



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

Madam Chairwoman/Mr Chairman,

I would like to thank Special Rapporteur Concepción Escobar Hernández for her seventh report on “Immunity of State officials from foreign criminal jurisdiction”. Germany welcomes the intense and fruitful discussions in the Commission and will continue to follow its work on this topic with great interest.

Germany believes that the specific subject of the sixth and of this year’s seventh report, i.e. procedural provisions and safeguards in the context of immunities of state officials, is of paramount importance. Indeed, procedural provisions and safeguards may enable the smooth application of the law on immunity in a given case and greatly facilitate the handling of relevant cases by both the forum state and the state of the official. Importantly also, they may help to strike a reasonable balance between the conflicting interests underlying cases of state officials’ immunities, i.e. between the interest of the forum State in prosecuting criminal wrong committed by a foreign State official on the one hand and the mutual respect and sovereign equality of States on the other hand. In this regard, we also concur with the Special Rapporteur’s observation that procedural safeguards may generate trust between the affected States and reduce the potential for a destabilization of bilateral relations over cases of immunity.

We are furthermore convinced that basic common procedural standards at the international level may foster a more uniform application of the law on immunity by domestic courts. Domestic courts apply the immunity of state officials in a decentralized fashion. Providing them with guidance on how to proceed in determining immunity – for example with regard to questions on invocation, waivers or the exchange of information with the State of the official



– may enable them to arrive at decisions which are more in harmony with those of other States’ courts in comparable cases. This in turn may enhance the efficacy, credibility and legitimacy of the international rules on the immunity of State officials and alleviate the systemic risk of a fragmentation in this particular area of international law. At the same time, we would like to reiterate that international procedural provisions regarding state officials’ immunities must respect the specific features of domestic legal systems. The procedural safeguards proposed by the Special Rapporteur provide a useful point of departure.

In terms of methodology, we would like to reiterate what we have stated before with regard to the draft articles in general: It is essential for the Commission to transparently distinguish between findings of *lex lata* and propositions for a progressive development of international law. Any substantial change of international law would have to be agreed upon by States by treaty. It is our understanding that the discussed draft articles on procedural provisions and safeguards contain many propositions *de lege ferenda* but do not, in their entirety, reflect existing customary international law.

In our view, in particular the relationship between procedural rules and draft article 7 needs to be explored further. As we have stated before: The controversy surrounding draft article 7 has underlined the importance of thoroughly considering the linkage between draft article 7 as it was formulated by the Commission and procedural rules and guarantees fleshing out the conditions of its applications. Due to the political sensitivity and potential for controversies of cases in which draft article 7 might be applied, and in light of its being particularly prone to misuse, adequate procedural safeguards are a key factor. We had hence expected that the specific issue of procedural provisions and safeguards in the context of draft article 7 would constitute one of the main priorities of the seventh report and any newly proposed draft articles. However, we feel that the seventh report addresses the issue only partially.

We would like to underline, first, that any ambiguity as regards the application of procedural provisions and safeguards to situations in which draft article 7 would apply should be avoided. Draft article 7 states quite sweepingly that concerning the listed crimes, immunity *ratione materiae* “shall not apply”. This could indeed lead domestic authorities and courts to



conclude that procedural rules ‘ancillary’ to immunity might not be applicable in such cases as well. The procedural rules in draft articles 8-16, it would appear, often presuppose a situation in which the application of immunity is at least possible – something which could be questioned from the outset in cases falling under draft article 7. In this regard, we note with great interest the provisional adoption by the Drafting Committee of a draft article 8 *ante* which is a positive development regarding the provision of clarity in this respect. We believe that the draft articles should be as far as possible self-explanatory. The new draft article 8 *ante* may indeed add to their quality, coherence and predictability.

Second, some of the procedural provisions could be more specific regarding situations in which draft article 7 concerns or might apply. This applies especially to draft article 12 and draft article 14. The obligation of early notification and transparency vis-à-vis the State of the official could generate much-needed trust in the draft article 7-cases. Moreover, we share the belief that the instrument of a transfer of proceedings incorporated in draft article 14 proposed by the Special Rapporteur can be particularly useful in the context of draft article 7-cases. It should hence be discussed whether proposed draft article 14 should be specifically tailored to such cases.

Third, and most important in this context, we believe that additional procedural provisions and safeguards which specifically take into account the difficulties underlying draft article 7-cases should be considered and we note with appreciation the Special Rapporteur’s general openness towards additional procedural safeguards. For example, as we have previously stated, the application of draft article 7 would raise difficult questions regarding the applicable standard of proof in determining whether the requirements of draft article 7 are met. So far, neither the report nor the draft articles as initially proposed by the Special Rapporteur provide sufficient guidance in this respect. We welcome, however, the debate in the Commission in this respect and proposals made during the 71<sup>st</sup> session regarding the necessary evidentiary standard. Moreover, political tensions between the forum State and the State of the official may be particularly high in draft article 7-cases. It should hence be made sure that the decision to pursue criminal proceedings is 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 such cases. 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.

To sum up: We doubt that the procedural provisions and safeguards as proposed in the seventh report are sufficient to guarantee a smooth operation of draft article 7. We continue to believe that draft article 7 in its present form does not strike a proper balance between the much needed stability in international relations and the interest of the international community in preventing and punishing the most serious crimes under international law.

Please allow me to make the following additional remarks on the draft articles as proposed by the Special Rapporteur in the seventh report:

- As regards the interplay of the different procedural instruments, we welcome the openness of the Special Rapporteur to restructure Part 4: Procedural Provisions and Safeguards. By changing the order of the respective draft articles in this part, the sequence of their application can be made more transparent.
- We support the Special Rapporteur's position regarding the need to distinguish, in general terms, between a duty of the forum State to consider immunity at an early stage or without delay under proposed draft article 8 and rules on the determination of immunity in proposed draft article 9. The use of different terminology for the two aspects and their treatment in different provisions should in our view be upheld.
- We generally welcome the rules on dialogue and exchange of information contained in proposed draft article 13 as valuable propositions for the discussion on how general cooperation rules among States in this context might be substantiated.
- As regards proposed draft article 14, we share the view that the procedural instrument of a transfer of proceedings can be a very helpful means of avoiding disputes over immunity but must not lead to an insufficient prosecution by the State of the official. A transfer should only occur if the State of the official is willing and able to properly prosecute the official. This aspect should be reflected in the Draft Articles.



- As has been discussed in the Commission, the proposed draft articles 8-16 paragraph 2, could be further streamlined. For example, proposed draft article 16.2, in confirming that the ‘safeguards shall be applicable [...] [also] during the process of determining the application of immunity from jurisdiction’ could be deemed to repeat parts of proposed draft article 16.1.

We again thank the Commission for its important work and urge it to carefully consider all that has been said above when proceeding with this project at its next session.

Germany continues to observe this project carefully.

Thank you!



## **Statement im 6. Ausschuss der VNGV zum ILC-Projekt „Protection of the environment in relation to armed conflicts“**

### The general outcome of the project:

1. Germany expresses great appreciation for the Commission's work in adopting at first reading of the draft principles and comments on the complex issue of "protection of the environment in relation to armed conflict". For the first time, comprehensive principles and concepts have been compiled at international level with respect to this elusive topic.
2. The biggest challenge of this project is the identification of norms for the protection of the environment in different legal regimes and their interpretation in order to develop a comprehensive approach for the formulation of general rules and principles. I commend the Commission for its preparatory work formulating the draft principles and its commentary.
3. We welcome the fact that the two special rapporteurs have shed light on the subject from many different angles in their reports and that they have included complex issues such as the role of non-state actors, the extraction of raw materials in areas of armed conflict and the environmental impact of camps of displaced people. They have thus addressed the particular challenges and complexities of today's armed conflicts and their impact on and threat to the environment.
4. The division of the draft principles into temporal phases, before, during and after an armed conflict, is appropriate from our point of view, since different legal regimes, such as international humanitarian law, the law of occupation,



international environmental law and/or human rights law, can come into play in the different phases of a conflict.

5. These draft principles are, to a large extent, not a codification of existing law, but aim to develop it further. The international community should promote legal development in this area in order to prevent future environmental disasters resulting from armed conflicts. We appreciate the Commission's transparent communication about its intention to further develop the law.

6. We also appreciate the Commission's effort to make a distinction between those principles that are a reflection of established international law and those which apply *lege ferenda*. In this regard, the commentaries are certainly useful. However, we deem it important that the principles themselves are formulated in an unambiguous manner.

On the content of the draft principles in detail:

7. Germany takes note of the adoption of Draft Principle 12, which refers to the Martens clause. It is indeed necessary to confirm the existence of rules on the protection of the environment in times of armed conflict that transcend explicit treaty provisions. With the inclusion of the term "principles of humanity", however, the concepts of humanity and nature might become blurred. It might be useful to clarify (e.g. in the commentary) that the inclusion of the principle of humanity shall not lead to a humanization of the concept of "nature", but also cover cases where the destruction of the environment endangers vital human needs.

8. At the same time, we appreciate that Draft Principles 13 and 16 imply an intrinsic value of the natural environment in and of itself, recognizing that



attacks against the natural environment are prohibited unless it has become a military objective, as are reprisals against the natural environment. However, as we understand it, this prohibition is not based on Art. 55 para. 2 of the first Additional Protocol to the Geneva Conventions, despite the use of the same wording in Draft Principle 16, because Art. 55 provides for the protection of the environment in order to protect the health and survival of the civilian population. However, it is Art. 35 para. 3 of Additional Protocol I, which supports the view that environmental protection in international humanitarian law has an intrinsic value. Furthermore, this is without prejudice to recognizing an intrinsic value of the natural environment or nature in legal regimes other than IHL.

9. We welcome the call to establish protected areas in Draft Principles 4 and 17. These principles provide encouragement to work together on this issue in the future. As pointed out by the Commission, a multilateral treaty on the designation of protected areas would be necessary to have binding effect on all parties under international law. Such a treaty should, in our opinion, be modeled on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict rather than being considered in the context of protected emblems.

10. Lastly, we support and welcome the intention conveyed in Draft Principles 27 and 28 to eliminate remnants of war that could have harmful effects on the environment. However, para. 1 of Draft Principle 27 could be read as entailing an obligation to act in any case where remnants of war are identified, including in the territorial sea and, with respect to warships and other state-owned vessels,





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even outside territorial waters, which would place an inappropriate burden on many States. It would therefore seem advisable to reword Draft Principle 27 in order to make it clear that an obligation to act only arises after an environmental impact assessment has concluded that action is viable, necessary and appropriate in order to minimize environmental harm.

11. Finally, Germany would like to thank the Commission for its excellent work on a difficult, but timely and very important topic. We will continue following this project with great interest.