



**Sixth Committee – Agenda item 77-II
Immunity of State officials from foreign criminal jurisdiction**

**Statement by the Federal Republic of Germany
28 October 2022**

Madam Chairwoman/Mr. Chairman,

On behalf of the Federal Republic of Germany, please allow me to comment on the present Report of the International Law Commission with regard to its Chapter VI, “Immunity of State officials from foreign criminal jurisdiction”.

I would like to commence this statement by thanking the Commission and the Special Rapporteur Concepción Escobar Hernández for their thorough and excellent work on this highly relevant dossier. The adoption of the draft articles on first reading as well as the adoption of the commentaries to the draft articles both by the Commission in its latest 73rd session constitute a significant milestone close to the conclusion of the overall endeavor. Especially the procedural safeguards, which constitute the most substantial point of progress of this 73rd session, provide a useful starting point for harmonizing the application of the law on immunity by states and their domestic courts. We would like to use this opportunity today primarily to make general comments as well as comments on selected sections of the draft articles deserving particular attention:

Firstly, Germany would like to reiterate its commitment to the fight against impunity, notably for the most serious crimes under international law. Reports about atrocities committed in the course of Russia’s war of aggression against Ukraine are a sad reminder about the importance of this fight against impunity. This fight constitutes one of the most significant tenets of German justice and foreign policy. The investigation and prosecution of crimes under international law by domestic prosecutors and courts under certain conditions constitute an indispensable element of our international criminal justice architecture. This includes 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. Nevertheless, 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.

Madam Chairwoman/Mr. Chairman,

We believe that a reasonable balance between this need for effective prosecution of international crimes and for stability in international relations can best be struck by States. For this purpose, a transparent distinction in the draft articles between *lex lata* and *lex ferenda* remains essential. In our view, an extensive and clear methodological distinction between the findings of established law by the Commission and its proposals for progressive development of the law will promote a broader acceptance of the draft articles. In this context, 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. With the present impressive ground-laying work by the Commission, this topic appears to us to be well prepared to be taken up by a State conference.

Secondly, against this backdrop, we would like to outline our positions on selected sections of the draft articles, while reserving the option to submit written comments and observations in accordance with articles 16 to 21 of the statute of the Commission:

Germany welcomes the present adopted version of draft article 8. It provides much needed clarity on the scope of application of Part IV with regard to Part II and III of the draft articles, adding considerably to the understanding of the relationship between the procedural part of the draft articles and the substantive norms.

Nevertheless, Germany considers the unchanged wording of draft article 7 to remain a point of concern: The categorical formulation that immunity “shall not apply” in the cases stated in draft article 7 leaves room for potential misinterpretation and political misuse. We would welcome further considerations by the Commission to include the various reflections of the Commissions in the commentaries into the draft articles, clarifying the applicability of Part IV with regard to draft article 7. That being said, Germany considers the draft articles on procedural provisions and safeguards (Part IV) to constitute, for the most part, propositions *lex ferenda*, which are not entirely supported by existing customary international law. We would like to emphasize that in our view these procedural provisions will only find broad acceptance if they reflect the different domestic legal systems and their specific approaches in finding the right balance between effective criminal proceedings and the stability in international relations.

Germany would also like to comment on the new paragraph 4 of draft article 15 (previously draft article 14). As we articulated our position before, a transfer should only occur if the State of the official is willing and able to properly prosecute the official. We believe therefore that the proposed possibility of the forum State to resume its criminal proceedings if, after the transfer, the State of the official does not “promptly and in good faith” submit the case to its competent authorities for the purpose of prosecution, provides sufficient grounds for further discussions and generates trust in draft article 7 cases.

Germany continues to observe and follow the developments of this project carefully and with great interest. We reserve our option to submit written comments and observations regarding the overall set of draft articles.

Thank you.



**Sixth Committee – Agenda item 77-II
Sea-level rise in relation to international law**

**Statement by the Federal Republic of Germany
28 October 2022**

Madam Chairwoman/Mr. Chairman,

We would further like to commend on the considerations in Chapter IX “sea-level rise in relation to international law” in the present Report of the International Law Commission. Germany deems this dossier highly relevant and topical: Climate change continues to pose an existential threat to states, individuals and to international security. The rising sea-level raises multiple legal questions of which the second issues paper is focusing on the matters of statehood and the protection of individuals affected by sea-level rise. We would like to express our profound gratitude to the Co-Chairs Ms Galvão Teles and Mr Ruda Santolaria for the preparation of this second paper on these matters of utmost urgency.

We would also like to refer to the June 2022 German contribution to the ILC work on the law of the sea-related issues, where we explain how we interpret the UNCLOS rules regarding the stability of baselines. In our view, a contemporary reading of these UNCLOS rules gives the Coastal State the right to update its baselines when the sea level rises or falls or the coastline moves but it does not require the Coastal State to do so.

Germany attaches great importance to the question of the degree to which individuals affected by a rising sea-level are protected by international law. We would therefore explicitly like to commend the comprehensive discussion by the Commission and the Concluding Remarks by the Co-Chairs with regard to the legal status of persons affected by sea-level rise. As the Report concludes in alignment with Germany’s view, the various existing legal frameworks applicable to individuals affected by sea-level rise are fragmented and general in nature and further studies are necessary.

Madam Chairwoman/Mr. Chairman,

The root cause of sea-level rise, the man-made climate change, can only be addressed on the basis of international cooperation. With the present report and second issues paper, the Commission has in our view contributed ambitiously as well as significantly to the common task of mapping out the existing international legal framework in which all States are called upon to play their part in averting the worst scenarios. As German

Foreign Minister, Annalena Baerbock, together with Foreign Minister of Palau, Gustav Aitaro, recently concluded at their side-event on international law and climate security: the existing legal framework must be examined as to the extent it sufficiently provides protection to individuals. Where there are gaps, new instruments may need to be developed in order to reflect the specificities of the long-term consequences of sea-level rise.

In this regard, Germany fully supports the Commission's future work on the various subtopics of this matter, such as the implications on human rights, the identification of the scope of state obligations, the relevance of the principle of *non-refoulement* and humanitarian visas, tools for the avoidance of statelessness and the content of the principle of international cooperation in the context of sea-level rise. The Commission's further elaborations will fulfill in our view a pivotal function in clarifying the role existing and yet-to be developed international law will play in guiding States' response to sea level rise as a core challenge of our times.

Nonetheless, as these elaborations to partly novel legal questions can only be based on no or only rather scarce pertinent state practice and *opinio juris*, Germany would like to reiterate its stance on a transparent distinction between findings *de lege lata* and suggestions for a progressive development of international law by the Commission. Germany deems this aspect of particular importance in the context of the present topic.

Germany will continue to engage with its partners, international organizations and academic institutions, to further promote this discussion nationally as well as internationally in order to shed light on the existing legal regime and identify aspects where new legal frameworks might be needed. Germany looks forward with great interest to the further developments of this project by the Commission.

Thank you.