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Statement

by

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in the

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on

Immunity of State officials from foreign criminal jurisdiction

Formation and evidence of customary international law

Provisional Application of Treaties

Treaties over Time

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Immunity of State officials from foreign criminal jurisdiction

Mr Chairman,

This year the ILC discussed the preliminary report of the newly appointed Special Rapporteur on immunity of State officials from foreign criminal jurisdiction. Before turning to the subject of the preliminary report, I would like to thank the former Special Rapporteur, Mr Roman Kolodkin, for his valuable contribution to the topic that will undoubtedly assist the Commission in its future work. At the same time, I would like to congratulate the new Special Rapporteur, Ms Concepción Escobar Hernandez, on her appointment. She has taken up a complex and politically sensitive subject. She deserves our staunch support in tackling the various issues involved.

I thank her for her first report, which is a preliminary one, devoted to preparing the ground for her future work and the future debate of the topic within the ILC.

Methodological considerations

Germany is open with regard to the possible outcome of this project, -e.g. a draft convention, guidelines or framework principles etc. However, we are convinced that the starting point has to be a solid and thorough analysis of existing state practice and a specifically identified *opinio iuris*.

Germany reiterates its position that the Commission should base its work on *lex lata*. The rules of immunity are predominantly rooted in customary international law. There is a good reason for this. We are dealing with the –politically very sensitive area of - delimitation and mutual respect of sovereign powers of States. Claims by one State to exercise jurisdiction over foreign state officials might encroach upon the right of the State that is represented by those state officials. *Lex lata* as it stands represents a fine balance of the sovereign rights of the States concerned. The rules of *lex lata* have proven to be generally acceptable and are therefore followed. Consequently, States base their conduct on accepted customary rules in order not to endanger their relations with other States.

Regarding the workplan of the Special Rapporteur

While we agree with most of the questions identified and support the idea of a detailed workplan to better structure the work, some aspects concerning the questions and the structure need further consideration:

An analysis of "immunity in the system of values and principles of contemporary international law" should be based on a specifically identified *opinio iuris* and relevant state practice rather than on abstract considerations of a more theoretical nature. We have doubts whether such an analysis can be undertaken this early in the working process as it may already prejudice certain results.

Furthermore, in the first part on "general issues of a methodological and conceptual nature" it seems worth discussing whether a conceptual distinction should be made between immunity from foreign civil jurisdiction and immunity from foreign criminal jurisdiction.

Regarding the relationship between the rules on immunity and the rules to combat impunity

Germany reiterates its view that immunity does not inevitably lead to impunity. There is not the slightest doubt that the fight against impunity is of paramount importance. You can fight impunity successfully and still accept immunity. Why is it so? First, States can and are responsible for exercising their jurisdiction over their own officials if the latter are suspected of having committed unlawful acts. Besides, States always have the instrument of a waiver of immunity. And finally, in case these traditional mechanisms do not function, mention should be made of the possibility of international criminal jurisdiction. We understand the ILC-approach that the issue of immunity of state officials from international criminal jurisdiction be excluded.

Mr Chairman,

Let me conclude by stressing that Germany continues to follow this project closely and advocates an approach based on the relevant current and past practice. We are ready to support the work of the ILC by providing relevant German practice and would like to encourage other States to also provide their relevant practice. An analysis of state practice is absolutely crucial for drawing conclusions on the many difficult and complex questions asked by our new Special Rapporteur in her preliminary report.

Formation and evidence of customary international law

Mr Chairman,

We welcome and support the decision by the ILC to include the topic "Formation and evidence of customary international law" in its long-term programme of work and we congratulate Sir Michael Wood on his appointment as new Special Rapporteur.

Customary international law plays a significant role in the international legal system as well as within the constitutional order of many States. For example, in Germany Article 25 of the German Constitution stipulates that customary international law shall be an integral part of federal law. It even takes precedence over ordinary parliamentary legislation and may directly create rights and duties for all inhabitants of German territory. As a consequence, national judges in Germany are regularly called upon to apply customary international law rules.

Germany fully shares and supports the aim of the ILC's study on customary international law, which is to provide practical guidance to judges and lawyers, as well as to diplomats and government legal advisers required to apply customary international law. At the same time, we agree with those ILC members who favour a moderate approach. Customary international law is too large a subject to be covered in all its aspects sufficiently. In our view, the ILC should focus on the practical aspects and on national judges or lawyers seeking advice.

Mr Chairman,

Germany will follow this project closely. We are ready to support the work of the ILC by providing information on relevant German practice relating to customary international law and we would like to encourage other States and international organizations to do likewise. An analysis of state practice is crucial for producing results that can be of concrete assistance to international law practitioners confronted in their daily work with customary international law.

Provisional Application of Treaties

Mr Chairman,

Germany would like to thank the International Law Commission for including the important topic of provisional application of treaties in its programme of work.

Please allow me to make a few comments to point out the relevance of provisional application for treaty relations today and how we perceive it to function. The provisional application of treaties as provided for in article 25 of the VCLT has become more frequent over the years. States make use of this option when lengthy national ratification procedures stand in the way of the quick entry into force of a treaty. Provisional application is the tool to give a treaty effect pending its entry into force. It is used for bilateral treaties as often as for multilateral treaties.

It is Germany's understanding that the provisional application of a treaty means that its rules will actually be put into practice and will govern the relations between the negotiating States, i.e. the prospective Parties – to the extent provisional application is agreed.

States may decide to limit the extent of provisional application of a treaty. This has been done in many treaties concluded with Germany's participation. In that case, the extent of provisional application is determined either in the treaty itself or in the instrument containing the agreement on provisional application.
In many States - including Germany - internal law determines to what extent provisional application of a treaty may be agreed to or to what extent a treaty may be provisionally applied. If the implementation of a treaty requires change or adoption of internal national legislation in a negotiating State, the provisional application of this treaty will be impossible for the State, at least until the respective law has been changed or adopted by the legislative bodies. The same might be true if the financial funding demanded by the treaty requires parliamentary approval.
Therefore, in many cases where provisional application of a treaty is agreed in a treaty or otherwise, States will limit its provisional application to the framework of applicable national law, thereby making it clear that they may not be in a position to completely

meet the treaty's obligations. Alternatively, States might agree to the provisional application of a treaty upon notification of completion of the necessary internal procedures, in other words, on the condition that the necessary internal procedures to ensure compliance with treaty regulations have been fulfilled.

Provisional application in itself is not in any way the expression of a consent to be bound nor does it lead to an obligation to declare consent to be bound. Article 25 Para. 2 VCLT clarifies that a State which has determined that it has no intention to be bound by a treaty – because e.g. necessary parliamentary approval for ratification has been refused – is entitled to end provisional application.
It may be a different matter – depending on the concrete terms of the agreement – whether and how States that have already consented to be bound by a treaty not yet in force may or may not terminate provisional application of that treaty.

Germany is very much looking forward to the ILC's contribution to this important topic in international treaty relations.

Treaties over Time

Mr Chairman,

In its 64th session, the ILC decided to change the format of the work on this subject, as proposed by the Study Group and its Chairman, and appointed Professor Georg Nolte as Special Rapporteur on "*Subsequent agreements and subsequent practice in relation to the interpretation of treaties*".

We are pleased that the Commission followed the Study Group's recommendation. We congratulate Professor Georg Nolte on his appointment as Special Rapporteur and we look forward to receiving his first report in this capacity, which will also contribute to making the valuable work undertaken so far more accessible to States than when it was conducted within the framework of the Study Group.

We welcome the work undertaken by the Study Group during the past session, in particular the finalization of the Preliminary Conclusions by the Chairman regarding the Second report in the light of the discussions within the Study Group. The Study Group has dealt with a wide range of important aspects of the topic.

In our view, the decision to change the title and to narrow the scope as it had already previously been suggested by the new Special Rapporteur was right. It will contribute to focus the work on the legal effect of subsequent agreements and practice with respect to the interpretation of treaties and related matters.

Mr Chairman,

Germany continues to follow this project with great interest. We reiterate our appeal to other States and international organizations to provide the Commission with information on relevant practice, as the analysis of the latter is of particular importance for a better understanding of the subject and the successful outcome of the project.

Thank you.