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to the United Nations
New York

Statement by

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on the occasion of

**the 71th Session of the
United Nations General Assembly**

6th Committee

Statement 68th ILC Report (2016)

New York, International Law Week 2016

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Immunity of State officials from foreign criminal jurisdiction
Special Rapporteur: Concepción Escobar Hernández (ESP)

Madam Chairwoman/Mr Chairman,

We would like to thank Special Rapporteur Concepción Escobar Hernández for her fifth report on immunity of State officials from foreign criminal jurisdiction. We welcome the two draft articles, including commentaries, which have now been provisionally adopted by the Commission.

We appreciate that the discussion during the last session and states' comments on draft articles 2 (f) and draft article 6 are reflected in the relevant commentaries.

This year's report by the Special Rapporteur addressed the question of possible exemptions from immunity and proposed a new draft article 7 on this matter. This highly pertinent topic remains of immense interest and importance to us. However, we are aware of the fact that the Commission has not yet had the opportunity to discuss this topic among itself in a due and sufficient manner and that its report therefore remains incomplete. We understand the need for the Commission to continue its internal discussion before commenting in detail and conclusively on the substance of an outcome that is yet to be finally determined. We look forward to a complete report on the Commission's work on this topic after the debate is finalised at the sixty-ninth session.

Nevertheless, we feel the need to use this opportunity to reiterate a caveat that we have mentioned before and that is essential for us. 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. Yet we must not forget that we are talking about an exception from an important and well-established legal norm. This exception is justified because of the special nature of the crimes concerned. Typically, they involve crimes that are only rarely prosecuted by the perpetrators' competent national courts due to the rank of the criminal actors in the national State hierarchy. And they are crimes of such gravity that not bringing the perpetrators

to justice is unacceptable and has the potential to undermine the credibility of the international legal order. In the words of the Rome Statute, they are the “most serious crimes of concern to the international community as a whole”.

There seems to be broad international consensus on the crimes that justify an exception from the general rule of immunity. The case law of international courts and in particular of the International Court of Justice provides ample evidence of the scope of immunity in international law, especially including any possible exemptions. In its judgement of February 2002 on the *Arrest Warrant Case*, the ICJ limited exemptions to immunity of State officials from foreign criminal jurisdiction to clear-cut cases that lend themselves to universal acceptance. These findings by the ICJ remain in line with current State practice. We continue to advise against attempts to engage in expanding exceptions beyond what can clearly be shown to be supported by State practice and *opinio juris*. These attempts could have a destabilising effect on international relations and weaken the existing exceptions by making exemptions from immunity politically questionable as a whole. Questions of immunity are politically highly sensitive and therefore require fine balancing of the sovereign rights of the States concerned. The rules of *lex lata* have shown themselves to fulfil these prerequisites. We must not put them at risk.

We are not convinced that the Special Rapporteur’s present report, which leads to the recommendation of a new draft article 7, addresses these concerns in a satisfactory manner. Allow me to share with you some observations concerning the report’s methodological approach.

- We need a clear separation of the parts which – in the view of the Special Rapporteur – reflect existing customary international law and the parts where it is suggested that new legal norms could gradually be developed.
- While the report states a lack of consensus among States on the issue of “exceptions and limitations” to immunity, it surprisingly then identifies a “clear” trend towards such exceptions.
- Looking at national case law, the report analyses how national courts have dealt with issues of immunity. However, in many instances national prosecutors will refrain from pursuing a case after having come to the conclusion that immunity applies, thus leading to a systematic lack of case law in these cases. Accordingly, only limited

conclusions can be drawn from the number and content of rulings by national courts. We understand that the Commission has asked States to provide information on, inter alia, their national legislation and practice with reference to the stage at which the national authorities take immunity into consideration. We will use this opportunity to reiterate our point and encourage other States to do likewise.

- When citing “a number of States [that] have drawn attention to the need to approach the question cautiously”, the report makes no mention of, for example, our own call for a cautious approach at the Sixth Committee meeting of the 70th session of the General Assembly last year.

In our view, only an impartial and thorough analysis of all relevant State practice can form the basis for recommendations that make a meaningful contribution to the issue. In particular, we would ultimately find it difficult to support proposals, such as draft article 7, exempting entire categories of offences from immunity as a direct result of the approach taken by the report. We hope the ILC will allow these concerns to be taken fully into account in the coming discussions about the report and when adopting a draft article on the issue.

Germany remains highly interested in this project and continues to follow it closely. We encourage other States to do likewise.

Thank you!