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Statement by the Federal Republic of Germany on Cluster 2 (Chps: VI (Immunity of State officials from foreign criminal jurisdiction) and IX (Sea-level rise in relation to international law)) in the debate of the Sixth Committee of the Report of the International Law Commission

Thank you Madam/Mister Chair,

Excellencies,

Ladies and Gentlemen,

On behalf of Germany, allow me to comment on the report of the ILC concerning the topics of "Immunity of State officials from foreign criminal jurisdiction" and "Sea-level rise in relation to international law". I will start with our comments on Chapter VI, the "Immunity of State officials from foreign criminal jurisdiction":

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

Madam Chairwoman/Mr Chairman,

Let me begin by thanking the Special Rapporteur and the Commission for their important and substantive work on the highly complex topic of "Immunity of State officials from foreign criminal jurisdiction". The session's treatment of the topic saw significant achievements, i.e. the presentation and discussion of the Special Rapporteur's 8th report on the topic, the provisional adoption of a number of draft articles with commentaries and the referral of further draft articles to the Drafting Committee. This progress is particularly commendable given that the work of this year's session took place under

the difficult conditions imposed by the COVID 19 pandemic. With the work on this project hence entering its finalization phase, Germany would like to avail itself of the opportunity to make (1) some general comments on the project and the way ahead before (2) addressing specific issues regarding the Special Rapporteur's 8th report and its discussion in the Commission.

As we have stated before, the importance of this topic in Germany's view cannot be overstated. The commitment to the fight against impunity notably for the most serious crimes under international law continues to be one of the most significant tenets of German justice and foreign policy. Germany is committed to the Nuremberg Principles, including, in particular, the core concept that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." (Principle III of the 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal" as adopted by the International Law Commission in 1950). The investigation and prosecution of crimes under international law by domestic prosecutors and courts under certain conditions is an indispensable element of our international criminal justice architecture and, in parts, an obligation under international law – Germany has fundamentally espoused this notion with the creation of the German Code of Crimes against International Law which came into force in 2002 and which provides a basis for the prosecution of certain crimes under international law, *inter alia* on the basis of universal jurisdiction. In practice, based on this law, German prosecutors and courts make an important contribution to the investigation and prosecution of crimes under international law.

At the same time, immunities, including those of state officials from foreign criminal jurisdiction, are a core element of protecting our international legal system based on the principle of sovereign equality of States. They constitute an elementary functional basis of stable and peaceful inter-state relations. As has been emphasized by the Commission, its work on this project fulfils an important function in further clarifying how these potentially competing interests – the need for effective criminal proceedings and for stability in international relations – are and can best be balanced by States, also taking into account the procedural provisions and safeguards regarding immunity.

Given the sensitivity of such balancing, and the ongoing controversy surrounding this topic, Germany would like to reiterate, once again, its standing position that it is essential for the Commission to clearly distinguish between findings of *lex lata* and propositions for a progressive development of international law. It should be considered whether the respective status of each draft article (or even sub-section) is marked in the commentaries. In Germany's view, far-reaching transparency on this issue would greatly benefit the finalized version of the draft articles and facilitate their broad acceptance. Given that the draft articles, once adopted in total, will in our understanding contain a

mixture of identified *leges latae* and proposed *leges ferendae* (for example with regard to certain procedural safeguards), Germany would like to re-emphasize that any substantial change of international law in this area proposed by the Commission would have to be agreed upon by States by treaty.

Germany urges the Commission to continue, during the finalization phase of the project, to scrupulously examine state practice, including any court decisions and proceedings both regarding exceptions to immunity *ratione materiae* as well as procedural safeguards, but also possible statements by governments. It appears that the controversial discussions in the Commission and in the Sixth Committee on draft article 7 have catalyzed wider discourses and laid open a certain amount of uncertainty on the application and precise scope of immunity *ratione materiae*. Any reactions in state practice and communicated *opinio iuris* to the discussions thus triggered should be taken into account to the extent possible.

Germany continues to follow this project closely also because of recent important developments in the German jurisprudence on immunities of state officials: On 28 January 2021 the German Federal Court of Justice (Bundesgerichtshof) decided on an appeals case which 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. In essence, the Court found that according to customary international law, criminal prosecution by a domestic court for certain war crimes was not barred by functional immunity if the acts were committed abroad by a foreign state official of subordinate rank in the exercise of his sovereign functions. The judgement formally addresses the issue of immunity in the context of certain war crimes only but 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.

The Court also decided that it was not under an obligation to refer the matter to the Federal Constitutional Court. The latter shall render a decision, *inter alia,* if, in the course of litigation, doubt exists whether (and with what scope) a general rule of international law is an integral part of federal law. For the time being, the Federal Court of Justice's judgement is hence the highest-rank judicial decision in Germany on the issue of immunities of state officials from foreign criminal jurisdiction during recent times. It constitutes important German State practice and will have a significant bearing also on the German government's position on the present topic.

As the Commission's work on this topic draws to a close, Germany would also like to highlight in general terms 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 raised. Beyond their subject and scope of application, 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 scrupulously differentiate between the various types of immunity and the situations in which immunities might be raised is well established in international case-law and was alluded to also in the Federal Court of Justice's judgement of 28 January 2021.

As regards this year's work of the Commission on the subject, Germany would like to commend the Special Rapporteur for her knowledgeable and nuanced 8th report and agrees with the Special Rapporteur that a clear line should be drawn between the present topic on the one hand and the rules governing the functioning of international criminal courts and tribunals (or, respectively, the exercise of criminal jurisdiction in the context of proceedings against State officials before international criminal courts and tribunals) on the other hand. The distinction should be made explicit in the draft articles. In particular, the present topic appears not to be the right context to elaborate on the highly complex interplay of domestic and international criminal justice and prosecutorial systems in cooperation situations in a generalized fashion. Any impression that the draft articles could carry legal implications for the rules governing the operations of international criminal courts and tribunals should be avoided. Germany generally sees a 'without prejudice-clause' as a good means to counteract such impression. Such type of clause will add to the clarity and the transparency of the draft articles and Germany looks forward with interest to the Drafting Committee's conclusions as regards its exact formulation. We also share the view that the term "international criminal courts" as used in current draft article 18 should be further clarified, defined (possibly in the commentaries) or broadened so as to encompass also other criminal justice bodies which are partly rooted in international law such as hybrid tribunals, etc.

Germany notes with interest the inclusion of provisions on a dispute settlement mechanism in the draft articles. Based on a preliminary examination, we are under the impression that draft article 17 as proposed by the Special Rapporteur gives rise to a number of fundamental systematic and practical questions. In many States, including Germany, it shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction and this has also been the approach of the original draft article 9 as proposed by the Special Rapporteur in her 7th report on the determination of immunity which continues to be under review, now as draft article 13, in the Drafting Committee. Following this principle, the opportunity of either

the forum state or the state of the official to refer an inter-state dispute with regard to the determination and application of immunity to arbitration or to the International Court of Justice, as proposed in draft article 17 para. 2 – a matter which would typically be decided by the respective governments – might call the independence of the domestic courts into question. The independence of domestic courts may in particular also be affected by the obligation to suspend domestic proceedings pending inter-State dispute resolution, as provided in draft article 17 para. 3. This proposed obligation not only raises difficult questions regarding the separation of powers but might also have unintended implications for the effective investigation and prosecution of crimes in cases in which immunity does not apply. Under no circumstances should the aforementioned fight against impunity as a commitment of the international community of states be undermined. A dispute settlement mechanism that would jeopardize legitimate efforts and measures of criminal prosecution in cases in which immunity does not apply cannot be accepted. Notwithstanding these initial thoughts, Germany is looking forward to further discussing draft article 17 in the ongoing debates.

As regards the draft articles and commentaries on procedural rules and safeguards provisionally adopted by the Commission, Germany notes with interest and general approval the finalized draft article 8 *ante*, which clarifies the scope of application of Part IV of procedural provisions and safeguards. Germany deems that this article considerably adds to the certainty of the draft articles and facilitates their understanding. Besides this aspect, Germany refers to its comments made in its statement 2019 on the issue of procedural rules and safeguards and reserves the option to comment on the set of procedural provisions and safeguards, which are highly interconnected, in its entirety, once it has been provisionally adopted by the Commission.

Madam Chairwoman/Mr Chairman, let me close my remarks on this first topic of the cluster by once again extending my gratitude to Special Rapporteur Concepción Escobar Hernández and the members of the Commission for their impressive work on this highly relevant topic – a topic which Germany will continue to follow with great interest and attention.

Sea-level rise in relation to international law

Madam Chairwoman/Mr Chairman,

Germany also welcomes and follows with great interest the Commission's work on the seminal topic "Sea-level rise in relation to international law." Sea-level rise will impact all coastal states, including those with coastal Megacities and instable coastlines, and all other States due to the significant

implications for stable international relations, economic prosperity and the enjoyment of human rights. It is in particular the small island states as well as states with low-level coastal areas or large river deltas which will be disproportionately affected by the phenomenon.

Being a coastal state, sea-level rise will also have direct effects in Germany, as has recently been recognized also by the Federal Constitutional Court (Bundesverfassungsgericht) in its landmark decision of 24 March 2021 on Germany's Federal Climate Change Act of 12 December 2019. In its summary of the background facts on the effects of climate change, the Court *inter alia* referred to reports, according to which "over the last 100 years, sea levels [had] risen about 20 cm in the German Bight and around 14 cm on the German Baltic coast." The Court further mentioned findings which indicated that higher sea levels could increase storms in the North Sea and Baltic Sea and would leave German coastal regions exposed to greater risk of flooding.

As with regard to its root cause, climate change, long-term sea-level rise cannot but be addressed by all States on the basis of cooperation, using the mechanisms, rules, and institutions our multilateral system offers. In this regard, the Commission's work on the topic in Germany's view fulfills a pivotal function in clarifying the role existing international law plays and could play in guiding States' response to sea level rise as a core challenge of our times.

As for the law of the sea-thread of the topic, Germany once more thanks the Co-Chairs of the Study Group, Bogdan Aurescu and Nilüfer Oral, for their insightful and profound first issues paper of 2020. The paper raises salient questions, *inter alia,* on the issue of the preservation of baselines and maritime zones. In this regard, Germany appreciates that, based on the syllabus of 2018, the law of the sea implications of sea level rise are examined by the ILC Study Group in full respect of the integrity of the United Nations Convention on the Law of the Sea. Germany commits to support the process and work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules.

Germany looks forward with interest to the second paper of the study group on the issues of statehood and the protection of persons affected by sea-level rise. Especially the latter aspect, Germany believes, is of particular urgency. As the Convention relating to the Status of Refugees and its 1967 Protocol do not apply to so-called "climate refugees", it might be helpful to further clarify possible human rights based non-refoulement obligations of States – taking into account also the views adopted by the Human Rights Committee in a case against New Zealand concerning a Kiribati national's deportation to his home country.

Germany urges the Commission to transparently distinguish between findings *de lege lata* and suggestions for a progressive development of international law. This is a concern raised by Germany in relation to many topics on the Commission's agenda. As the present topic involves a mapping exercise of very different legal issues across a variety of legal fields as well as novel questions with regard to which pertinent state practice and *opinio juris* appears to be rather scarce, Germany deems this aspect of particular importance in the context of the present topic.

Germany commends the Commission for its ambitious approach towards this broad yet immensely relevant topic and encourages it to continue implementing its work plan on the subject.

Thank you very much.