foreign criminal jurisdiction"

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") to afford the opportunity for more Governments to comment, 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.

2. Germany wishes to present its thanks to the Special Rapporteur, Claudio Grossman Guiloff, as well as the Commission as a whole for their important work on this highly relevant topic. As stated in earlier comments and observations, Germany has always been and will always be a staunch supporter of international criminal law. Germany has been at the forefront of the development of international criminal law – being mindful of the fact that the Nuremberg trials can be considered the starting point for international criminal law as we know it today.

3. Germany welcomes the Commission's decision not to rush to a second reading but rather to closely evaluate and examine the numerous comments and observations submitted by States. 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 is nearing its end. Indeed, the ILC is one of the most respected and prestigious institutions in the field of international law. This is not least due to the impeccable care and highest standards it adheres to when making its determinations. Also, the close ties that the Commission maintains with and the privileged access that it enjoys to States are what sets it apart from other highly qualified legal expert bodies. It is, therefore, only fitting that the Commission should decide to allow for more time to consider the opinion of States. It is imperative that the right balance be struck between the need for effective criminal proceedings and the need for stability in international relations.

4. Germany would like to make use of this opportunity to submit further comments and observations to update the Commission on important developments in Germany's national legal system. In its written comments and observations in November 2023, Germany has already drawn the Commission's attention to a judgement by the German Federal Court of Justice (*Bundesgerichtshof*) dating from 28 January 2021 (3 StR 564/19). In that decision, the German Federal Court found that functional

immunity (immunity ratione materiae) does not prevent a State from criminally prosecuting a foreign State official on charges of war crimes, if "the acts were committed abroad by a foreign state official of subordinate rank in the exercise of his sovereign functions".

5. More recently, the Federal Court of Justice further developed its jurisprudence. On 21 February 2024, the Court held that functional immunity does not apply to international crimes, *irrespective* of the status and rank of the perpetrator (AK 4/24, Order of 21 February 2024). In another decision dating from 20 March 2024 (3 StR 454/22, Order of 22 March 2024), the Court further held that functional immunity does not apply to acts the punishability of which is directly rooted in customary international law. This includes, so the Court, crimes against humanity and war crimes, as enshrined in the provisions of the Rome Statute of the International Criminal Court and, accordingly, in the German Code of Crimes against International Law, which is Germany's national law criminalizing the core crimes contained in the Rome Statute of the International Criminal Court.

6. Following these decisions by the German Federal Court of Justice, the German parliament (*Bundestag*) adopted an act codifying the principle contained in these decisions in German national law. The newly incorporated section 20 para. 2 sentence 2 of the German Courts Constitution Act now explicitly states that functional immunity does not prevent the extension of German criminal jurisdiction to the prosecution of international crimes as defined in the German Code of Crimes against International Law.

7. Finally, and to provide the Commission with a full picture of recent German jurisprudence in the field of functional immunity, the Federal Court of Justice, in its decision of 27 August 2024 (StB 54/24), confirmed what it held in previous cases: that the functional immunity of State officials does not apply to espionage and acts of secret service violence; rather, that international law recognizes the legitimate interest of the State concerned to counter such violations of its sovereignty by means of criminal law.

8. German law therefore clearly recognizes the existence of exceptions to the principle of functional immunity. The jurisprudence mentioned above refers to immunity ratione materiae only. Section 20 para. 20 sentence 2 of the amended German Courts Constitution Act, too, expressly speaks of immunity ratione materiae.

9. In addition, it should be noted that the exceptions as now recognized in German law apply to criminal jurisdiction only. The German practice just described should therefore not be interpreted as pertaining to the immunity of States in other contexts, e.g. and in particular, in the field of civil proceedings. Germany would therefore like to

stress 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.

10. Finally, Germany wishes to point out that section 20 para. 2 sentence 2 of the amended Courts Constitution Act speaks of international crimes as defined in the German Code of Crimes against International Law – these crimes include the crime of genocide, crimes against humanity, war crimes and the crime of aggression.