



Permanent Mission  
of the Federal Republic of Germany  
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## **Statement by**

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**on the occasion of**

**the 72nd Session of the  
United Nations General Assembly**

**6<sup>th</sup> Committee**

**Statement 69<sup>th</sup> ILC Report (2017)**

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**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 again for her fifth report on “Immunity of State officials from foreign criminal jurisdiction”. The topic remains one of the most controversial subjects the Commission has ever dealt with and is of utmost importance to us.

The principle of individual responsibility for international crimes is one of this era’s great achievements. Starting with the historical experience of the Nuremberg trials to the establishment of the International Criminal Court, Germany has been at the forefront of the development of modern international criminal law. However, despite all progress in this area, the fight against impunity is far from won. We continue to be a staunch supporter of bringing perpetrators of international crimes to justice and appreciate the Commission’s ongoing efforts in this regard.

In the realm of this endeavour, the Commission’s work on the current project plays an important part. We believe, for this endeavour to succeed, it must carefully strike a balance between the sovereign equality of States and the need for stability in international relations – otherwise it stands no chance of being accepted and adopted by States. Furthermore, the legitimacy and thus success of the Commission’s work on this sensitive issue rests on the application of highest academic standards and careful consideration of all relevant aspects. We would like to comment on both of these aspects regarding the Commission’s work on this subject thus far.

As for the methodological approach of the fifth report of the Special Rapporteur, we appreciate that some of the concerns we raised last year were echoed in the Commission’s discussion. As previously stated, it remains our position that the Special Rapporteur’s fifth report displays grave methodological flaws, among which the most concerning are:

- It lacks a clear-cut separation between what the Special Rapporteur deems to reflect existing exceptions to immunity under customary international law and what in her view would be a desirable development of the law as it stands today.
- It uses State practice selectively and arbitrarily to establish a “clear trend” towards extensive exceptions to immunity.
- It does not adequately consider State practice in which investigations or proceedings were closed because the individual concerned was considered to be immune from criminal jurisdiction.

As a result, Germany welcomes the fact that the commentary to the article as adopted by the Drafting Committee reflects the vast differences of opinion within the Commission. This is underlined by the unusual event of a recorded vote for the adoption of *draft article 7* by the ILC. However, we believe this point could be made even clearer. It also urgently needs to extensively address the equally controversial reception of the article by States in their statements in the Sixth Committee as well as on other occasions.

Having said that, the gravest methodological concern regarding *draft article 7* has not been resolved by the Drafting Committee. In the commentary it continues to identify a “discernible trend” towards limiting the applicability of immunity from jurisdiction on the basis of – in our view disputable – State practice. With this it implies, in one interpretation, that the article in its present form reflects existing norms of customary international law. However, the commentary also refers to the ILC’s mandate “of promoting the progressive development and codification of international law” as the basis for the draft article. It thus remains unclear which parts of *draft article 7* are considered as proposals for progressive development and which are deemed to codify existing exceptions to immunity under customary international law.

In our view, *draft article 7*, whether in its original form as proposed by the Special Rapporteur or in its current form, fails to reflect the state of customary international law as it stands today. Germany has made this point in its previous statements on the issue and reiterates this view, one shared by several members of the Commission itself, again today.

We therefore strongly agree with the concerns raised by some members of the Commission: the ILC should not portray its work as a codification of existing customary international law when there is no sufficient State practice to support this thesis. This has to be reflected in the final product of the Commission's work. Whenever it proposes new rules of international law, the method that should be used is to propose a draft treaty and not merely formulate draft articles to be used directly by national courts and others in order to determine existing international law.

We consider this to be a pivotal moment for Commission as a whole and one that could determine the impact and relevance of its work for the future in areas that go far beyond the present issue. The International Law Commission is one of the most respected and prestigious institutions in the field of international law. This is not least due to the impeccable care and highest standards to which it adheres when making its determinations.

It has a role that is different from that of a non-governmental organisation, which can advocate an argument in order to pursue a political goal. The point is that the ILC is an organ of the United Nations that has been created by UN Member States, receives its mandate from States and whose members are elected by States.

For all of these reasons, its work is often directly considered by national courts, but also executive and legislative branches, when determining the state of current international law on a specific issue. This pertains to the first part of the ILC's mandate, the codification of existing international law. There can be no doubt that the Commission's mandate also extends to making suggestions for desirable progressive development of international law to be adopted by States. However, when the Commission blurs the line between these two aspects of its mandate, it calls into question the very foundation of its legitimacy.

Germany feels the need to unequivocally stress again that it is the States – and not the Commission – that create international law. Hence, as indicated, any substantial change of international law in this area would have to be agreed upon by States by treaty.

This leads to the question whether *draft article 7* in its present form would be a desirable development of international law. In this regard, we support the criticism levelled at *draft article 7* by many members within the ILC itself:

- We are unable to comprehensively comment on *draft article 7* without knowing how it relates to the vital issue of procedural safeguards. While we thus believe these issues should not have been dealt with separately, we welcome that the current text of the draft articles contains a footnote that refers to the urgent need to consider procedural provisions at the 70<sup>th</sup> session of the ILC.
- The exception to immunity for “corruption-related crimes“ included in the Special Rapporteur’s version of *draft article 7* was dropped – but only as it was the prevailing view that in such cases there was not even an official act and thus no immunity applied to begin with. This reasoning raises several serious issues in itself, but eventually points to an important observation: namely, that the list of crimes to which immunity did not apply in *draft article 7* was in the end not exhaustive and would thus not ensure legal certainty. This is exacerbated by the fact that, in the commentary, the term “corruption” is said to only cover “grand corruption”, which hardly serves as a sufficient definition in a sensitive area of international law. This alone shows the immaturity of the proposal.
- The remaining list of crimes in respect of which immunity *ratione materiae* shall not apply in the present *draft article* seems arbitrary. On the one hand, it omits the “crime of aggression” even though it is one of the crimes covered by the Rome Statute. On the other hand, it includes the “crime of apartheid” with reference to it being subject of an international treaty that establishes a special legal regime for it – while at the same time excluding international crimes potentially identified in other multilateral treaties such as “slavery” and “human trafficking”.
- The implementation of such exceptions would likely raise immense technical difficulties for national courts. Immunity is indeed a procedural matter that has to be considered by courts at the earliest stages of a proceeding. However, in order to assess whether the requirements of *draft article 7* would be fulfilled, a court would have to already decide on substantial issues of the merits of a case. It remains unclear to which standard of proof a court would have to adhere to in order to be sufficient for the application of the article. Also for this reason, *draft article 7* needs to be evaluated in the context of the accompanying procedural rules.

Therefore, as a whole, we do not believe that *draft article 7* in its present form accomplishes what many members of the Commission have rightfully stated to be the paramount goal of the ILC's project: to strike an equitable balance between much needed stability in international relations and the interest of the international community in preventing and punishing the most serious crimes under international law.

Finally, it is unfortunate that the Special Rapporteur was unable to present her sixth report on "Procedural Safeguards" at the 69<sup>th</sup> session of the ILC. Safeguards against the misuse of exceptions to immunity are a vital matter in themselves, but have become even more important with a view to draft article 7 as it has now been proposed. We finally again urge the Commission to carefully consider all that has been said above when proceeding with this project at its next session.

Germany continues to observe this project closely and strongly encourages others to do so as well.

Thank you!