



Notable statements on international law during October 2021

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Throughout the year, Germany makes numerous statements on international law. Not all these statements form part of a case study presented on GPIL. However, these statements may nevertheless be of interest to international lawyers. We therefore compile these statements on a monthly basis.

4 October 2021

During the 48th session of the UN Human Rights Council, Germany joined 38 other States in a statement on the Follow-up to and implementation of the Vienna Declaration and Programme of Action which read in part as follows:

“Over the few last decades, around the world, as a consequence of various social, cultural, legal, political, and scientific changes, there has been an increased recognition of diverse and various forms of families that go beyond the so-called ‘traditional model’ – of a mother, a father and biological children.

Their existence has been recognized, for example, at the International Conference on Population and Development (1994), the World Summit on Children (2002) and later by the General Assembly in its Resolution 59/147 (2004).

Acknowledging this reality will allow States to strive to ensure human rights of all, regardless of age, gender, sexual orientation or gender identity, marital status, etc.”

During the same meeting, Germany also joined 37 other States in a statement on the human rights situation in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, which read in part as follows:

“2. Article 3 of the Vienna Declaration stipulates that ‘Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation, and effective legal protection against the violation of their human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 14 August 1949, and other applicable norms of humanitarian law’. [...]

4. We recall the UNGA resolution 75/192, in which the General Assembly urged the Russian Federation to uphold its obligations under applicable international law as an Occupying power and condemned all attempts by Russia to legitimize or normalize its attempted annexation of Crimea, including the automatic imposition of Russian citizenship, illegal election campaigns and voting, change of the demographic structure of the population of Crimea, and suppression of national identity.

5. We therefore condemn the holding of Russian Duma elections on Ukraine’s sovereign territory on 17-19 September, without the consent of Ukraine.

6. We do not recognize the results of the elections held in the temporary occupied Crimean peninsula. [...]

7. As reaffirmed in several UNGA resolutions, Russia as an Occupying power, must fulfil its obligations under international humanitarian and human rights law, restore enjoyment of the rights of all individuals in Crimea, fully and immediately comply with the Order of the ICJ of 19 April 2017, and grant full and unimpeded access to Crimea for the established international and regional monitoring mechanisms, in particular the UN Human Rights Monitoring Mission in Ukraine and the OSCE Special Monitoring Mission to Ukraine.

8. We reiterate our support for the territorial integrity, political independence, unity, and sovereignty of Ukraine within its internationally recognized borders and resolve to work together for the respect of the human rights and fundamental freedoms of all residents of Crimea.”

4 October 2021

In a parliamentary question the Federal Government was asked to list all the legally non-binding norms, standards and codes of conduct as well as the various international forums and their decision-making rules and negotiation processes that informed its definition of the rules-based international order. The Parliamentary Secretary of State at the Federal Ministry of Defence, Thomas Silberhorn, replied:

“It is not possible to give a conclusive list as intimated in the question. The rules-based international order includes all norms and rules that the international community adopts for and in shaping international relations. On the one hand, it is not comprehensively codified, on the other hand, it is dynamic in nature and is constantly being further developed by the international community.”

6 October 2021

At the Launch of the Outcome Document from the Discussion Series #ProtectAidWorkers, Germany’s Permanent Representative to the United Nations, Ambassador Antje Leendertse stated with regard to the protection, safety and security of humanitarian and medical personnel in armed conflict:

“[D]espite existing legal frameworks at national and international level, most attacks on humanitarian or medical workers remain unpunished. [...]

The International Criminal Court (ICC) stands at the center of international efforts to combat impunity. It plays a pivotal role in investigating and trying international crimes. In situations in which the ICC cannot take action, international investigatory mechanisms and fact-finding missions may play an important part in collecting and processing evidence for domestic or international trials at a later stage. When crimes cannot be pursued where they were committed, the international level must step in. This is a fundamental element of the rules-based international order. [...]

We need to make use of the mechanisms we have to strengthen accountability: It should become standard practice that reports submitted by the Monitoring and Reporting Mechanism on Children and Armed Conflict, the Monitoring and Reporting Arrangements on Sexual Violence in Armed Conflict, the Surveillance System of attacks of the World Health Organization and other independent monitoring mechanisms and their expertise feed into the discussions and work of the Security Council.”

6 October 2021

A German delegation, including the Director for Legal and Consular Affairs, Legal Migration and Return Issues and the Head of the Department of Emergency Assistance for Germans Abroad at the Federal Foreign Office as well as several security officials travelled to the city of Qamishli in northeastern Syria in order to repatriate eight German women and 23 children from the Roj camp in the region. The German delegation visited Syria without the consent of the Syrian Government and held talks with the co-chair of the Department of Foreign Relations of the Autonomous Administration of North and East Syria. During the meeting the Director for Legal and Consular Affairs signed a repatriation agreement with the Autonomous Administration and thanked it for its cooperation in this ‘humanitarian mission’. On previous occasions, the Syrian Government of President Assad had formally protested such visits to the United Nations.

7 October 2021

Turkish businessman, activist, and philanthropist Osman Kavala had been in prison in Turkey since 18 October 2017. On 10 December 2019, the European Court of Human Rights (ECtHR) determined that the prolonged pre-trial detention of Osman Kavala was in violation of the European Convention on Human Rights and held that Turkey was to take all necessary measures to put an end to his detention and to secure his immediate release. The Committee of Ministers of the Council of Europe repeatedly called on Turkey to implement this judgement. On 16 September 2021, the Committee underlined its readiness to initiate infringement procedures against Turkey if Osman Kavala was not released by its next meeting dedicated to the supervision of the execution of ECtHR judgements in December 2021. On 7 October 2021, the Federal Government Commissioner for Human Rights Policy and Humanitarian Assistance at the Federal Foreign Office Bärbel Kofler and her French counterpart issued the following joint statement on the continuation of the trial against Osman Kavala and his co-defendants in Turkey:

“Almost two years ago, the European Court of Human Rights ruled in favor of Osman Kavala and called for his immediate release. Despite this decision, Osman Kavala will be summoned to a new audience on 8 October before the Istanbul Court. Yet 18 October 2021 will mark for Mr. Kavala his fourth year in pre-trial detention with little prospect for a swift judgement.

His case is one of the most prominent examples of Turkey’s intimidation of human rights defenders and civil society activists, thus violating the values enshrined in the European Convention on Human Rights.

We reiterate our urgent call on Turkey to fully comply with its international obligations and to implement without further delay the decision of the European Court of Human rights which calls for the immediate release of Osman Kavala.”

8 October 2021

During the UN Security Council Arrria Formula Meeting on the situation in Belarus, Germany’s Permanent Representative to the United Nations stated:

“It has been more than a year now since the 2020 elections. They were neither free nor fair, and, as a consequence, the Belarusian people were deprived of their basic and fundamental democratic rights. [...]

Equally shocking is the forced diversion of an international flight, in order to arrest journalist Roman Protasevich and his partner. This irresponsible and deplorable act put 132 passengers and crew members at risk. This is another violation of international law.”

10 October 2021

On the occasion of the World Day against the Death Penalty, Federal Foreign Minister Heiko Maas issued the following statement:

“The death penalty is a cruel and irreversible punishment which Germany categorically rejects. It not only violates the right to life but is also incompatible with the dignity of the individual.

Although there is an international trend towards suspending and abolishing the death penalty, more than 50 states continue to impose it. Just a handful of countries are responsible for the vast majority of executions.

Our goal is to abolish this relic from the past once and for all.”

11 October 2021

In response to a question about compensation for victims of the Leningrad blockade by German troops during the Second World War, a spokesperson for the Federal Foreign Office reiterated the German position that:

“the question of reparations for general war damage was closed in 1953 with the former Soviet Union’s renunciation of further German reparations.”

12 October 2021

Upon reports of the imminent execution of the Iranian Arman Abdolali, who was a minor at the time of the crime, Federal Government Commissioner for Human Rights Policy at the Federal Foreign Office Bärbel Kofler issued the following statement:

“Arman Abdolali was a minor at the time of the crime he allegedly committed. There is credible evidence that his confession was extracted under torture and that this sentence thus contravenes fundamental principles of the rule of law.

Should Arman Abdolali be executed, this would be an unacceptable violation of international law. Iran has ratified not only the UN Convention on the Rights of the Child, but also the International Covenant on Civil and Political Rights, both of which prohibit the execution of individuals who were minors at the time of an offence.

The German Government is opposed to the death penalty in all circumstances, as it is a cruel and inhumane form of punishment. The death penalty means that miscarriages of justice cannot be rectified. Furthermore, it has been proven that capital punishment does not serve as a deterrent.”

After the execution having been postponed several times, Arman Abdolali was executed on 24 November 2021, despite international appeals for his life to be spared. In a statement issued on the same day, the Federal Government Commissioner for Human Rights Policy expressed shock over the execution and reiterated her earlier statement.

13 October 2021

During the UN General Assembly's Sixth Committee's consideration of the agenda item "Crimes against humanity", Germany advocated the elaboration of a convention on the basis of the International Law Commission's draft articles on prevention and punishment of crimes against humanity which had been adopted on second reading on 22 May 2019. The German representative stated:

"We would like to emphasise that until today, there still does not exist a specialised global convention governing the prevention and punishment of crimes against humanity – unlike with respect to genocide and war crimes. A specialized and comprehensive instrument for the prevention and punishment of crimes against humanity would hence remedy a historical gap that has practical implications in securing accountability and bringing such crimes to justice – across legal systems and cultures. A new convention would foster inter-state cooperation with regard to the investigation, prosecution and punishment of crimes against humanity. It would also provide an important international treaty basis for the prohibition and prevention of such crimes. In short: We are convinced that a new convention would provide much-needed further impetus for the international efforts to prevent and prosecute atrocity crimes and would represent a milestone in the common fight against impunity."

18 October 2021

During the Arria-formula meeting of the UN Security Council on Sea-level rise and implications for international peace and security, the German representative stated:

"Rising sea levels [...] impact the coastline and thus the location of borders at sea. The UN Convention on the law of the sea becomes even more relevant in this regard. We are proud to have initiated the Group of Friends of UNCLOS in June together with Viet Nam which as of today has 112 members."

20 October 2021

On 19 October 2020, North Korea tested a new submarine-launched ballistic missile. The next day, a Federal Foreign Office spokesperson issued the following statement:

"Germany vehemently condemns the recent test of a ballistic missile by North Korea. With this test, North Korea has once again violated its obligations under relevant resolutions of the United Nations Security Council and endangered international and regional security and stability. North Korea's repeated cruise and ballistic missile tests in the past weeks have raised political tensions in an irresponsible manner.

Germany urgently calls on North Korea to abide by its obligations under international law, to accept the offer of talks put forward by the United States and South Korea and to enter into serious negotiations. North Korea remains bound to the complete, verifiable and irreversible ending of its programmes to develop weapons of mass destruction and ballistic missiles."

20 October 2021

During the regular government press conference, a spokesperson for the Federal Foreign Office stated:

“The annexation of Crimea by Russia was contrary to international law and is not recognized by the Federal Government. This position informs our position on all practical questions that arise in relation to the Crimea.”

20 October 2021

In its 16th Development Policy Report the Federal Government stated with regard to flight and migration:

“International law draws a clear dividing line between migrants and refugees. Migrants do not fall under the international refugee protection system. According to the UN, there are currently around 281 million migrants worldwide.

Both compacts [the Global Compact for Refugees and the Global Compact for Safe, Orderly and Regular Migration] are important voluntary commitments, but do not entail any binding obligations under international law.”

21 October 2021

At a meeting of the UN General Assembly’s Third Committee (on Social, Humanitarian and Cultural Issues), Germany joined 42 other States in a joint statement on the Human Rights Situation in Xinjiang which read as follows:

“We are particularly concerned about the situation in the Xinjiang Uyghur Autonomous Region.

Credible-based reports indicate the existence of a large network of “political re-education” camps where over a million people have been arbitrarily detained. We have seen an increasing number of reports of widespread and systematic human rights violations, including reports documenting torture or cruel, inhuman and degrading treatment or punishment, forced sterilization, sexual and gender-based violence, and forced separation of children. There are severe restrictions on freedom of religion or belief and the freedoms of movement, association and expression as well as on Uyghur culture. Widespread surveillance disproportionately continues to target Uyghurs and members of other minorities.

We also share the concerns expressed by UN Special Procedures in their 29 March statement and the letter published by UN experts describing collective repression of religious and ethnic minorities.

We thus call on China to allow immediate, meaningful and unfettered access to Xinjiang for independent observers, including the UN High Commissioner for Human Rights and her Office, and relevant special procedure mandate holders, as well as to urgently implement CERD’s eight recommendations related to Xinjiang. We welcome the High Commissioner’s announcement to present her findings to date and encourage publication as soon as possible. In view of our concerns about the human rights situation in Xinjiang, we call on all countries to respect the principle of non-refoulement. We also call on China to ratify without delay the ICCPR.

We urge China to ensure full respect for the rule of law and to comply with its obligations under national and international law with regard to the protection of human rights.”

This statement followed similar joint statements made by mainly Western States in 2019 and 2020. As in previous years, China strongly denounced the statement and a group of 62 States made a joint statement in support of China, stressing that respecting sovereignty, independence and territorial integrity of States and non-interference in internal affairs of sovereign States represented basic norms governing international relations.

22 October 2021

In the UN General Assembly’s Sixth Committee, the German representative made a statement on “The scope and application of the principle of universal jurisdiction” which read in part:

“Germany has found universal jurisdiction to be an effective and proportionate tool to pursue accountability for the worst international crimes. While we would prefer to have the most serious crimes under international law tried by international tribunals, in particular the International Criminal Court if the applicable complementarity criteria are met, we do our part in working towards accountability for these crimes. [...]”

Since 2002, German prosecutors can exercise universal jurisdiction under the Code for Crimes against International Law (Völkerstrafgesetzbuch – VStGB). Investigations and prosecutions can be initiated into genocide (§ 6 VStGB), crimes against humanity (§ 7 VStGB) and war crimes (§§ 8-12 VStGB).

There are no material conditions to the applicability of universal jurisdiction for these crimes. The Code for Crimes against International Law also applies to crimes committed outside Germany, regardless of the nationality of the victim or perpetrator or any other connections to Germany (§ 1 VStGB). German law does not provide for criminal liability of companies or other legal persons. Also, the possible applicability of immunity may need to be considered in certain cases. In order to be tried before a German court, the defendant needs to be present in Germany. A trial in absentia is not foreseen in our legal system. However, prosecutor and police can commence preparatory investigations to preserve evidence and allow for a swift commencement of proper proceedings once the accused has entered Germany.

Specialised units have been created within our Federal Criminal Police (BKA) and the Federal Prosecutor General (Generalbundesanwalt) to investigate international crimes. The Federal Prosecutor General often initiates investigations into international crimes based on information received from the German migration authority (BAMF). The Federal Prosecutor General also runs a number of structural investigations (“Strukturermittlungsverfahren”) to investigate the background of largescale crimes. Structural investigations serve to gather and preserve evidence in preparation of future proceedings. [...]”

25 October 2021

In a parliamentary question the Federal Government was asked about the compliance with international law of the continued use of the Guam military base by the United States. The Federal Government replied:

“Guam is a US territory with special constitutional status. The use of the military base on Guam by the United States therefore does not raise any questions of international law.”

25 October 2021

During the interactive dialogue with the Special Rapporteur on the situation of human rights in Belarus in the UN General Assembly's Third Committee, the German representative accused the "Lukashenko regime" of "flagrant human rights violations" and called upon it to "halt human rights violations immediately and to fully respect all its international human rights obligations."

25 October 2021

On 24 October 2021, the Israeli Ministry of Construction and Housing announced that tenders had been published for 1,355 new settlement homes in the occupied West Bank. Commenting on this announcement, the Director Middle East and North Africa at the Federal Foreign Office wrote on Twitter:

"Very concerned by Israeli publication of tenders for construction of more than 1,300 housing units in settlements in the West Bank. Settlements are contrary to international law and a substantial obstacle to peace and a two-state solution. They should stop."

25 October 2021

In an interview published on 21 October 2021, Federal Minister of Defence, Annegret Kramp-Karrenbauer was asked whether NATO was contemplating scenarios of regional deterrence in the air space above the Baltic and the Black Sea regions, including the use of nuclear weapons. In response, she stated:

"That is the way of deterrence. We have to make it very clear to Russia that ultimately – and that is also the doctrine of deterrence – we are prepared to use such means so that it has a deterrent effect and nobody gets the idea of attacking NATO partners, for example, in the spaces above the Baltic States or the Black Sea."

The Russian Foreign Ministry criticised the statement and the Russian Ministry of Defence summoned the German military attaché and handed him a note of protest. Asked during the regular government press conference on 25 October 2021 to comment on the statement of the Defence Minister, the cabinet spokesperson said:

"Like previous federal governments, we remain committed to the goal of a world free of nuclear weapons. This goal, called 'global zero'; that is, the complete and verifiable worldwide abolition of nuclear weapons, can also be found in the relevant NATO documents. To this end, the Federal Government is working together with its partners in Europe, including in the transatlantic alliance.

Nonetheless, with a view to significant changes in our security environment, we must recognize that some states continue to regard nuclear weapons as a means of military battle. As long as that is the case, the need to maintain a nuclear deterrent within the framework of NATO continues. The Federal Government is committed to this in terms of its nuclear participation."

26 October 2021

During the debate of the Report of the International Law Commission (ILC) in the UN General Assembly's Sixth Committee, the Legal Adviser to the Federal Foreign Office stated with regard to the ILC's draft guidelines on the protection of the atmosphere:

“Germany welcomes that the preamble classifies atmospheric pollution and degradation as a common concern of humankind. [...] Germany points to its view communicated in the past that it considers the obligation to protect the atmosphere an obligation *erga omnes*. Because of the unity of the global atmosphere, Germany deems the obligation to protect it to be one that is owed to the international community as a whole. [...]

Germany considers that in certain cases also peaceful uses of nuclear energy might lead to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment and, consequently, fall under the definition of atmospheric pollution in draft guideline 1 (b). With regard to such cases, the phrase in the commentary that “the reference to radioactivity as energy is without prejudice to peaceful uses of nuclear energy in relation to climate change in particular” should not be interpreted in a way that would treat the peaceful use of nuclear energy differently from other peaceful activities that can lead to atmospheric pollution.”

26 October 2021

During the debate of the Report of the International Law Commission (ILC) in the UN General Assembly's Sixth Committee, the Legal Adviser to the Federal Foreign Office stated with regard to the ILC's Guide to Provisional Application of Treaties:

“Article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) forms the basic rule for provisional application of treaties. This remains so even after the adoption of the Guidelines. The Guidelines are mainly based on that article, and the central importance of Article 25 of the 1969 and the 1986 Vienna Conventions is also recognized in the commentary to Guideline 2. While this provision constitutes a provision of customary law and provides clear instructions on pertinent aspects of this legal figure in treaty law, it remains silent on several important matters. For example, the decision on the scope and conditions of provisional application is left with the contracting parties. This is, given the intended flexible nature of provisional application, entirely acceptable. [...]

The principles of *pacta sunt servanda* and State responsibility apply also for provisional application of treaties.”

The German representative also commented on the provisional application of so-called mixed agreements which were not dealt with by the ILC in any detail, noting “not without interest” that the ILC chose to categorise mixed agreements as bilateral treaties. The representative stated:

“Germany, in particular as Member State of the European Union, would like to underline the importance of further clarifying, through treaty practice and jurisprudence, the interaction of international and domestic law, especially in context with the so-called mixed agreements, i.e. with agreements between the European Union and its Member States, on the one part, and a third party, on the other part which touches both on powers, or competencies, exclusive to the European Union and on competencies exclusive to Member State of the European Union. [...]

Even if a State cannot invoke the provisions of its internal law as justification for its failure to perform obligations arising under provisional application of those parts of mixed agreements for which the European Union—or, as the case may be, any other supranational organization—has exclusive competence and authority, conflicts may arise which affect the trust among the contracting parties and the will to carry out the provisional application of the respective treaty. For Germany, this remains an impending issue of great importance for the reason that the treaty type of mixed agreements is apt to modify the residual character of Article 25 of the 1969 Vienna Convention on the Law of Treaties as a default rule by relieving, in part, the provisional application tool from the hands of the negotiating States.”

28 October 2021

In the debate in the UN General Assembly on the report of the International Court of Justice, the Legal Adviser of the Federal Foreign Office stated:

“Whenever States have submitted to the Court’s jurisdiction, they must respect and follow its decisions. That is true for other international courts and tribunals as well as the International Court of Justice, and it applies both to decisions on the merits of a case as well as to decisions on its jurisdiction.

The only way to ensure the Court’s effectiveness in the peaceful settlement of disputes and the advancement of international law as the defining framework of international relations is by respecting and implementing its judgments. It is therefore crucial to ensure that the parties to a case comply with the decision of the Court, as required by Article 94 of the Charter of the United Nations. Failure to do that not only frustrates the Court’s efforts to bring the dispute in question to a conclusion, it also undermines respect for the Court and in turn its overall effectiveness as an instrument for settling disputes, far beyond any individual case. Moreover, it erodes the respect for the global rule of law that the Court symbolizes. The Court has underlined the importance it ascribes to implementation by taking steps to establish an ad hoc committee to monitor the implementation of the provisional measures it indicates.”

28 October 2021

On 27 October 2021, the Israeli Government advanced plans for more than 3,100 new homes in Jewish settlements in the occupied West Bank. The Civil Administrations Higher Planning Council gave its final approval for 1,800 housing units and preliminary approval for 1,344 others. On 28 October 2021, a spokesperson for the Federal Foreign Office joined their colleagues from eleven other European countries in a joint statement which reads in part:

“We urge the Government of Israel to reverse its decision to advance plans for the construction of around 3,000 settlement units in the West Bank. We reiterate our strong opposition to its policy of settlement expansion across the Occupied Palestinian Territories, which violates international law and undermines efforts for the two-state solution.”

28 October 2021

As a member of the Media Freedom Coalition Germany joined a statement expressing deep concern about the Russian government’s intensifying harassment of independent journalists and media outlets in Russia. The statement read in part:

“We reiterate our condemnation of the Russian government’s targeting and harassment of independent journalists and media outlets. We urge the Russian Federation to comply with its international human rights commitments and obligations and to respect and ensure media freedom and safety of journalists. We call on the Russian government to cease its repression of independent voices, end the politically motivated proceedings against journalists and media organizations, and release all those who have been unjustly detained.”

29 October 2021

During the debate of the Report of the Human Rights Council in the UN General Assembly, the German representative stated:

“Human rights need to be at the heart of our efforts both in Geneva and in New York. Human rights need to be mainstreamed throughout the United Nations system and be provided with the necessary adequate funding. We see room for improvement in both respects, especially with a view to the nexus between peace and security and human rights. We strongly believe that the briefing by the Peacebuilding Commission Chair to the Human Rights Council adds to the necessary mainstreaming, and we express our hope and expectation that it will be held soon. Addressing the challenges of our times requires a strong and human rights-based approach. That applies to climate change, new and emerging digital technologies, gender equality and many other topics. Germany welcomes the important steps taken in that regard, such as the establishment of a Special Rapporteur on the promotion and protection of human rights in the context of climate change, as well as the recognition by the Human Rights Council, at its forty-eighth session, of the right to a healthy environment.”

29 October 2021

During the debate of the Report of the International Law Commission (ILC) in the UN General Assembly’s Sixth Committee, the Legal Adviser to the Federal Foreign Office commented on the ILC’s work on the topic “Sea-level rise in relation to international law”, saying that:

“Germany was committed to working with other States to preserve their maritime zones and the rights and entitlements that flowed from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intention and purpose, rather than through the development of new customary rules.”

He also emphasised that the ‘Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees did not apply to so-called “climate refugees”.’ The Legal Adviser also expressed some concern about the tendency of the ILC not to distinguish clearly between findings *de lege lata* and *de lege ferenda*. He said:

“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.”

29 October 2021

During the debate of the Report of the International Law Commission (ILC) in the UN General Assembly's Sixth Committee, the Legal Adviser to the Federal Foreign Office also commented on the ILC's work on the topic "Immunity of State officials from foreign criminal jurisdiction", saying:

“commitment to the fight against impunity, especially for the most serious crimes under international law, continued to be one of the most significant tenets of German justice and foreign policy. Germany was committed to the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950, including, in particular, the core concept set out in Principle III that “the 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.” The investigation and prosecution of crimes under international law by domestic prosecutors and courts under certain conditions was an indispensable element of the international criminal justice architecture and, in part, an obligation under international law. Germany had espoused that notion with the adoption of the German Code of Crimes against International Law of 2002, which provided a basis for the prosecution of certain crimes under international law, inter alia on the basis of universal jurisdiction. [...]

At the same time, immunity, including that of State officials from foreign criminal jurisdiction, was a key element in protecting the international legal system based on the principle of the sovereign equality of States. It constituted a functional basis of stable and peaceful inter-State relations. [...]

On 28 January 2021, the German Federal Court of Justice had ruled on an appeal involving the prior conviction of a former first lieutenant of the Afghan armed forces for war crimes, based on the German Code of Crimes against International Law. In essence, the Court had 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 or her sovereign functions. While the judgment formally addressed the issue of immunity only in the context of certain war crimes, the ruling had been interpreted as providing a basis for German courts to find immunity *ratione materiae* to be inapplicable in cases involving other crimes under customary international law, namely crimes against humanity, genocide and the crime of aggression, all of which were punishable under the Code. [...]

For Germany, [the judgment of the Federal Court of Justice on the issue of immunity of State officials from foreign criminal jurisdiction] constituted important State practice and would also have a significant bearing on his Government’s position on the topic under consideration. [...]

Germany stressed the importance of clearly differentiating between the various types of immunity under international law and the different situations in which immunity under international law might be raised. The need for such clear differentiation was well established in international case law and had also been referred to in the ruling of the German Federal Court of Justice on 28 January 2021. The draft articles on the immunity of State officials from foreign criminal jurisdiction,

and the concomitant debates and statements, should in general not be interpreted as having implications for other forms of immunity, such as those of States in civil proceedings. [...].

[Germany] agreed that a clear distinction should be made between the topic and the rules governing the functioning of international criminal courts and tribunals. The topic appeared not to be the right context for elaborating in a general fashion on the highly complex interplay of domestic and international criminal justice and prosecutorial systems in situations of cooperation. 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.”

The Legal Adviser also expressed concerns about a new draft article 17 which had been proposed by the Special Rapporteur in her eighth report and which provided for a mechanism for the settlement of disputes relating to immunity of State officials between the forum State and the State of the official. He stated:

“Germany noted with interest the inclusion in the draft articles of provisions on a dispute settlement mechanism. The proposed draft article 17 seemed to give rise to a number of fundamental systematic and practical questions. In many States, including Germany, it was for the courts of the forum State that were competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction. [...]. Following that principle, the possibility of either the forum State or the State of the official referring an inter-State dispute to arbitration or to the International Court of Justice, as proposed in draft article 17, paragraph 2, a matter which would typically be decided by the respective Governments, might call the independence of the domestic courts into question. Such independence might also be affected by the obligation to suspend domestic proceedings pending inter-State dispute settlement, as provided in draft article 17, paragraph 3. That not only raised 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 did not apply. A dispute settlement mechanism that would jeopardize legitimate efforts and measures to conduct criminal prosecutions in such cases was unacceptable. Under no circumstances should the fight against impunity be undermined.”

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