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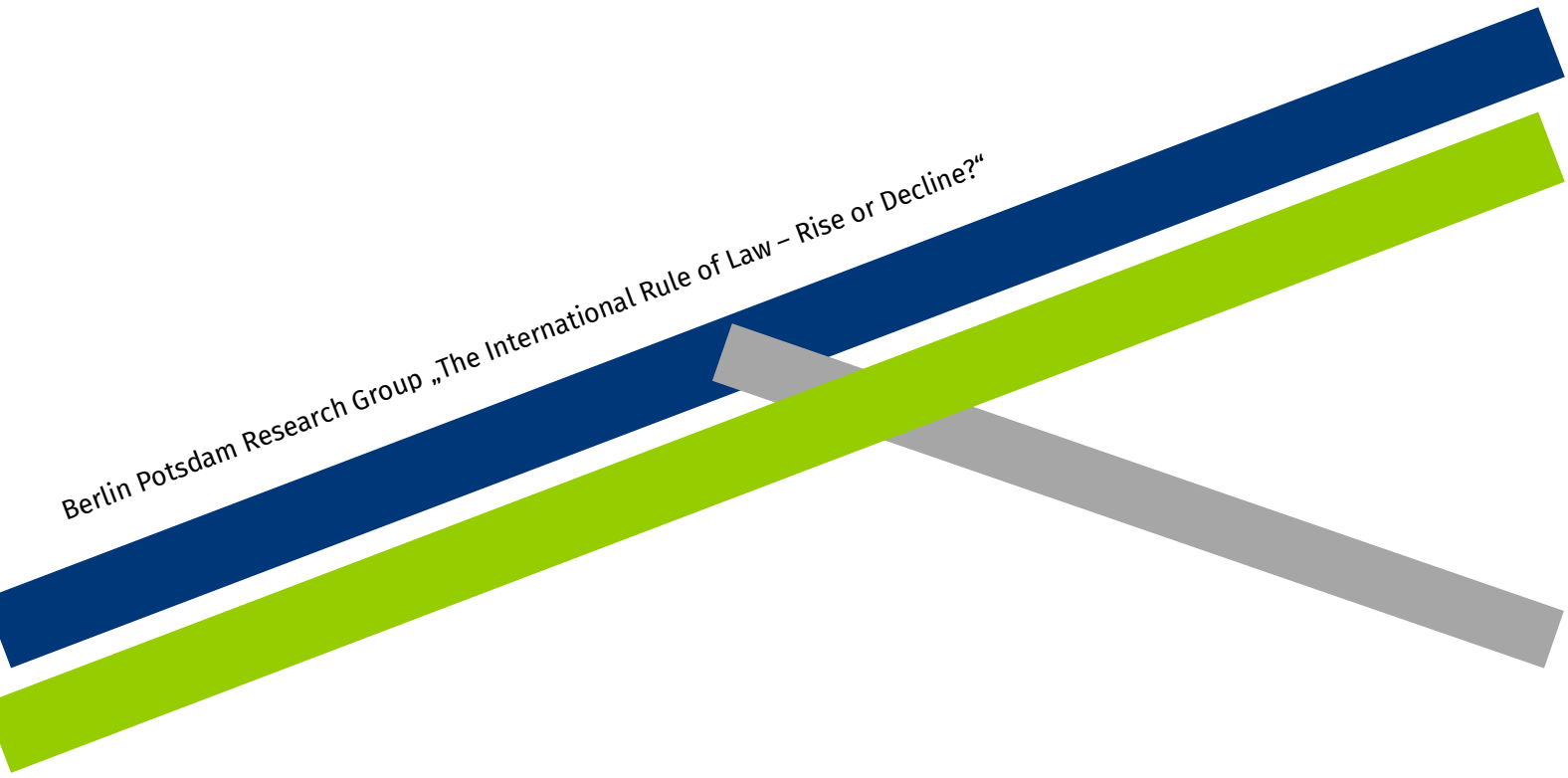
Janina Barkholdt & Julian Kulaga

Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on *Immunity of State officials from foreign criminal jurisdiction*, United Nations General Assembly, Sixth Committee, 2017



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Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on *Immunity of State officials from foreign criminal jurisdiction*, United Nations General Assembly, Sixth Committee, 2017

*Janina Barkholdt and Julian Kulaga**

Abstract:

During its sessions in 2016 and 2017 the UN International Law Commission (ILC) debated the question whether the immunity of State officials from foreign criminal jurisdiction is subject to exceptions for international crimes and provisionally adopted a Draft Article 7 on immunity ratione materiae. The following analytical presentation classifies and documents the reactions of States to draft article 7, paragraph 1, as they have been expressed in the Sixth (Legal) Committee of the General Assembly in 2017.

* Humboldt University Berlin; written with the support of Jan-Philipp Cludius and Isabel Walther, and advice from Georg Nolte (all Humboldt University Berlin).

Contents

I. Introduction

The immunity of States and their officials from the jurisdiction of foreign courts is a complex and much discussed area of international law. The pertinent rules are expressions of the tension which may arise between the sovereign equality of States, on the one hand, and other principles, rules and goals of international law, in particular the fight against impunity, on the other. Since about twenty years, developments and debates have intensified which call for a clarification, reassessment or even a possible change of the applicable rules. The following presentation analyses and documents an important aspect of the relevant debates: the positions which States have expressed in the Sixth Committee of the UN General Assembly in 2017 regarding a proposal by the International Law Commission (ILC) on possible exceptions to the immunity of State officials from foreign criminal jurisdiction.

The modern debate gathered momentum in 1998/1999 when the British House of Lords rejected the claim of the former Chilean Head of State, Augusto Pinochet, that he be granted immunity in respect of charges of torture.[1] In these decisions, those judges who rejected the claim relied on different lines of reasoning for not granting immunity.[2] Decisions of domestic courts[3], views of scholars[4], as well as domestic legislation[5] regarding a "human rights exception" or a "core crimes exception" to immunity of foreign officials evolved into differing directions.

So far, treaties which expressly and comprehensively deal with the question of exceptions to immunity of State officials from foreign criminal jurisdiction do not exist.[6]

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[1] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* [2000] 1 AC 61; [2002] 119 ILR 50; *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147; [2002] 119 ILR 135.

[2] *Ibid.*

[3] *International Law Commission, Report of the Sixty-ninth session (2017), Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, Chapter VII, pp. 179-182, decisions in FN 762 and 765 citing, *inter alia*, for Court decisions not granting immunity: Spain, Constitutional Court, *Guatemala Genocide Case* (26 September 2005), Judgment No. STC 237/2005; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, Judgment of 25 July 2012, BB.2011.140; for Court decisions upholding immunity *ratione materiae* in criminal proceedings: *Senegal, Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, Judgment of 4 July 2000 and Court of Cassation, Judgment of 20 March 2001; ILR vol. 125, pp. 571-577; Germany, *Jiang Zemin*, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2, para. 6.

[4] See e.g. Institut de Droit International, "Resolution on Immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", Naples session (arts. II. 2 and 3, and III.1) (Annuaire, vol. 73, t. I and II, Paris, Pedone, 2009; further: Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", (2011) 21(4) *European Journal of International Law* 815–852, p. 816 f.; Ingrid Wuerth, "Pinochet's Legacy Reassessed", (2012) 106 *American Journal of International Law* 731-768, p. 767.

[5] Cf. *ILC Report 2017* (n 3), pp. 179 f., referring, *inter alia*, to: Belgium, Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003; Netherlands, International Crimes Act of 2003; Niger, Criminal Code of the Republic of the Niger, as amended in 2003; Spain, "Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España"; but see also the critique of the members voting against draft article 7 regarding the reference to those laws (*ILC Report 2017* (n 3), pp. 182 f.).

[6] E.g. addressing the issue of exceptions to immunity *ratione materiae* – perhaps – implicitly: Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) United Nations Treaty Series, vol. 78, No. 1021, p. 278; International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations Treaty Series, vol. 1015, No. 14861, p. 244; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December

The International Court of Justice has not conclusively decided on the question of possible exceptions to immunity from foreign criminal jurisdiction. In the *Arrest Warrant Case (Democratic Republic of the Congo v Belgium),* decided in 2002, the Court found that an incumbent Minister of Foreign Affairs of a State can claim immunity from the criminal jurisdiction of a foreign State even when charged with war crimes and crimes against humanity.[7] In its judgment on *Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* of 2008, the Court did not take a position on possible exceptions to immunity. Four years later, however, the Court dealt with the question of possible exceptions to the immunity of States themselves in the case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).* In its judgment, the Court stated that:

> "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it"[8].

The Court then rejected the existence of exceptions to state immunity based on the gravity of the human rights violations committed or on the *jus cogens* character of the violated norm,[9] but added that:

> "In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply

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1984), United Nations Treaty Series, vol. 1465, No. 24841, p. 113; International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), A/RES/61/177; Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), OAS Treaty Series, No. 67; Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 9 June 1994), <www.oas.org/juridico/english/treaties/a-60.html>; compare for conventions addressing special regimes of immunity: Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations Treaty Series, vol. 500, No. 7310, p. 96; Vienna Convention on Special Missions (New York, 8 December 1969), *ibid*., vol. 1400, No. 23431, p. 232; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations Juridical Yearbook 1975 (Sales No. E.77.V.3), p. 87; Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations Treaty Series, vol. 596, No. 8638, p. 262; for conventions addressing exceptions to State immunity: United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49), vol. I, resolution 59/38, annex; European Convention on State Immunity (Basle, 16 May 1972), United Nations Treaty Series, vol. 1495, No. 25699, p. 182.

[7] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, pp. 3, 26 para. 61: "Accordingly, the immunities enjoyed under International law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy al1 of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."

[8] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, pp. 99, 123 f., para 57.

[9] *Ibid*., para. 58: "the law of immunity is essentially procedural in nature [...]. It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."

> in criminal proceedings against an official of the State is not in issue in the present case[10]."

Given the importance of the question it was proposed in 2006 that the International Law Commission ought to make an effort to examine the law.[11]

At its 2940th meeting, on 20 July 2007, the ILC decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman Kolodkin as Special Rapporteur.[12] After the debate on his Third report in 2011, Kolodkin was succeeded in 2012 as Special Rapporteur by Ms. Concepción Escobar Hernández.

Since then, the Commission has, until 2017, consensually elaborated a number of draft articles on the topic of *Immunity of State officials from foreign criminal jurisdiction.* Those include in particular draft article 5 which provides that "State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction", and draft article 6 which states that "State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity". The Commission has thereby recognized - in accordance with the traditional understanding - that a distinction needs to be drawn between immunity *ratione materiae* and immunity *ratione personae*: As a general rule, State officials enjoy immunity only with respect to acts performed in their official capacity, which subsists after the individuals concerned have ceased to be State officials (immunity *ratione materiae*).[13] Certain high-ranking State officials (the so-called "troika":[14] Heads of State, Heads of Government and Ministers for Foreign Affairs) are additionally entitled – only during their term of office – to 'absolute' immunity which also covers private conduct (immunity *ratione personae*)[15]. Whereas it is generally recognized that immunity *ratione personae* is not subject to exceptions with regard to certain crimes, it is less clear whether immunity *ratione materiae* is subject to exceptions for international crimes, as demonstrated, for example, by the Pinochet decisions.

The Fifth report of Special Rapporteur Escobar Hernandez analysed possible "limitations and exceptions" to the immunity of State officials from foreign criminal jurisdiction. This report was debated by the Commission during its sessions in 2016 and 2017. At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted Draft Article 7, this time not by consensus, as it usually does, but by a recorded vote, with 21 votes in favour, 8 votes against and 1 abstention.[16]

Draft Article 7[17] reads:

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[10] *Ibid*., p. 139, para. 91.

[11] A/61/10, Report of the International Law Commission on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006), p. 193, paras 17 f.

[12] A/62/10, Report of the International Law Commission on the work of its fifty-ninth session (7 May–5 June and 9 July–10 August 2007), p. 98, para 376.

[13] Draft Article 5 ("Persons enjoying immunity *ratione materiae*") and Draft Article 6 ("Scope of immunity *ratione materiae*"), *ILC Report 2017* (n 3).

[14] *ILC Report 2017* (n 3), p. 167, para. 87.

[15] Draft Article 3 ("Persons enjoying immunity *ratione personae*") and Draft Article 4 ("Scope of immunity *ratione personae*").

[16] Some members have given reasons for their votes, cf. Summary Record of the 3378th meeting (A/CN.4/SR.3378).

[17] A/CN.4/L.893.

Draft article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
   (a) crime of genocide;
   (b) crimes against humanity;
   (c) war crimes;
   (d) crime of apartheid;
   (e) torture;
   (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

The following analytical presentation does not seek to assess the arguments in favor or against possible exceptions to immunity *ratione materiae* in respect to certain crimes under international law.[18] The presentation rather classifies and documents the reactions of States to draft article 7, paragraph 1, as they have been expressed in the Sixth (Legal) Committee of the General Assembly in 2017.[19]

II. Analysis of the Comments and Observations by States on Draft Article 7, para. 1

In 2017, 49 States[20] have commented in the Sixth Committee of the General Assembly on the topic "Immunity of State officials from foreign criminal jurisdiction".

The following analytical presentation is based on the original comments and observations by States on this topic, as they are available on the website of the United Nations.[21] All comments are fully reproduced in the Annex, for convenience.

The presentation provides an overview of the main positions which States have expressed regarding the general proposition contained in draft article 7, paragraph 1 ("Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:"). The presentation does not address specific positions expressed by States regarding the list of crimes and other specific aspects. It also does not cover the statements made by States during the debate in 2016 on the same topic.

[18] For a fuller discussion of possible exceptions to immunity *ratione materiae*, see most recently: *AJIL Unbound*, "Symposium on the Present and Future of Foreign Official Immunity", vol. 112 (2018), published online 4 April 2018, <https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/symposium-on-the-present-and-future-of-foreign-official-immunity>.

[19] cf. also Adil Ahmad Haque, "Immunity for International Crimes: Where do States really stand?", published online 17 April 2018, *JustSecurity*, <https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/>.

The presentation seeks to be as transparent as possible by quoting, in each footnote, the respective extract from any statement which forms the basis for attributing a specific position to a given State. The presentation does not claim to be the only possible way in which the statements by States may be grouped, but it aims to accurately reflect the debate. Every effort has been made to ensure that each quotation is clear in itself and that it gives no misleading impression when read within the context of the statement in which it appears.

III. General Attitude of States towards Draft Article 7, paragraph 1

1. 23 States have expressed a predominantly positive attitude towards the general rule contained in Draft Article 7, paragraph 1.

   Austria,[22] Chile,[23] Cuba,[24] Czech Republic,[25] El Salvador,[26] Greece,[27] Estonia,[28] Hungary,[29] Italy,[30] Mexico,[31] Netherlands,[32] Norway (on behalf of the 5 Nordic Countries),[33] Peru,[34] Portugal,[35] Slovakia,[36] Slovenia,[37] South Africa,[38] Ukraine,[39] Vietnam[40].

2. 21 States have expressed a predominantly negative attitude towards the basic rule contained in Draft Article 7, paragraph 1.

   Australia,[41] Belarus,[42] China,[43] France,[44] Germany,[45] India,[46] Indonesia,[47] Iran,[48] Ireland,[49] Israel,[50] Japan,[51] Republic of Korea,[52] Malawi,[53] Russia,[54] Singapore,[55] Spain,[56] Sri Lanka,[57] Switzerland,[58] Thailand,[59] United States of America,[60] United Kingdom[61].

3. 5 States have expressed a reserved or an ambiguous attitude towards the general rule contained in Draft Article 7, paragraph 1.

   Malaysia,[62] New Zealand,[63] Poland,[64] Romania,[65] Sudan[66].

4. Among the 23 States which have expressed a predominantly positive attitude towards Draft Article 7, paragraph 1, 11 States, despite their general support for Draft Article 7, paragraph 1, expressed certain reservations:

   - 6 States firmly emphasized the close relationship between the content of Draft Article 7 and the pending procedural safeguards.[67]
   - 2 States called for further work, examination of practice, and deliberations by the Commission regarding Draft Article 7, paragraph 1.[68]
   - 2 States pointed to the provisional character of their comments. [69]
   - 1 State stressed the lack of consensus among national courts.[70]

IV. Positions regarding the legal character of Draft Article 7, paragraph 1

1. 5 States have more or less clearly expressed the view that Draft Article 7, paragraph 1 reflects existing customary international law (while differing in the reasons given for their position and in the extent to which they view Draft Article as reflecting existing law). Among those 5 States only one State has explicitly expressed the view that Draft Article 7, paragraph 1 is based on customary international law.

Italy,[71] Netherlands,[72] New Zealand,[73] Slovakia,[74] Vietnam[75].

2. 16 States have more or less clearly expressed the view that Draft Article 7 does not reflect customary international law. Among those 16 States, 10 States have explicitly expressed the view that Draft Article 7, paragraph 1, is not based on customary international law.

   Australia,[76] Belarus,[77] China,[78] France,[79] Germany,[80] Indonesia,[81] Iran,[82] Ireland,[83] Israel,[84] Russia, [85] Spain, [86] Sri Lanka, [87] Switzerland, [88] Thailand, [89] United Kingdom, [90] United States[91].

3. 24 States have expressed an ambiguous or insecure attitude regarding the legal character of Draft Article 7, paragraph 1.

   Austria,[92] Chile,[93] Cuba,[94] Czech Republic,[95] El Salvador,[96] Estonia,[97] Greece,[98] Hungary,[99] India, [100] Japan, [101] Republic of Korea, [102] Malaysia, [103] Mexico, [104] Norway (on behalf of the Nordic Countries),[105] Peru,[106] Romania,[107] Singapore,[108] Slovenia,[109] South Africa,[110] Ukraine[111].

V. Observations regarding the method and the procedure of the Commission regarding its work on Draft Article 7, paragraph 1

1. 11 States did not express reservations or criticism regarding the method or procedure by which Draft Article 7, paragraph 1 was adopted.

   Chile, [112] Cuba, [113] Czech Republic, [114] El Salvador, [115] Greece, [116] Hungary, [117] Mexico, [118] Netherlands,[119] Peru,[120] Portugal,[121] South Africa[122].

2. 26 States did express reservations or criticism regarding the method or procedure by which Draft Article 7, paragraph 1, was adopted.

   Australia, [123] Austria, [124] China, [125] France, [126] Germany, [127] Greece, [128] Indonesia, [129] Iran, [130] Ireland,[131] Israel,[132] Japan[133], Republic of Korea,[134] Malawi,[135] Norway on behalf of the Nordic Countries,[136] Poland,[137] Singapore,[138] Slovakia,[139] Slovenia,[140] Spain,[141] Sri Lanka,[142] United Kingdom,[143] United States[144].

3. 16 States have emphasized that the distinction between the codification/*lex lata* and progressive development/*lex ferenda* is important in the present context.

   Australia, [145] Austria, [146] Belarus, [147] France, [148] Germany, [149] India, [150] Ireland, [151] Israel, [152] Japan, [153] Russia, [154] Singapore, [155] Spain, [156] Sri Lanka, [157] Switzerland, [158] Thailand, [159] United Kingdom[160].

4. 21 States have expressed the view that the ILC should revisit or clarify Draft Article 7.

   Australia, [161] Austria, [162] Belarus, [163] China, [164] Cuba, [165] France, [166] Hungary, [167] Indonesia, [168] Iran,[169] Ireland,[170] Republic of Korea,[171] Malawi,[172] Malaysia,[173] New Zealand,[174] Poland,[175] Singapore,[176] Slovakia,[177] Slovenia,[178] Thailand,[179] United Kingdom,[180] United States[181].

5. 21 States have criticized that Art. 7, paragraph 1, is not based on sufficient State practice.

Belarus,[182] China,[183] France,[184] Germany,[185] Hungary,[186] India,[187] Indonesia,[188] Iran,[189] Ireland,[190] Israel,[191] Japan,[192] Republic of Korea,[193] Malaysia,[194] Russia,[195] Singapore,[196] Spain,[197] Sri Lanka,[198] Switzerland,[199] Thailand,[200] United Kingdom,[201] United States[202].

VI. Procedural Safeguards and future focus of the work

31 States have emphasized the importance of procedural safeguards. 24 of these 31 States have emphasized the interdependence between the substantive content of Draft Article 7, paragraph 1, and the pending issue of procedural safeguards.[203]

Austria,[204] Cuba,[205] Estonia,[206] France,[207] Germany,[208] Greece,[209] Ireland,[210] Israel,[211] Japan,[212] Republic of Korea,[213] Mexico,[214] Netherlands,[215] New Zealand,[216] Peru,[217] Poland,[218] Portugal,[219] Romania,[220] Russia,[221] Singapore,[222] Slovakia,[223] Slovenia,[224] Spain,[225] Sri Lanka,[226] Switzerland,[227] United Kingdom,[228] United States,[229] Norway (on behalf of the 5 Nordic Countries)[230].

[20] Australia, Austria, Belarus, Chile, China, Cuba, Czech Republic, El Salvador, Estonia, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Malawi, Malaysia, Mexico, Netherlands, New Zealand, Norway (on behalf of the five Nordic countries), Peru, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Thailand, Ukraine, United Kingdom, United States, Vietnam.

[21] ≤https://papersmart.unmeetings.org/ga/sixth/72nd-session/statements/> (last accessed 7th December 2017). Where indicated, translations of the original statement have been made by the authors or transcribed from the simultaneous translation which is available on the UN website.

[22] "As already expressed in past years, the Austrian delegation, in principle, is in favour of the proposed exceptions and limitations to immunity *ratione materiae*."

[23] "While, as we have said, immunity is a procedural matter which could be separated from substantive rules on the commission of crimes, we believe that it is necessary to maintain the relevancy of the prosecution and punishment for crimes referred to in draft article 7 provisionally adopted." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[24] "Our view is that the approach in paragraph 1 is correct in that it follows the model of the UN Convention on Jurisdictional Immunities of States and Their Property." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[25] "[T]he Czech Republic welcomes the adoption of draft article 7, […]".

[26] "From the beginning of the topic, our delegation supported the need to maintain a balanced position regarding the immunity from foreign criminal jurisdiction, particularly when it comes to determining the cases in which immunity would not be applicable *ratione materiae*. In this respect, we support the work aimed at identifying among such cases those crimes which are most serious for the international community as a whole." [Translation by the authors]

[27] "As we stated last year, we firmly believe that in contemporary international law, the rules on immunity should strike a balance between on the one hand the respect for the sovereign equality of States and the stability of international relations and, on the other hand, the need to preserve the essential interests of the international community as a whole, one of which is undoubtedly to combat impunity for the most serious crimes under international law. From that point of view, we consider the Commission's decision a step in the right direction."

[28] "Immunities should not be implemented in a way that effectively seeks to shield individuals from accountability for the most serious crimes and defeats the purpose of important universal jurisdiction laws. […] We would like to thank the ILC for its work done which represents an important step towards a common understanding of the relevant international legal norms."

[29] "Hungary believes that international crimes should be regarded, prima facie, as exceptions to immunity. Therefore, we welcome the provisional adoption of draft article 7, which clearly sets out the exceptions in respect of rationae materiae to the immunity of state officials from foreign criminal jurisdiction."

[30] "Against this background, my delegation welcomes the choice of the Drafting Committee of curtailing the list of crimes in relation to which immunity *ratione materiae* does not apply, while changing the title of Article 7(1), which we find evidentiary of customary international law."

[31] "Mexico celebrates the enriching debate generated around the issue of immunity of State officials from foreign criminal jurisdiction, as well as the comments and clarifications formulated by the Special Rapporteur on this matter. […] [M]exico agrees with the Special Rapporteur that the Commission has to continue to address the issue of immunity of State officials from foreign criminal jurisdiction from a perspective of both codification and progressive development of international law. The foregoing is consistent with the mandate of the Commission itself." [Translation by the authors]

[32] "[M]y Government welcomes the concept as proposed in draft Article 7, on crimes under international law, in respect of which immunity *ratione materiae* shall not apply."

[33] "[W]e support draft article 7, […]".

[34] "The reflections that I have just mentioned are in keeping with the draft article 7 proposal concerning crimes for which immunity *ratione materiae* does not apply, which my delegation was pleased to receive and has received with special interest." [Translation by the authors]

[35] "For the reasons above, Portugal commends the Commission for having adopted draft Article 7 concerning international crimes in respect of which immunity *ratione materiae* does not apply."

[36] "We therefore support inclusion of draft article 7 on the limitation and exceptions, which in our view shall not go beyond core crimes under international law."

[37] "We therefore share the views expressed within the Commission that, while today the status of customary international law does not allow for limitations and exceptions to immunity *ratione personae* in the context of inter-state relations, the opposite trend exists with respect to immunity *ratione materiae* and the most serious international crimes."

[38] "In its wisdom, which is highly appreciated and welcomed by my delegation, the Commission decided to include draft article 7 for the following reasons."

[39] "Also, we took note of the decision of the Commission not to include the crime of aggression, although we still deem that the perpetration of this crime should fall under the non-applicability of immunity *ratione materiae*, as it is the most serious of crimes under international law." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[40] "First, Vietnam concurs with the rules established under draft Article 7(i) as it reflects existing legal principles enshrined in various international treaties dealing with international criminal liability."

[41] "Australia does not, however, agree that draft article 7 represents an appropriate means of addressing this issue."

[42] "Article 7 is unbalanced. It is hardly worth counting on the fact that this article will be adopted by many states. In the case of an attempt to apply it, this rule may pave the way for serious abuses and violations of the principles of the sovereign equality of states, the nonuse of force and the threat of force, the peaceful settlement of disputes." [Translation by the authors].

[43] "In our opinion, this draft article is very problematic [...]".

[44] "Given the lively debates and divisions on the subject, it would seem preferable for the Commission to take the time to come up with a coherent vision of the relevant practice in order to reach a more consensual project." [Translation by the authors].

[45] "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: [...] 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."

[46] "We appreciate the methodology adopted in the Report, however, it provides less treaty practice with regard to limitations and exceptions to immunity. [...] The issues involved in the draft Articles are highly complex and politically sensitive for the States and therefore, diligence, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata* or *lex ferenda*). This would be clear only when the Commission will be able to show consistent State and treaty practice to support the exceptions asserted in draft article 7. Any new system, if not agreed, would be likely to harm inter-State relations and also undermine the very objective of ending impunity of most serious international crimes."

[47] "We need to bear in mind that prosecution of officials of one country, by the courts of foreign countries, will potentially raise problems in relation to the principle of sovereign equality. The complexity and sensitivity of the topic particularly in draft article 7 was obviously reflected in how the draft article was provisionally adopted by voting. The differing views on these important provisions, specifically concerning limitation and exception to immunity, make this provision worth revisiting."

[48] "We believe that the Special Rapporteur has stepped into the path of progressive development of international law by proposing draft article 7 which does not benefit from sufficient State practice. This is why we do not agree that the draft article represents an appropriate means of addressing the issue."

[49] "Accordingly, the resultant draft Article 7 may not be fully grounded in widely accepted State practice. In light of this, further information on practice relating specifically to the non-application of immunity would be helpful. For these reasons, Ireland would like to express the wish that the Commission continue to consider the basis for and content of draft Article 7 in conjunction with the provisions on procedures and safeguards at its next session with a focus on State practice."

[50] "Accordingly, we believe that the Draft Articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction, and that Draft Article 7 should be deleted."

[51] "Although the Commission does not necessarily determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion. [...] For these reasons, although draft article 7 was provisionally adopted by the Commission, clarification is needed on the aforementioned aspects. It is also necessary to continue observing state practice in order to determine whether the draft article reflects the actual view of the international society. [...]. In this regard, the responsibility of States should not be confused with that of individuals: at the same

time, it is also important to respect the international legal order which is based upon the sovereign equality of States."

[52] "Meanwhile, our government would like to point out the divergence of opinions regarding limitations or exceptions in respect to immunity *ratione materiae* such as the rule of *lex lata* or *lex ferenda*. My delegation fully supports global efforts to combat impunity, but it is necessary to pay attention to the jurisprudence of the ICJ on this issue. In the case of the *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo V. Belgium)*, ICJ confirmed that the nature and gravity of crimes in question belonging to substantive matters do not constitute a bar to immunity, which is a procedural matter. In this regard, my delegation requests that the Commission and the Special Rapporteur collect and examine relevant practices in a thorough manner."

[53] "The fact that [Article 7] was adopted by a recorded vote is a sign that it merits further study. My delegation therefore wishes to urge the Commission to revisit this article."

[54] "We believe that the artificial creation of an international legal norm that does not reflect the reality and confronts continuous objections of states cannot be either codification or progressive development of international law and is inconsistent with the goals of the Commission's work."

[55] "The dissension within the Commission on draft article 7 reflects that the propositions contained within could benefit from further consideration. My delegation is of the view that there are legitimate concerns, and we would invite the Commission to reconsider draft article 7."

[56] "If the Commission intends to make a *de lege ferenda* proposal, the least that can be asked is that within the Commission there be agreement on this; otherwise, we greatly fear, and we are very sad to say it, that the proposal will be stillborn."

[57] "This approach in our view militates against the sanctity of the principle of sovereign equality of States enshrined in the charter, and could jeopardize the broad acceptability of the draft articles as a whole, a scenario that should, as a matter of prudence, be carefully avoided."

[58] "After a careful review of the different sources cited in support of draft article 7, Switzerland is of the view that this high threshold has not been reached. We encourage the Commission to provide stronger evidence in support of draft article 7 or to indicate unambiguously that it falls within the area of progressive development."

[59] "My delegation is of the view that the work on this complicated and highly sensitive topic should be based on *lex lata* and State practice. In this respect, de *lege ferenda* proposals should only be made where there is international consensus in support of such proposals."

[60] "In addition to serious concerns about the lack of consistent state practice and *opinio juris* supporting Draft Article 7, we are troubled by the article's statement that immunity *ratione materiae* "shall not apply" to specified crimes. [...] We are deeply concerned that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space."

[61] "In the view of the United Kingdom, the exceptions to immunity *ratione materiae* listed in draft article 7 lack sufficient support in State practice to be regarded as established under customary international law. [...] If the Commission's work on this topic is going to contain proposals for progressive development of the law or "new law", the United Kingdom considers that the appropriate form for the outcome of the Commission's work should be a treaty."

[62] "Due to the aforesaid reasons, Malaysia views that draft article 7 should be studied and deliberated further since the existing states' practices vary on the definition and characterization of the offences, in particular torture and enforced disappearances. Therefore, Malaysia maintains its reservations on these offences as an exception to immunity."

[63] "We support the view that there are limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction *rationae materiae*, particularly in respect of certain types of behaviour that constitute the most serious crimes under international law. We note the concerns expressed by many representatives in this Committee and ask the Commission to consider the issues raised. In this regard, New Zealand would be interested to see further consideration by the Special Rapporteur of the suggested alternative approach of reformulating draft article 7 on the basis of an obligation to waive or prosecute international crimes."

[64] "Nonetheless, whether draft article 7 indeed draws balance between codification and progressive development needs further evaluation, particularly after assessing draft articles on procedural character of the immunity, that are to be discussed by the Commission in future."

[65] "We agree that the lingering uncertainty over the scope of immunity requires the guiding work of Commission. However, as we move forward, we need to carefully consider the risk of inter-State tensions by asserting limitations and exceptions to immunity that States are not expected to accept by means of a treaty and for which there is no sufficient and coherent State practice."

[66] "The issue of the immunity of State Officials from foreign criminal jurisdiction has been taken a lot of importance as the enjoyment by the State or the representatives or the property thereof with immunity is derived from the equal sovereignty and we have to differentiate between the rules that govern the jurisdiction of national courts and the rules that govern the immunity from jurisdiction, because being subject to jurisdiction does not negate immunity and vice versa." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[67] Austria: "clear link"; Estonia: "there is a need to consider the close relationship between the question of limitations and exceptions to immunity and the procedural aspects"; Mexico: "[…] of great importance for Mexico. These rules are crucial to avoid abuses arising from political conflicts that result in undue interference with the activities of a state official, as well as to the detriment of due process."; Netherlands: "I believe that it is important to consider the substantive aspects of *immunity ratione materiae* in conjunction with the procedural aspects"; Slovakia: "This will be an important issue to complement the material provisions adopted so far, and may be crucial for having workable and meaningful set of draft articles to be adopted and accepted by the States."; Slovenia: "Slovenia considers that this balance would be achieved through […] a thorough examination of the procedural aspects of immunity, including procedural safeguards and guarantees."

[68] Cuba: "We recognize that the most controversial issue is determining whether or not there are limits and exceptions to immunity of state officials from foreign criminal jurisdiction and we believe this requires further work in the ILC on the practice of States and International Courts and Tribunals.", Vietnam: "The drafting of the articles need to ensure the mentioned principles and reflect the codification of established norms. In this context, we believe that the exceptions to criminal jurisdiction warrant further debate."

[69] Italy: "Our comments on the ongoing work are to be considered provisional and without prejudice to our stand on the text of all draft articles when complete."; Peru: "[…] we would like to make the following preliminary comments referred to its fifth report […]" [Translation by the authors].

[70] Ukraine: "Indeed, the national case law is not uniform in its approach to this question. Attitudes used by domestic courts were based on the case by case methods."

[71] "We note from the Commission's Report that the debate around the exceptions, or limitations, to immunity for State officials from foreign criminal jurisdiction largely reflects the lack of consensus among States with regard to some of the exceptions originally proposed for discussion. […] Against this background, my delegation welcomes the choice of the Drafting Committee of curtailing the list of crimes in relation to which immunity *ratione materiae* does not apply, while changing the title of Article 7(1), which we find evidentiary of customary international law. In the same vein, we are also in favour of the choice of referring to those crimes as strictly defined in the relevant treaties to be listed in an annex to the draft articles."

[72] "It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity."

[73] "We support the view that there are limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction *rationae materiae*, particularly in respect of certain types of behaviour that constitute the most serious crimes under international law."

[74] "Slovakia supports the concept of immunity *ratione materiae* of State officials from foreign criminal jurisdiction, as well as the existence in current general international law of limitation and exception to this immunity. We therefore support inclusion of draft article 7 on the limitation and exceptions, which in our view shall not go beyond core crimes under international law. […] We are however convinced that the list shall not go beyond *de lege lata* international crimes and not to include crimes that are not firmly part of general international law or those that fall into a broader category of particular international crimes, namely crimes against humanity."

[75] "First, Vietnam concurs with the rules established under draft Article 7(i) as it reflects existing legal principles enshrined in various international treaties dealing with international criminal liability."

[76] "Australia shares the concerns of those members who voted against the provisional adoption of the draft article that, in its current form, does not reflect any real trend in State practice, still less existing customary international law."

[77] "We believe that the information presented in the report does not prove the existence of this trend." [Translation by the authors].

[78] "In light of the above, China does not believe that the provisions of draft article 7 qualify as codification or progressive development of customary international law."

[79] "In the view of my delegation, the exceptions to the immunity *ratione materiae* retained by the Commission in its draft article 7 do not constitute rules of customary international law, in the absence of State practice and a sufficient *opinio juris*." [Translation by the authors].

[80] "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."

[81] "My delegation wishes to observe that there are only a few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. In the case of Indonesia, up to now, no single case relates to the limitations and exceptions, except in civil proceedings."

[82] "We believe that the Special Rapporteur has stepped into the path of progressive development of international law by proposing draft article 7 which does not benefit from sufficient State practice."

[83] "Ireland is of the view that while the Special Rapporteur's report contained an extensive discussion of practice, the groundwork for detailed consideration of the question of nonapplication of immunity was not fully in place prior to this year's session. Accordingly, the resultant draft Article 7 may not be fully grounded in widely accepted State practice. In light of this, further information on practice relating specifically to the non-application of immunity would be helpful."

[84] "With respect to Draft Article 7 which was recently adopted by the Commission, stipulating exceptions to the applicability of immunity *ratione materiae*, Israel shares the view that there are no established norms of international law regarding exceptions or limitations to immunity from criminal jurisdiction of State officials, nor is there a trend towards the development of such norms."

[85] "We believe that the artificial creation of an international legal norm that does not reflect the reality and confronts continuous objections of states cannot be either codification or progressive development of international law and is inconsistent with the goals of the Commission's work."

[86] "With regards to the particular issue we are now dealing with, my delegation has no doubts, for example, about the consideration as customary international law of the immunity of former Heads of State and of Government and former Ministers of Foreign Affairs. However, if we are being honest, we cannot say the same thing about the exceptions and limits to the immunity *ratione materiae*. In this regard, identifying (and perhaps also analysing) both State practice and *opinio iuris* proves particularly difficult. State practice is scarce and the necessary legal consensus cannot be found either."

[87] "Questions have been raised in the course of the debate as to whether the report does contain sufficiently cogent evidence to support the conclusion that has been reached on the existence of limitations and exceptions in respect of acts *ratione materiae* that has been proposed. While recognizing that the discussion of the practice in the Report was indeed extensive, the criticism has been made, inter-alia, that examples cited in the Report related to State immunity or immunity in civil proceedings rather than criminal prosecutions; that they were taken from different contexts and that the report selectively discussed cases that supported the establishment of limitations and exceptions while disregarding evidence indicating the opposite."

[88] "After a careful review of the different sources cited in support of draft article 7, Switzerland is of the view that this high threshold has not been reached. We encourage the Commission to provide stronger evidence in support of draft article 7 or to indicate unambiguously that it falls within the area of progressive development."

[89] "We take note of draft article 7 as provisionally adopted by the Commission, listing out crimes which immunity does not apply, with the exception for persons enjoying immunity *ratione personae*, based on the Special Rapporteur's finding that no customary international law exists in relation to limitations or exceptions to such type of immunity. My delegation is of the view that the work on this complicated and highly sensitive topic should be based on *lex lata* and State practice. In this respect, de *lege ferenda* proposals should only be made where there is international consensus in support of such proposals."

[90] "In light of these circumstances surrounding its provisional adoption, the United Kingdom considers that draft article 7 cannot be considered as reflecting existing international law (*lex lata*), or even the Commission's settled view of existing international law on this topic."

[91] "In the view of the United States, there is insufficient state practice to illustrate a 'clear trend,' let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal."

[92] "As already expressed in past years, the Austrian delegation, in principle, is in favour of the proposed exceptions and limitations to immunity *ratione materiae*. However, my delegation understands the need for clarification whether these exceptions and limitations already reflect customary international law or are more of a progressive development character. We believe it would be useful if the Special Rapporteur and the Commission could make additional efforts to indicate to what extent the exceptions and limitations under consideration reflect already existing customary international law. Whatever the outcome of the work of the Commission on this topic, such indication would provide essential guidance for the assessment of the existence or not of immunity by national courts and other authorities."

[93] "We agree with the provisional adoption of [paragraph 1 of draft article 7] which appropriately reflects a current trend of the matter in international law." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[94] "We recognize that the most controversial issue is determining whether or not there are limits and exceptions to immunity of state officials from foreign criminal jurisdiction and we believe this requires further work in the ILC on the practice of States and International Courts and Tribunals." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[95] "This year's discussions in the Commission on this report and on draft article 7, concerning the crimes under international law in respect of which immunity *ratione materiae* should not apply, clearly demonstrate that it is sometimes an uneasy task to identify established rules of customary international law, since relevant State practice may be varied and legal issues complex and sensitive. The exceptions to immunity *ratione materiae* seem to be an example of such a controversial issue. Having said that, the Czech Republic welcomes the adoption of draft article 7, since, in our opinion, the draft article, in principle, properly reflects the trend in State practice which supports the existence of an exception to immunity *ratione materiae* when crimes under international law, as well as other so-called official crimes defined in relevant treaties, are committed."

[96] "Regarding the formulation of the list of crimes contemplated in paragraph 1 of the draft article 7, we have difficulty sharing the position of some members of the Commission, which refers to requiring that the tendency of a customary practice be verified with respect to each one of them, since the work of the Commission not only refers to the codification of International Law, but also to promote its progressive development, according to article 1(1) of the Statute of the International Law Commission."

[97] "The topic of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction raises many questions and should therefore be analysed comprehensively as it is politically highly sensitive, and has at the same time a very important practical dimension."

[98] "As we stated last year, we firmly believe that in contemporary international law, the rules on immunity should strike a balance between on the one hand the respect for the sovereign equality of States and the stability of international relations and, on the other hand, the need to preserve the essential interests of the international community as a whole, one of which is undoubtedly to combat impunity for the most serious crimes under international law. From that point of view, we consider the Commission's decision a step in the right direction."

[99] "Hungary believes that international crimes should be regarded, prima facie, as exceptions to immunity. Therefore, we welcome the provisional adoption of draft article 7, which clearly sets out the exceptions in respect of rationae materiae to the immunity of state officials from foreign criminal jurisdiction."

[100] "The issues involved in the draft Articles are highly complex and politically sensitive for the States and therefore, diligence, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata or lex ferenda*). This would be clear only when the Commission will be able to show consistent State and treaty practice to support the exceptions asserted in draft article 7."

[101] "First, there was debate on whether "limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction" is an established customary international law (*lex lata*) or development of a new law (*lex ferenda*). The Commission could not reach common ground on this matter. Although the Commission does not necessarily determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion."

[102] "My delegation basically agrees with the position taken by the Special Rapporteur and the Commission that there exist neither limitations nor exceptions with respect to immunity *ratione personae*. Meanwhile, our government would like to point out the divergence of opinions regarding limitations or exceptions in respect to immunity *ratione materiae* such as the rule of *lex lata* or *lex ferenda*."

[103] "Due to the aforesaid reasons, Malaysia views that draft article 7 (1) should be studied and deliberated further since the existing states' practices vary on the definition and characterization of the offences, in particular torture and enforced disappearances. Therefore, Malaysia maintains its reservations on these offences as an exception to immunity."

[104] "In addition, Mexico agrees with the Special Rapporteur that the Commission has to continue to address the issue of immunity of State officials from foreign criminal jurisdiction from a perspective of both codification and progressive development of international law." [Translation by the authors].

[105] "Firstly, we would like to reiterate our view that for the gravest international crimes no rules of immunity should apply in national jurisdictions. In this respect, we encourage the Commission to strike a balance between the fight against impunity for serious international crimes within the sphere of national jurisdictions, and the need to preserve a legal framework for stability in inter-State relations. It is an

important, but complex and contentious topic, the ILC is working on, and we note the Commission's desire to proceed cautiously and prudently. Secondly, the Nordic countries appreciate the analysis of practice, in the fifth report. We acknowledge the difficulty in drawing clear conclusions regarding some of the issues, and note the differing views in the Commission."

[106] "On the other hand, in the case of immunity *ratione materiae* it does seem possible to determine the existence of a tendency to consider limits and exceptions to the immunity from jurisdiction for serious crimes that repel the conscience of mankind. In this sense, it is essential to establish a balance between two values: on the one hand, the respect for the sovereign equality of States, which constitutes a factor of stability in international relations and on the other hand, the fight against impunity for commission of atrocious crimes." [Translation by the authors].

[107] "We take note of the Commission's decision to deal with this issue from the perspective of both codification and progressive development of international law. Against this backdrop and in light of limited relevant practice and *opinio juris*, we appreciate the more cautious approach exercised in proceeding towards a decision on draft article 7."

[108] "First, my delegation is of the view that, while the temporal scope of immunity *ratione materiae* is not controversial, the material scope has benefited and would still benefit from further study and elucidation. In this vein, we have concerns as to whether there is sufficient State practice, in terms of case law, national statutes and treaty law, which would justify the codification of the specific list of crimes under international law in draft article 7 for which immunity *ratione materiae* shall not apply. If, instead, it is the Commission's intent to state a conclusion *de lege ferenda*, this intent should be clearly articulated."

[109] "Slovenia would like to reiterate its view that, while the immunity of state officials from foreign criminal jurisdiction is based on the principles of the sovereign equality of states, non-intervention, and the interest of states in maintaining friendly relations, this matter should also be addressed against the background of the growing prominence of legal humanism and the fight against impunity, in particular through the prism of the progressive development of international law and developments in international criminal law. [...] We therefore share the views expressed within the Commission that, while today the status of customary international law does not allow for limitations and exceptions to immunity *ratione personae* in the context of inter-state relations, the opposite trend exists with respect to immunity *ratione materiae* and the most serious international crimes."

[110] "In its wisdom, which is highly appreciated and welcomed by my delegation, the Commission decided to include draft article 7 for the following reasons. First, there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law."

[111] "Indeed, the national case law is not uniform in its approach to this question. Attitudes used by domestic courts were based on the case by case methods. In addition, we do not have to shy away from the fact that there were instances, where domestic courts ruled to upheld immunities due to rather political motivations." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[112] "We agree with the provisional adoption of [paragraph 1 of draft article 7] which appropriately reflects a current trend of the matter in international law." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[113] "Our view is that the approach in paragraph 1 is correct in that it follows the model of the UN Convention on Jurisdictional Immunities of States and Their Property. We prefer a list of crimes since without one, a general formulation could give rise to different interpretations during enforcement." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)]

[114] "Having said that, the Czech Republic welcomes the adoption of draft article 7, since, in our opinion, the draft article, in principle, properly reflects the trend in State practice which supports the existence of an exception to immunity *ratione materiae* when crimes under international law, as well as other so-called official crimes defined in relevant treaties, are committed. The Czech Republic also appreciates that the commentary to this draft article elucidates in clear terms several aspects of this contentious issue."

[115] "Thus, we think that the Commission by identifying such cases of exception to immunity, respects the basis of principles of international law, such as: the principle of sovereign equality of States, contained in article 2(1) of the Charter of the United Nations; as well as the principle of individual criminal responsibility, the legal background of which derives from the old jurisprudence of the Nuremberg Tribunal and is nowadays a legal category of international criminal law." [Translation by the authors].

[116] "It is in this spirit that the Commission ultimately decided to bolster the discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of certain types of behaviour, by including in Draft

Article 7 certain crimes under international law in relation to which immunity *ratione materiae* shall not apply."

[117] "Therefore, we welcome the provisional adoption of draft article 7, which clearly sets out the exceptions in respect of rationae materiae to the immunity of state officials from foreign criminal jurisdiction."

[118] "In addition, Mexico agrees with the Special Rapporteur that the Commission has to continue to address the issue of immunity of State officials from foreign criminal jurisdiction from a perspective of both codification and progressive development of international law. The foregoing is consistent with the mandate of the Commission itself." [Translation by the authors].

[119] "Therefore, my Government welcomes the concept as proposed in draft Article 7, on crimes under international law, in respect of which immunity *ratione materiae* shall not apply. It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity."

[120] "The reflections that I have just mentioned are in keeping with the draft article 7 proposal concerning crimes for which immunity *ratione materiae* does not apply, which my delegation was pleased to receive and has received with special interest."

[121] "For the reasons above, Portugal commends the Commission for having adopted draft Article 7 concerning international crimes in respect of which immunity *ratione materiae* does not apply."

[122] "In its wisdom, which is highly appreciated and welcomed by my delegation, the Commission decided to include draft article 7 for the following reasons."

[123] "Australia regrets, however, that the Commission was unable to resolve the issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction by consensus, and that draft article 7 was provisionally adopted by vote."

[124] "Austria has taken note of the fact that the Commission even took the unusual step of voting on the adoption of proposed draft article 7."

[125] "First of all, the hasty adoption of the draft article without thorough discussion seems inappropriate. We have noted that before the deliberation on this issue could run its course, the Commission rushed to a vote and adopted the draft article with almost one third of the members voting against it. We suggest that the Commission proceed with caution and prudence, and continue with in-depth exchange of views on the issue of exceptions to seek the broadest possible consensus. The Commission should avoid tabling a draft article on which there exists extensive controversy since it may undermine the authority of any potential outcome in this regard."

[126] "My delegation notes that the discussion of the topic, and in particular of draft article 7, has provoked heated debate within the Commission itself, leading to the adoption of this provision by a majority vote." [Translation by the authors].

[127] "This is underlined by the unusual event of a recorded vote for the adoption of draft article 7 by the ILC."

[128] "In this respect, we note with concern that this year the apparently irreconcilable divergence of views on this issue did not allow the Commission to come up with a consensual proposal regarding Draft Article 7, and rendered inevitable the rather unusual recourse to a recorded vote."

[129] "The complexity and sensitivity of the topic particularly in draft article 7 was obviously reflected in how the draft article was provisionally adopted by voting. The differing views on these important provisions, specifically concerning limitation and exception to immunity, make this provision worth revisiting."

[130] "We note the unusual way in which this draft article was provisionally adopted by the Commission. This indicates that there has been a fundamental division of opinions on certain issues among members, reflecting the difficulty and sensitivity of the topic as it involves highly complex and politically delicate issues for the States."

[131] "Therefore, Ireland wishes to voice our concern that the Commission was divided internally on the adoption of draft Article 7 and its commentaries, which led to a vote being held on its adoption."

[132] "The fact that Draft Article 7 was adopted by the Commission by a vote rather than by consensus - in contrast to the long-standing practice of the Commission - itself reflects the problematic nature of this provision and its failure to reflect accurately the state of the law."

[133] "It should be noted that the draft article 7 was provisionally adopted by a recorded vote in the Commission. This indicates that there was a fundamental division of opinions on certain issues among members, reflecting the difficulty and sensitivity of the topic."

[134] "My delegation takes note of the fact that the Commission adopted draft article 7 provisionally by recorded vote (vote by roll call) on July 20, 2017. This voting method is an exception to the ordinary process for adoption of the draft articles by consensus in the Commission. The fact that draft article 7 was

provisionally adopted with twenty-one votes in favour, eight votes against and one abstention reveals that there was substantial disagreement on limitations and exceptions to immunity within the Commission."

[135] "On immunity of States Officials from Criminal jurisdiction, my delegation notes with concern, the departure from the ILC's established procedure of adopting its work by consensus."

[136] "We encourage the Commission to seek to reach consensus on the most difficult aspects of this important topic, thereby creating the best possible conditions for its work to be taken further by States."

[137] "We have noticed that the Commission adopted by recorded vote the draft article 7 relating to crimes in respect of which immunity does not apply. This is quite unusual, taking into account the practice of the Commission."

[138] "We, however, note the unusual manner in which draft article 7 was provisionally adopted by the Commission; that is by way of recorded vote. The dissension within the Commission on draft article 7 reflects that the propositions contained within could benefit from further consideration."

[139] "At the outset allow me to present some concerns on how the ILC proceeded in procedurally solving the apparent deadlock in consideration of question of limitations and exceptions to the immunity *ratione materiae*. Although voting is a legitimate procedural tool, the ILC shall use it only as a last resort and only with extreme caution especially in highly politically charged questions. Therefore, we are not entirely convinced that the Commission was supposed to force the adoption of draft article 7 through recorded voting."

[140] "Moreover, we believe that as a general rule the Commission should strive to avoid recourse to a recorded vote when provisionally adopting draft articles. We would thus advise an approach that emphasises diligence over swiftness in deliberating on critical and challenging aspects of a topic."

[141] "Furthermore, also on a general level, we would like to manifest the deep concern of our delegation regarding the fact that the adoption of certain draft articles has been carried out through voting. We are not unaware that the Commission has adopted decisions through voting in the past. But we believe this entails a risk of dividing the Commission, with a possible future impact on its work." [Translation by the authors].

[142] "It is this conclusion and the approach adopted through Draft Article 7 that has generated a sharply divisive debate within the Commission and has led, unfortunately, to a decision through recourse to a vote, on an issue, which, in our view must by its very nature, be the subject of further critical analysis and a decision to be taken by consensus."

[143] "Not only is there a lack of State practice to justify drawing this conclusion, it is clear that the Commission itself is deeply divided on the issue. Indeed, it is striking that the provisional adoption of draft article 7 was achieved only on the basis of a recorded vote of the Commission's members. That is very unusual for the Commission nowadays."

[144] "The unusual split vote that led to the Committee's provisional adoption of the Draft Article further demonstrates that this topic does not command a true consensus of the Commission, and that the resulting language cannot be said to represent customary international law or even the progressive development of existing law."

[145] "Australia recognises that the Commission has a dual mandate of codification and progressive development of the law. It is, however, vital that where the Commission elects to advance a proposal that does not reflect existing law, that proposal be clearly identified as such. Australia regrets that this has not always occurred in the Commission's work on this topic."

[146] "However, my delegation understands the need for clarification whether these exceptions and limitations already reflect customary international law or are more of a progressive development character. We believe it would be useful if the Special Rapporteur and the Commission could make additional efforts to indicate to what extent the exceptions and limitations under consideration reflect already existing customary international law. Whatever the outcome of the work of the Commission on this topic, such indication would provide essential guidance for the assessment of the existence or not of immunity by national courts and other authorities."

[147] "We believe it is absolutely necessary to clearly indicate whether any of the conclusions and proposals of the Commission are codification or are aimed at the progressive development of international law." [Translation by the authors]

[148] "To that extent, the French delegation considers that on such an important subject it is of particular importance that the Commission clearly indicates whether its work is part of its task relating to the codification of international law or its progressive development. In this respect, the French delegation notes that the Commission itself indicates that it has relied on the existence of a 'trend'." [Translation by the authors]

[149] "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 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. [...] 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. [...] However, when the Commission blurs the line between these two aspects of its mandate, it calls into question the very foundation of its legitimacy."

[150] "The issues involved in the draft Articles are highly complex and politically sensitive for the States and therefore, diligence, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata* or *lex ferenda*). This would be clear only when the Commission will be able to show consistent State and treaty practice to support the exceptions asserted in draft article 7. Any new system, if not agreed, would be likely to harm inter-State relations and also undermine the very objective of ending impunity of most serious international crimes."

[151] "Ireland, however, believes it is unclear from the Special Rapporteur's Report, the report of the Drafting Committee and the commentaries whether and in what respect draft Article 7 seeks to determine the scope of existing international law (*lex lata*) or the extent to which the Commission is following an emerging trend towards desirable norms (*lex ferenda*). Indeed, while the Special Rapporteur stated that the Commission was not engaged in crafting 'new law', Ireland takes note of the comments made by some members of the Commission that the text does not reflect existing international law or identifiable trends. Ireland recalls the mandate of the Commission to codify and progressively develop international law. Whilst both aspects of its work are equally valid, Ireland believes that the focus of the Commission on any given item should initially be on establishing the current state of the law and only then should it move on to assess proposals for progressive development. This is particularly so with a topic such as the current one, which may give rise to practical issues that fall to be considered not only by Foreign Ministries and international lawyers, but also by domestic courts grappling with highly sensitive cases that may come before them. Therefore, irrespective of the form of the outcome of the Commission's work on this topic, the Commission should — in our view — articulate in a granular way and in respect of each draft Article or part thereof identify whether it seeks to codify customary international law or progressively develop it. I should emphasise that this desire for clarity does not imply that my delegation is opposed to progressive development, but rather that elements of such development, based on emerging trends, should be clearly signposted."

[152] "If the ILC wishes to propose the progressive development of the law in a certain direction, then it should be transparent and clear that this is the purpose of the exercise and States will react accordingly."

[153] "Although the Commission does not necessarily determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion."

[154] "We did not see either the agreement in the Commission on the issue whether it considered such exceptions to be *lex lata* or *lex ferenda* rule which also does not prove that this issue had been considered objectively. Thus, we have to recognize with regret that during the consideration of this issue the objective approach was substituted by a subjective wish to create a new rule for prosecution of state officials. The questions whether international law contains exceptions to immunities and whether they should exist at all are not similar as the notions of immunity and impunity are not similar either."

[155] "If, instead, it is the Commission's intent to state a conclusion *de lege ferenda*, this intent should be clearly articulated."

[156] "In this same order of things, we also consider that, in the ILC's work, it is important to distinguish clearly when it acts *as lex lata* and when as *lex ferenda*. States need to have certainty as to whether a Commission proposal represents a codification or a development of International Law. This is particularly necessary when we face sensitive topics. We deem this is always important. This also applies to the case of draft articles, even though States can obviously later accept or not to include them in a treaty. [...] we believe that on this subject, as in all the others, the Commission should make a clear distinction on whether it is acting on a *de lege lata* or a *de lege ferenda* basis. And, in any case, it should avoid giving the impression of being creating Law. Otherwise, the final effect will be precisely the opposite of the intended one." [Translation by the authors]

[157] "In our view, it would be necessary to focus on existing law (*lex lata*) and to build up a solid foundation of existing State practice, as the starting point. The aspect of progressive development (*lege ferenda*) could be addressed at a subsequent stage."

[158] "We believe that it is important to distinguish the two aspects of the Commission's work as clearly as possible. For it is well known that the ILC's draft articles enjoy great practical authority and are often interpreted as statements of the law by domestic courts. [...] We believe that it is of paramount importance

that an article on the exceptions to functional immunity of State officials from foreign criminal jurisdiction is either solidly based in extensive and virtually uniform State practice and *opinio juris* or clearly labeled as a progressive development of the law."

[159] "My delegation is of the view that the work on this complicated and highly sensitive topic should be based on *lex lata* and State practice. In this respect, *de lege ferenda* proposals should only be made where there is international consensus in support of such proposals."

[160] "Accordingly, the United Kingdom considers it to be of vital importance with this particular topic that the Commission clearly indicates those draft articles which it considers to reflect existing international law (*lex lata*) and those which it does not, whether on the basis of representing the progressive development of international law, or whether amounting to proposals for 'new law'.

Indeed, if the underlying aim of producing these draft articles is to provide a set of guidelines for use in domestic courts, States, as well as their judges and practitioners, surely need to know what the Commission considers existing international law is. If the aim is to make proposals for States for 'new law' to be adopted by them, as they see fit, in treaty form, that that should be clearly stated. It is unfortunate that the Commission has not provided this clarification to date."

[161] "Australia recognises that the international community can and must do more to ensure that State officials who commit international crimes are held to account. Australia does not, however, agree that draft article 7 represents an appropriate means of addressing this issue. Australia notes with interest the proposal by some members of the Commission that a treaty-based obligation to 'waive or prosecute' be established. Australia suggests that this is a concept deserving of further consideration by the Commission."

[162] "However, my delegation understands the need for clarification whether these exceptions and limitations already reflect customary international law or are more of a progressive development character. We believe it would be useful if the Special Rapporteur and the Commission could make additional efforts to indicate to what extent the exceptions and limitations under consideration reflect already existing customary international law. Whatever the outcome of the work of the Commission on this topic, such indication would provide essential guidance for the assessment of the existence or not of immunity by national courts and other authorities."

[163] "We expect that the comments of the states on the fundamentally important topic of immunity of officials from foreign criminal jurisdiction will be carefully considered by the Commission. It is a constructive interaction with future law enforcers and consideration of the positions of the states in the work of the Commission is the pledge not only of the viability of the documents being developed by the Commission, but also of preserving its unquestioned authority deserved for seventy years." [Translation by the authors]

[164] "First of all, the hasty adoption of the draft article without thorough discussion seems inappropriate. We have noted that before the deliberation on this issue could run its course, the Commission rushed to a vote and adopted the draft article with almost one third of the members voting against it. We suggest that the Commission proceed with caution and prudence, and continue with in-depth exchange of views on the issue of exceptions to seek the broadest possible consensus. The Commission should avoid tabling a draft article on which there exists extensive controversy since it may undermine the authority of any potential outcome in this regard."

[165] "We recognize that the most controversial issue is determining whether or not there are limits and exceptions to immunity of state officials from foreign criminal jurisdiction and we believe this requires further work in the ILC on the practice of States and International Courts and Tribunals. [...] Finally Sir, the Cuban delegation is of the view that this is a topic that requires further study and we await the opportunity to review the sixth report on this topic." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[166] "The difficulties encountered this year regarding the 'Immunity of State officials from foreign criminal jurisdiction'— and I will address this topic in more detail later in the week— must alert us to the risks of the Commission working too rapidly. Some of these difficulties could have been avoided if the Commission had been able to dedicate more time to the consideration of this topic, which it indeed required. A working group could have been tasked with carefully considering State practice, the interpretation of which divided the Commission's members. That would have assisted the Commission in reaching a consensus on draft Article 7." [Translation by the authors]

[167] "Even though the three additional crimes, namely torture, enforced disappearance and apartheid are doubtlessly heinous crimes, it would merit further examination whether there is sufficient state practice to assert legal basis for introducing them as separate crimes among the `crimes under international law in respect of which immunity ratione materiae shall not apply`."

[168] "Finally, Indonesia is of the view that given the sensitivity and complexity of the topic at hand, it is desirable to have a more extensive study and analysis of the draft articles, and we look for-ward to being at the next session to see further results of the work of the ILC."

[169] "Accordingly, due to the sensitivity of the nature of immunity as the direct consequence of the principle of sovereign equality of States, we suggest that the Commission proceeds on the topic with more caution. In fact, though the Commission does not determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not afford convincing evidence to support its conclusion."

[170] "Therefore, irrespective of the form of the outcome of the Commission's work on this topic, the Commission should — in our view — articulate in a granular way and in respect of each draft Article or part thereof identify whether it seeks to codify customary international law or progressively develop it."

[171] "Thus our government considers it appropriate that the Commission continues to discuss exceptions to immunity this year. […]

In this regard, my delegation requests that the Commission and the Special Rapporteur collect and examine relevant practices in a thorough manner."

[172] "The fact that it was adopted by a recorded vote is a sign that it merits further study. My delegation therefore wishes to urge the Commission to revisit this article."

[173] "Due to the aforesaid reasons, Malaysia views that draft article 7 (1) should be studied and deliberated further since the existing states' practices vary on the definition and characterization of the offences, in particular torture and enforced disappearances."

[174] "In this regard, New Zealand would be Interested to see further consideration by the Special Rapporteur of the suggested alternative approach of reformulating draft article 7 on the basis of an obligation to waive or prosecute International crimes. This could explore a possible duty of a State either to waive the Immunity of Its officials before the criminal courts of a foreign State, or to undertake to fulfil Its obligation to prosecute Its own officials, thereby reducing any Impunity gap.

[175] Nonetheless, whether draft article 7 indeed draws balance between codification and progressive development needs further evaluation, particularly after assessing draft articles on procedural character of the immunity that are to be discussed by the Commission in future."

[176] "If, instead, it is the Commission's intent to state a conclusion *de lege ferenda*, this intent should be clearly articulated."

12. "Second, given the manner in which draft article 7 is currently framed, my delegation reiterates our suggestion that the Commission may wish to revisit, as a matter of progressive development of the law, the extension of immunity *rationae personae* to high officials beyond the troika, following completion of its work on immunity *rationae materiae*. […] My delegation is of the view that more in-depth analysis should be given to the draft articles, given this intrinsically complex area of international law, and we look forward to studying the further outcomes of the Commission on this topic."

[177] "We note further the intention of the Commission to complete the draft articles on first reading next year, however we call for caution not to proceed towards premature completion by any cost."

[178] "Given the importance of the topic to states, Slovenia considers that these deliberations require appropriate attention, enough time and thoroughness. Moreover, we believe that as a general rule the Commission should strive to avoid recourse to a recorded vote when provisionally adopting draft articles. We would thus advise an approach that emphasises diligence over swiftness in deliberating on critical and challenging aspects of a topic."

[179] "My delegation is of the view that the work on this complicated and highly sensitive topic should be based on *lex lata* and State practice. In this respect, *de lege ferenda* proposals should only be made where there is international consensus in support of such proposals. Thailand will continue to follow closely the Commission's work on this topic and we encourage the Commission to explore the matter further, taking into account the views expressed by States in the Sixth Committee."

[180] "Indeed, if the underlying aim of producing these draft articles is to provide a set of guidelines for use in domestic courts, States, as well as their judges and practitioners, surely need to know what the Commission considers existing international law is. If the aim is to make proposals for States for 'new law' to be adopted by them, as they see fit, in treaty form, that that should be clearly stated. It is unfortunate that the Commission has not provided this clarification to date. If the Commission's work on this topic is going to contain proposals for progressive development of the law or 'new law', the United Kingdom considers that the appropriate form for the outcome of the Commission's work should be a treaty."

[181] "Sometimes a group of talented legal scholars and practitioners can develop a well- supported set of guidelines to address a difficult international legal issue. But sometimes the best answer, at least to part of the question, is: we don't know – the law is unsettled, State practice is sparse and uneven, and the issue is not capable of being properly resolved at this time. In that situation, we lawyers should follow a principle of our medical friends and resolve to do no harm. I suggest that the Commission revisit Draft Article 7, and the timeline for this project, with that important principle in mind."

[182] "We consider it important to make a comprehensive analysis of the practice of States on possible limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It should be noted that such an analysis should not only include consideration of situations that support an alleged tendency to restrict immunity, but also situations that disprove this trend. We believe that the information presented in the report does not prove the existence of this trend." [Translation by the authors]

[183] "Secondly, the six exceptions to immunity provided for in this draft article are not grounded in general international practice. When arguing for the exceptions to immunity, the fifth report of the Special Rapporteur and the relevant commentaries of the Commission cite very few domestic cases, and the only examples that have been examined are mostly from European and American jurisdictions. The practice of Asian States is not fully taken into consideration. Thirdly, the methodology used in the study is marred by tendentious selectiveness. For instance, many of the examples cited in the fifth report and commentaries in support of the establishment of exceptions to immunity are related to State immunity legislation or decisions of civil proceedings, and are irrelevant to the immunity of State officials from foreign criminal jurisdiction. Furthermore, there is a strong tendency toward selective invocation of international practice and judicial decisions, giving lopsided weight to a handful of cases in which immunity was denied while ignoring much more numerous instances of State practice and judicial decisions that upheld immunity. In addition, the references to certain judicial decisions selectively highlight the minority opinions against immunity, whereas the majority opinions in favour of immunity are not given due attention. In light of the above, China does not believe that the provisions of draft article 7 qualify as codification or progressive development of customary international law."

[184] "In the view of my delegation, the exceptions to the immunity *ratione materiae* retained by the Commission in its draft article 7 do not constitute rules of customary international law, in the absence of State practice and a sufficient opinio juris. The French delegation also regrets that the Commission has not set up a working group to examine in more detail the relevant State practice, the interpretation of which has divided the Commission even among the members who voted in favor of the adoption of draft article 7." [Translation by the authors]

[185] "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 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."

[186] "Even though the three additional crimes, namely torture, enforced disappearance and apartheid are doubtlessly heinous crimes, it would merit further examination whether there is sufficient state practice to assert legal basis for introducing them as separate crimes among the `crimes under international law in respect of which immunity ratione materiae shall not apply`."

[187] "The issues involved in the draft Articles are highly complex and politically sensitive for the States and therefore, diligence, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata* or *lex ferenda*). This would be clear only when the Commission will be able to show consistent State and treaty practice to support the exceptions asserted in draft article 7. Any new system, if not agreed, would be likely to harm inter-State relations and also undermine the very objective of ending impunity of most serious international crimes."

[188] "My delegation wishes to observe that there are only a few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. In the case of Indonesia, up to now, no single case relates to the limitations and exceptions, except in civil proceedings."

[189] "We believe that the Special Rapporteur has stepped into the path of progressive development of international law by proposing draft article 7 which does not benefit from sufficient State practice."

[190] "Ireland recalls the mandate of the Commission to codify and progressively develop international law. Whilst both aspects of its work are equally valid, Ireland believes that the focus of the Commission on any given item should initially be on establishing the current state of the law and only then should it move on to assess proposals for progressive development. This is particularly so with a topic such as the current one, which may give rise to practical issues that fall to be considered not only by Foreign Ministries and international lawyers, but also by domestic courts grappling with highly sensitive cases that may come before them. Therefore, irrespective of the form of the outcome of the Commission's work on this topic, the Commission should — in our view — articulate in a granular way and in respect of each draft Article or part thereof identify whether it seeks to codify customary international law or progressively develop it. I should emphasise that this desire for clarity does not imply that my delegation is opposed to progressive development, but rather that elements of such development, based on emerging trends, should be clearly signposted."

[191] "With respect to Draft Article 7 which was recently adopted by the Commission, stipulating exceptions to the applicability of immunity *ratione materiae*, Israel shares the view that there are no established norms of international law regarding exceptions or limitations to immunity from criminal jurisdiction of State officials, nor is there a trend towards the development of such norms."

[192] "First, there was debate on whether 'limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction' is an established customary international law (*lex lata*) or development of a new law (*lex ferenda*). The Commission could not reach common ground on this matter. Although the Commission does not necessarily determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion."

[193] "In this regard, my delegation requests that the Commission and the Special Rapporteur collect and examine relevant practices in a thorough manner."

[194] "Due to the aforesaid reasons, Malaysia views that draft article 7 (1) should be studied and deliberated further since the existing states' practices vary on the definition and characterization of the offences, in particular torture and enforced disappearances. Therefore, Malaysia maintains its reservations on these offences as an exception to immunity."

[195] "Our agreement with the conclusions of the Commission ends at this point. Having reviewed the report of the Commission as well as the report of the Special Rapporteur, we would like to note that they did not provide proof, especially regarding the practice of states, of the presence of exceptions to *ratione personae* immunity in the existing international law. Equally we cannot observe the trends toward exceptions in the practice of states. Exceptions listed in draft article 7 adopted by vote in the Commission are not confirmed by consistent practice of national or international courts or national legislation."

[196] "Finally, we empathize with the concerns expressed by several members of the Commission concerning the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction. In this respect, our delegation wishes to underscore the need to focus on safeguards to ensure that exceptions to immunity *ratione materiae* are not applied in a wholly subjective manner."

[197] "Nevertheless, Mr. Chairman, as we have already brought f01ward more generally in our previous intervention, we believe that on this subject, as in all the others, the Commission should make a clear distinction on whether it is acting on a *de lege lata* or a *de lege ferenda* basis. And, in any case, it should avoid giving the impression of being creating Law. Otherwise, the final effect will be precisely the opposite of the intended one. With regards to the particular issue we are now dealing with, my delegation has no doubts, far example, about the consideration as customary international law of the immunity of former Heads of State and of Government and former Ministers of Foreign Affairs. However, if we are being honest, we cannot say the same thing about the exceptions and limits to the immunity *ratione materiae*. In this regard, identifying (and perhaps also analysing) both State practice and *opinio iuris* proves particularly difficult. State practice is scarce and the necessary legal consensus cannot be found either. Such a lack of consensus can be discerned, firstly, from the fact that the International Court of Justice has avoided, at least twice, to pronounce' itself on the customary nature (or not) of this issue. As we all know, the lack of consensus became clearly evident within the Commission itself." [Translation by the authors]

[198] "In our view, it would be necessary to focus on existing law (*lex lata*) and to build up a solid foundation of existing State practice, as the starting point. The aspect of progressive development (*lege ferenda*) could be addressed at a subsequent stage."

[199] "The ILC's mandate includes both the codification and the progressive development of international law. We believe that it is important to distinguish the two aspects of the Commission's work as clearly as possible. For it is well known that the ILC's draft articles enjoy great practical authority and are often interpreted as statements of the law by domestic courts. […] After a careful review of the different sources cited in support of draft article 7, Switzerland is of the view that this high threshold has not been reached. We encourage the Commission to provide stronger evidence in support of draft article 7 or to indicate unambiguously that it falls within the area of progressive development."

[200] "My delegation is of the view that the work on this complicated and highly sensitive topic should be based on *lex lata* and State practice. In this respect, *de lege ferenda* proposals should only be made where there is international consensus in support of such proposals. Thailand will continue to follow closely the Commission's work on this topic and we encourage the Commission to explore the matter further, taking into account the views expressed by States in the Sixth Committee."

[201] "As noted in the Commission's annual report this year, the Special Rapporteur appears to consider that this topic should be approached from the perspective both of codification and the progressive development of international law (*lex ferenda*). As a general proposition, that is not inconsistent with the Commission's mandate; however, the Commission's annual report records that some members of the Commission queried whether draft article 7 in fact aimed to set out 'new law'. […] Accordingly, the United Kingdom considers it to be of vital importance with this particular topic that the Commission clearly indicates those draft articles

which it considers to reflect existing international law (*lex lata*) and those which it does not, whether on the basis of representing the progressive development of international law, or whether amounting to proposals for 'new law'. Indeed, if the underlying aim of producing these draft articles is to provide a set of guidelines for use in domestic courts, States, as well as their judges and practitioners, surely need to know what the Commission considers existing international law is. If the aim is to make proposals for States for 'new law' to be adopted by them, as they see fit, in treaty form, that that should be clearly stated. It is unfortunate that the Commission has not provided this clarification to date. If the Commission's work on this topic is going to contain proposals for progressive development of the law or 'new law', the United Kingdom considers that the appropriate form for the outcome of the Commission's work should be a treaty."

[202] "In the view of the United States, there is insufficient state practice to illustrate a 'clear trend,' let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal. [...] With all due respect to the Commission, the development of law in this area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7 exhibits none of these features, and risks creating the impression that the Commission is creating new law."

[203] Austria. Cuba, Estonia, France, Germany, Greece, Ireland, Israel, Japan. Republic of Korea, Mexico, The Netherlands, New Zealand, Peru, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Switzerland, United Kingdom, United States, , Norway (on behalf of the 5 Nordic Countries) .

[204] "At the same time, the Austrian delegation sees a clear link between exceptions and limitations to immunity on the one side and efficient procedural safeguards on the other. Already last year, we suggested that restrictions of immunity should be combined with procedural safeguards in order to avoid misuse and politically motivated criminal prosecutions of state officials in foreign countries."

[205] "We also believe it's important that we study further the procedural aspects of immunity where it refers to its review, invocation, possibility of waiver, and the procedure for such waivers, including other relevant elements." [Transcript from simultaneous translation, available at http://www.un.org/en/ga/sixth/72/ilc.shtml (last accessed 11th December 2017)].

[206] "As the Drafting Committee also acknowledged at the outset of its deliberations on draft article 7, there is a need to consider close relationship between the question of limitations and exceptions to immunity and the procedural aspects of immunity that will be addressed in the Special Rapporteur's next report."

[207] "The subject of applicable procedural provisions and safeguards, which will be examined next year, has a direct bearing on the question of exceptions to immunities." [Translation by the authors]

[208] "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 70th session of the ILC. [...] Finally, it is unfortunate that the Special Rapporteur was unable to present her sixth report on 'Procedural Safeguards' at the 69th 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."

[209] "In this respect, we welcome the fact that the Commission highlighted -both through the footnote inserted in Parts Two and Three of the Draft Articles and in the Commentary to Draft Article 7- the importance of procedural provisions and safeguards to prevent possible abuse in the exercise of foreign criminal jurisdiction over State officials. We would also like to commend the Special Rapporteur for her initiative to hold already this year informal consultations on this issue and we hope that the discussion next year of the procedural aspects of immunity, including guarantees and safeguards, will help to allay the above mentioned concerns."

[210] "For these reasons, Ireland would like to express the wish that the Commission continue to consider the basis for and content of draft Article 7 in conjunction with the provisions on procedures and safeguards at its next session with a focus on State practice."

[211] "Without prejudice to this position, we believe that should the ILC proceed with a discussion of exceptions - an effort which we do not encourage and which in any event would be an attempt to propose *lex ferenda* only - this must be done in conjunction with a discussion of safeguards rather than divorced from it."

[212] "During the current session, there were some discussions on procedural aspects of immunity and safeguards. However, it was not clear what the procedural aspects and safeguards would mean. Japan hopes that the sixth report of the Special Rapporteur will provide a rich explanation and references on these issues."

[213] "Meanwhile, the Special rapporteur is expected to present its next report concerning the procedural aspect of immunity. This issue is directly related to application of draft article 7 provisionally adopted this year."

[214] "Finally, the identification of the procedural rules related to the investigation and prosecution of an official who enjoys immunities is of great importance for Mexico. These rules are crucial to avoid abuses arising from political conflicts that result in undue interference with the activities of a state official, as well as to the detriment of due process."

[215] "In support of some members of the Commission, I believe that it is important to consider the substantive aspects of immunity *ratione materiae* in conjunction with the procedural aspects, as immunity remains a procedural matter."

[216] "Limitations and exceptions are closely linked to the procedural aspects of Immunity, and we look forward to the Special Rapporteur's next report on this topic."

[217] "Nonetheless, Peru considers it appropriate to emphasize the relevance of the aspects which are procedural in nature, which the Special Rapporteur has announced will be the subject of her next report; this, in the perspective of ensuring the existence of adequate guarantees when evaluating the invocation of immunity from criminal jurisdiction and considering the possibility of possible limits and exceptions to such immunity, as well as avoiding the risks of political manipulation."

[218] "Nonetheless, whether draft article 7 indeed draws balance between codification and progressive development needs further evaluation, particularly after assessing draft articles on procedural character of the immunity, that are to be discussed by the Commission in future."

[219] "To conclude, we encourage the Commission to continue its work on this topic and to complete next year its work on first reading, after considering the extremely important issue of procedural aspects and safeguards."

[220] "We agree that the lingering uncertainty over the scope of immunity requires the guiding work of Commission. However, as we move forward, we need to carefully consider the risk of inter-State tensions by asserting limitations and exceptions to immunity that States are not expected to accept by means of a treaty and for which there is no sufficient and coherent State practice. Therefore, in view of the potential of clearly defined procedural safeguards to prevent abuse in the exercise of jurisdiction by other States, we look forward to the next report of the Special Rapporteur on the procedural aspects of immunity and the Commission's considerations on the procedural safeguards applicable to the current draft articles, including article 7."

[221] "Before giving comments on the substance of the Commission's conclusions we would like to note with regret that the exceptions became a subject for consideration by the Commission before the procedural aspects of immunity. Since immunity is of a procedural nature (and thus it is totally different from material law, which determines the legitimacy of the person's conduct), the procedural aspects of its application are of priority importance. We believe that the formulation of procedural rules of application of immunity could remove a number of provisions that are used in favor of the need to record exceptions to the immunity of the officials."

[222] "Finally, we empathise with the concerns expressed by several members of the Commission concerning the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction. In this respect, our delegation wishes to underscore the need to focus on safeguards to ensure that exceptions to immunity *ratione materiae* are not applied in a wholly subjective manner."

[223] "We welcome the intention of the Special Rapporteur to deal in her sixth report to be presented at the next session of the Commission procedural provisions and safeguards. This will be an important issue to complement the material provisions adopted so far, and may be crucial for having workable and meaningful set of draft articles to be adopted and accepted by the States."

[224] "At the same time, Slovenia appreciates, on the one hand, the delicate nature of the issue and the need to ensure a balance between the sovereign equality of states and stability in international relations, and on the other hand, the need to prevent and punish the most serious crimes under international law. Slovenia considers that this balance would be achieved through a prudent approach to dealing with situations in which limitations and exceptions apply, as well as through a thorough examination of the procedural aspects of immunity, including procedural safeguards and guarantees, in order to address concerns regarding possible abuse."

[225] "Moving on to different considerations, we agree with Ms Escobar Hemández in that the issue of the limits or exceptions to immunity (or, if preferred, of the identification of the cases in which immunity *ratione materiae* does not operate) is an issue that is prior to the procedural aspects of immunity. However, issues such as State officials' waiver of immunity would not be part of those procedural issues, the treatment of which may be left for the end. Moving to the sphere of State immunities, here we can mention, as an example, the *United Nations Convention on Jurisdictional Immunities of States and Their Property* of 2004,

which addresses the waiver of immunity in Part II, on General Principles, and not in Part V, which includes procedural aspects." [Translation by the authors]

[226] "Finally, Mr. Chairman my delegation wholeheartedly agrees with the views that have been expressed in the Commission on the need to recognize the crucial relationship between possible exceptions to immunity *ratione materiae* and the procedural safeguards that would ensure that such exceptions would not be abused for partisan political purposes. In our view too, this Article should have been adopted only in conjunction with such safeguards - a view that has also been clearly expressed around this room during this debate. My delegation notes with satisfaction, however, that the Special Rapporteur has reiterated her conviction that the Commission should deal thoroughly with procedural issues, including necessary procedural guarantees and safeguards to prevent politicization and possible abuse in the exercise of criminal jurisdiction and that the Sixth Report would be devoted to procedural questions. We would emphasize the importance of the right of waiver in appropriate circumstances, as a key element in this regard."

[227] "First, the procedural nature of immunity obliges courts to address immunity as a preliminary matter. In relation to State immunity, the ICJ stated in the 2012 Germany v Italy case that 'the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem'. According to the ICJ, a national court would either be required to first establish whether the serious offense in question had been committed in order to determine whether the State could rely on its immunity from jurisdiction. At that point the foreign State would already have been subjected to the other State's jurisdiction. Or, the mere allegation that a grave offense had been committed would be sufficient to deny immunity, in which case even far-fetched proceedings with no grounding in facts would be allowed to continue. In our view, neither solution is fully satisfactory when it comes to criminal proceedings against foreign State officials. It would be useful for the ILC to comment on the matter. [...] In our view, before assessing the relevance of these cases for the purposes of exceptions, it is necessary to clarify whether the immunity of State officials exists independently of its invocation by the State, or respectively, whether a lack of invocation can be interpreted as an implicit waiver. For if the State in question never invoked immunity on behalf of its official, it is not clear whether immunity was not considered an obstacle because international crimes were in question, or because the State did not seem to claim it. This last point illustrates why in our view, it might be necessary to come back to the individual draft articles and commentary at a later stage, once all procedural and substantive questions have been addressed."

[228] "Finally, the United Kingdom notes that the Special Rapporteur's sixth report, to be submitted in 2018, will cover the procedural aspects of immunity. These aspects were ably dealt with by the former Special Rapporteur, Mr. Kolodkin, in his third report and will, as the Commission seems to accept, form a crucial part of the Commission's output on this topic."

[229] "The United States looks forward to the Special Rapporteur's next and final report on procedural provisions and safeguards, which the Commission is expected to take up next summer. The Special Rapporteur has recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States is very interested in this final report and supports a full discussion of its proposals. The United States feels strong that after the debate on procedural safeguards takes place, Draft Article 7 should be suspended until a consensus of the Commission can endorse all of the draft articles as sound and principled."

[230] "Finally, the Nordic countries recognize that the question of limitations and exceptions is related to that of procedural aspects of immunity. The Nordic countries would support procedural safeguards applicable to decisions made by independent prosecutors, in order to ensure that all relevant aspects of cases involving claims of immunity are taken into consideration. Further, we remain convinced that robust mechanisms based on the rule of law are important to avoid politically motivated proceedings or an illegitimate exercise of jurisdiction."

VII. Annex

UNGA, 6th Committee, 2017:

Statements of States on the topic Immunity of State officials from foreign criminal jurisdiction

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I. Statements by States

1. Australia

Thank you for a further opportunity to comment on the work of the International Law Commission. We will focus our comments on the issue of the immunity of State officials from foreign criminal jurisdiction.

State immunity is a basic principle of the international legal order, derived from the even more foundational principle of the sovereign equality of States. The immunity of State officials from foreign criminal jurisdiction is a corollary of State immunity. Australia appreciates the efforts of the Commission to bring greater clarity to this important area of international law. Australia recognises that the Commission has already made a valuable contribution to discussions on the topic, including through the adoption of a number of draft articles.

Australia regrets, however, that the Commission was unable to resolve the issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction by consensus, and that draft article 7 was provisionally adopted by vote. That draft article identifies a list of international crimes in respect of which immunity ratione materiae is said not to apply. Australia shares the concerns of those members who voted against the provisional adoption of the draft article that, in its current form, does not reflect any real trend in State practice, still less existing customary international law. Australia recognises that the Commission has a dual mandate of codification and progressive development of the law. It is, however, vital that where the Commission elects to advance a proposal that does not reflect existing law, that proposal be clearly identified as such. Australia regrets that this has not always occurred in the Commission's work on this topic.

Australia also emphasises the procedural nature of immunity ratione materiae and underscores the need for immunity not to be equated with impunity. Immunity ratione materiae operates to prevent the prosecution of State officials for international crimes in some, but not all, circumstances in some, but not all, forums. This does not mean that State officials enjoy impunity. State officials accused of international crimes may be prosecuted in their own State, before an international court with jurisdiction, or in the courts of a third party State after waiver of immunity.

Australia recognises that the international community can and must do more to ensure that State officials who commit international crimes are held to account. Australia does not, however, agree that draft article 7 represents an appropriate means of addressing this issue. Australia notes with interest the proposal by some members of the Commission that a treaty-based obligation to 'waive or prosecute' be established. Australia suggests that this is a concept deserving of further consideration by the Commission.

2. Austria

Mr. Chairman,

Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", the Austrian delegation appreciates the work of the Special Rapporteur and of the Commission on this highly important and certainly controversial topic. It welcomes the fact that the Commission was able to discuss the fifth report of Special Rapporteur Escobar Hernández presented already in 2016 which addressed the crucial issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Austria has taken note of the fact that the Commission even took the unusual step of voting on the adoption of proposed draft article 7.

As already expressed in past years, the Austrian delegation, in principle, is in favour of the proposed exceptions and limitations to immunity ratione materiae. However, my delegation understands the need for clarification whether these exceptions and limitations already reflect customary international law or are more of a progressive development character. We believe it would be useful if the Special Rapporteur and the Commission could make additional efforts to indicate to what extent the exceptions and limitations under consideration reflect already existing customary international law. Whatever the outcome of the work of the Commission on this topic, such indication would provide essential guidance for the assessment of the existence or not of immunity by national courts and other authorities.

In principle, Austria concurs with the idea expressed by the Special Rapporteur and reflected in paragraph 84 of the report that the Commission should support a developing trend in the field of immunity, rather than halt such a development. In particular, the Austrian delegation shares the view expressed in paragraph 109 of the report that perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution as their acts ultimately affect the international community as a whole. Indeed, the purpose of exceptions and limitations to immunity from criminal jurisdiction is the protection of human rights and the fight against impunity which are part of the fundamental interests of the international community.

At the same time, the Austrian delegation sees a clear link between exceptions and limitations to immunity on the one side and efficient procedural safeguards on the other. Already last year, we suggested that restrictions of immunity should be combined with procedural safeguards in order to avoid misuse and politically motivated criminal prosecutions of state officials in foreign countries. We wish to reiterate that one possible solution would be to create an international mechanism aiming at the prevention of such misuse. Such a mechanism could be inspired by the provisions on interim measures and other urgency procedures before international courts and tribunals, and the proposed immunity restrictions could be made conditional upon the

establishment of such a mechanism. However, we are also ready to consider other procedural safeguards which would guarantee an effective prosecution by national or international courts.

In that spirit, Austria looks forward to the Special Rapporteur's suggestions in her next report regarding procedural safeguards.

Regarding the crimes listed in draft article 7(1) provisionally adopted by the Commission, in respect of which immunity shall not apply, the Austrian delegation agrees with the approach to limit the exceptions to specific crimes under international law.

With regard to the crime of corruption my delegation sympathises with the view that corruption, although it usually involves some official activities, is itself an abuse of an official position for private gain and cannot therefore be regarded as an act performed in an official capacity. However, if this interpretation was generally accepted and immunity therefore not available in cases of alleged corruption, procedural safeguards would also in this context be necessary, as allegations of corruption are especially susceptible to misuse.

3. Belarus

a) Russian

VII. Иммунитет должностных лиц государства от иностранной уголовной юрисдикции

Уважаемый господин Председатель,

Делегация Беларуси выражает признательность Комиссии и специальному докладчику по данной теме, госпоже Консепсьон Эскобар Эрнандез, за проделанную работу.

Наша делегация исходит из необходимости максимально осмотрительного, консервативного подхода к данной теме. Несомненно, международная практика не стоит на месте и требует надлежащей рефлексии со стороны международного права. Вместе с тем рассматриваемая тема настолько тесно взаимосвязана с фундаментальными основами современного правопорядка, что чрезмерное увлечение прогрессивным развитием международного права в лучшем случае ограничится академическими дискуссиями без каких-либо практических последствий, а в худшем – усугубит правовую неопределенность, повлечет снижение уровня доверия и породит настороженность многих государств с последующими серьезными осложнениями.

Иммунитет должностных лиц государства от иностранной уголовной юрисдикции является обычной нормой международного права, вытекающая из принципа неприменения силы и угрозы силой. Любые исключения из обычной нормы международного права должны быть подтверждены наличием другой нормы обычного международного права.

В выявлении таких обычных норм об исключениях из иммунитета должностных лиц государств предлагаем использовать доклады Комиссии международного права по теме

«Выявление международного обычного права».

Считаем важным всесторонний анализ практики государств по возможным ограничениям и исключениям из иммунитета должностных лиц государств от иностранной уголовной юрисдикции. Следует отметить, что подобный анализ должен подразумевать не только рассмотрение ситуаций, поддерживающих якобы имеющую место тенденцию к ограничению иммунитетов, но и ситуации, опровергающие наличие этой тенденции. Полагаем, что представленная в докладе информация наличие указанной тенденции не доказывает. Необходимо отдавать себе отчет в том, что в случае надлежащей реализации привилегий и иммунитетов (а такой сценарий носит абсолютно преобладающий характер), спорных ситуаций, которые могли бы стать предметом анализа, просто не возникает. Эта позиция подтверждается и специальным докладчиком, отмечающей, что многие формы государственной практики, такие как решения государственных обвинителей или дипломатическая переписка, как правило, не носят общедоступного характера. При этом крайне сложно согласиться с выводом о том, что по этой причине они не могут рассматриваться в качестве государственной практики.

Кроме того, наша делегация достаточно скептически относится к использованию материалов международных *ad hoc* трибуналов в качестве подтверждения наличия практики государств. Не стоит забывать, что позиции данных учреждений по сути представляют позиции группы экспертов, ограниченных своим мандатом и рассмотрением конкретной ситуации со всей ее спецификой.

Что касается наличия норм об исключениях из иммунитета в некоторых международных договорах, мы исходим из того, что сам факт наличия специального договорно-правового исключения подтверждает наличие общего обычно-правового правила абсолютного иммунитета должностных лиц государств от иностранной уголовной юрисдикции.

Полагаем абсолютно необходимым четко указывать, являются ли те или иные выводы и предложения Комиссии кодификацией либо направлены ли на прогрессивное развитие международного права.

Также считаем важным обеспечить согласованность результатов работы Комиссии и определенный «синергетический эффект» параллельно разрабатываемых тем. Полагаем, что г-ном Шоном Мерфи серьезнейшим образом проработаны различные вопросы преступлений против человечности. Эти наработки следует использовать и в данной теме. Например, отразить в комментариях нормы об установлении национальной юрисдикции, обязательства судить или выдавать и другие.

Полагаем недоказанной норму о том, что иммунитет ratione personae прекращает существовать, когда лицо оставляет государственную должность. Иммунитет имеет процессуальное, а не материальное значение. Поэтому полагаем, что и после завершения

полномочий должностных лиц иностранные государств не имеют права их судить и решать вопрос о том, действовали они в официальном или личном качестве. По нашему мнению решение этих вопросов находится в исключительной юрисдикции государства, которые представляли соответствующие должностные лица.

В связи с этим в статье 4 предлагаем отразить, что иммунитет *ratione personae* также сохраняется и после того, как должностные лица оставили свою должность в отношении действий, совершенных во время ее занятия. В связи с этим предлагаем пункт 3 статьи 4 исключить.

Также требуется устранить логическую несогласованность в статье 4, так как сейчас пункт 1 статьи 4 ограничивает иммунитет *ratione personae* сроком фактического занятия соответствующей должности, тогда как пункт 2 распространяет его действие и на акты, совершенные до занятия должности.

Статья 7 носит несбалансированный характер. Вряд ли стоит рассчитывать на то, что эта статья будет принята многими государствами. В случае попытки ее применения эта норма может создать почву для серьезных злоупотреблений и нарушений принципов суверенного равенства государств, неприменения силы и угрозы силой, мирного разрешения споров.

Полагаем, что отсутствуют достаточные основания для включения в статью 7 пыток и насильственных исчезновений наряду с геноцидом, военными преступлениями и преступлениями против человечности. В отличие от первых последние не зря выделены в категорию преступлений по международному праву в силу их особой опасности для человечества в целом. Например, Проект статей по преступлениям против человечности совершенно обоснованно распространяется не на любое преступление только лишь по причине его упоминания в международном договоре, а на те из них, которые характеризуются особой опасностью для человечества, масштабом, систематичностью и т.п.

Рассчитываем, что замечания государств по принципиально важной теме иммунитета должностных лиц от иностранной уголовной юрисдикции будут внимательно рассмотрены Комиссией. Именно конструктивное взаимодействие с будущими правоприменителями и учет позиций государств в работе Комиссии является залогом не только жизнеспособности разрабатываемых Комиссией документов, но и сохранения ее заслуженного за семьдесят лет непререкаемого авторитета.

b) English

VII. Immunity of state officials from foreign criminal jurisdiction

Dear Mr. Chairman,

The delegation of Belarus expresses its gratitude to the Commission and to the special rapporteur on the topic, Ms. Concepción Escobar Hernández, for the work done.

Our delegation proceeds from the need for the most prudent, conservative approach to this topic. Undoubtedly, international practice does not stand still and requires proper reflection on the part of international law. At the same time, the subject under consideration is so closely interrelated with the fundamental principles of the modern legal order that the excessive interest in the progressive development of international law will at best be confined to academic discussions without any practical consequences, and at worst will exacerbate legal uncertainty, entail a decrease in the level of trust and generate the alertness of many states with subsequent serious complications.

The immunity of State officials from foreign criminal jurisdiction is a customary rule of international law, stemming from the principle of non-use of force and the threat of force. Any exceptions to the customary rule of international law must be confirmed by the existence of another rule of customary international law.

In the identification of such customary rules on exceptions to the immunity of State officials, we suggest using the reports of the International Law Commission on the topic "Identification of international customary law".

We consider it important to make a comprehensive analysis of the practice of States on possible limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It should be noted that such an analysis should not only include consideration of situations that support an alleged tendency to restrict immunity, but also situations that disprove this trend. We believe that the information presented in the report does not prove the existence of this trend. It is necessary to realize that in the case of proper implementation of privileges and immunities (and such a scenario is absolutely predominant), disputable situations that could be the subject of analysis simply do not arise. This position is also confirmed by the special rapporteur, who notes that many forms of state practice, such as decisions by public prosecutors or diplomatic correspondence, are generally not publicly available. It is extremely difficult to agree with the conclusion that for this reason they cannot be considered as state practice.

Moreover, my delegation is skeptical about using the materials of the international ad hoc tribunals as evidence of the existence of State practice. Do not forget that the positions of these institutions essentially represent the positions of a group of experts limited by their mandate and considering the specific situation with all its specifics.

Regarding the existence of rules on exceptions to immunity in certain international treaties, we proceed from the fact that the very existence of a special treaty-legal exception confirms the existence of a general customary rule of absolute immunity for State officials from foreign criminal jurisdiction.

We believe it is absolutely necessary to clearly indicate whether any of the conclusions and proposals of the Commission are codification or are aimed at the progressive development of

international law.

We also consider it important to ensure the consistency of the results of the work of the Commission and a certain "synergistic effect" of the topics being developed in parallel. We believe that Mr. Sean Murphy has thoroughly worked through various issues of crimes against humanity. These developments should be used in this topic. For example, reflected in the comments on the norms on the establishment of national jurisdiction, the obligation to judge or extradite and others.

We assume an unproven rule that immunity ratione personae ceases to exist when a person leaves public office. Immunity has procedural, not material significance. Therefore, we believe that even after the end of the authorities of officials, foreign states have no right to judge them and decide whether they acted in an official or personal capacity. In our opinion, the solution of these issues is in the exclusive jurisdiction of the state, which was represented by the relevant officials. In this connection, in Article 4, we propose to reflect that the immunity ratione personae also persists even after the officials have left their position with respect to the acts committed during its employment. In this regard, we propose to delete clause 3 of article 4.

It is also necessary to eliminate the logical inconsistency in article 4, since now article 1 (1) restricts immunity ratione personae to the actual occupation of the relevant post, whereas paragraph 2 extends its validity to acts committed prior to the occupation of the post.

Article 7 is unbalanced. It is hardly worth counting on the fact that this article will be adopted by many states. In the case of an attempt to apply it, this rule may pave the way for serious abuses and violations of the principles of the sovereign equality of states, the nonuse of force and the threat of force, the peaceful settlement of disputes.

We believe that there are insufficient grounds for including torture and enforced disappearances in article 7, along with genocide, war crimes and crimes against humanity. Unlike the former, the latter are not in vain identified as crimes under international law because of their particular danger to humanity as a whole. For example, the draft articles on crimes against humanity are quite justifiably applicable not to any crime only because of its mention in an international treaty, but to those that are of particular danger to humanity, scale, systemativeness, etc.

We expect that the comments of the states on the fundamentally important topic of immunity of officials from foreign criminal jurisdiction will be carefully considered by the Commission. It is a constructive interaction with future law enforcers and consideration of the positions of the states in the work of the Commission is the pledge not only of the viability of the documents being developed by the Commission, but also of preserving its unquestioned authority deserved for seventy years.

4. Chile

a) Spanish

En segundo lugar, quisiera referirme al capítulo VII del informe sobre "Inmunidad de jurisdicción penal extranjera de los funcionarios del Estado". Este año, la Relatora Especial, Sra. Concepción Escobar Hernández, presentó su quinto informe, que trata sobre la cuestión de los límites y excepciones a la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado.

El informe señala que respecto de la inmunidad ratione personae, no se ha podido identificar una norma consuetudinaria que dé cuenta de que exista algún límite o excepción respecto de ella. En cuanto a la inmunidad ratione materiae, la Relatora Especial llega a la conclusión que en los casos de comisión de crímenes de derecho internacional, esta inmunidad no se aplica.

Luego de que la Comisión remitiera el proyecto de artículo 7 al Comité de Redacción, la Comisión mediante votación aprobó el proyecto de artículo 7 referido a los casos en que no se aplica la inmunidad ratione materiae. Asimismo, en el actual período de sesiones, fueron aprobados los comentarios a dicho artículo.

Como en todos los informes anteriores, la Relatora Especial ha realizado un riguroso trabajo al examinar la práctica de los Estados, la jurisprudencia internacional y la labor previa de la Comisión, así como, las legislaciones nacionales. Además ha tenido en cuenta la información recibida de los Gobiernos en respuesta a las preguntas planteadas por la Comisión y las declaraciones orales de los Estados en esta Sexta Comisión.

El quinto informe de la profesora Escobar Hernández ha sido objeto de un interesante debate al interior de la Comisión, en el cual incluso se consideró el alcance de la labor de la propia Comisión ya sea en su función codificadora o de desarrollo progresivo del Derecho Internacional. Tal como lo afirmó mi delegación el año pasado el asunto de las limitaciones y excepciones a la inmunidad de la jurisdicción penal extranjera no es un asunto fácil, toda vez que respecto de él entran en juego principios fundamentales como son los de la igualdad soberana de los Estados, por un parte y por la otra, la lucha contra la impunidad de graves crímenes internacionales que contempla el actual derecho internacional.

Mi delegación comparte el criterio señalado por la Relatora Especial en su informe y recogido por la Comisión en cuanto a la existencia de una clara tendencia en el derecho internacional general a poner límites a la inmunidad *ratione materiae* de que gozan los funcionarios estatales en el caso que ellos cometan alguno de los crímenes más atroces que ha conocido la humanidad. Es por esto, que a nuestro juicio, como parte de la labor de la Comisión, los límites y excepciones a la inmunidad *ratione materiae* deben quedar bien asentados, como ya es tendencia en la práctica internacional. Aceptar lo contrario, sería acercar la inmunidad a la impunidad.

Si bien como se ha planteado, la inmunidad es una cuestión procesal que podría ser separada de las normas sustantivas sobre comisión de delitos, creemos que es necesario preservar la relevancia que tiene la persecución y castigo de los crimenes a los que se refiere el proyecto de artículo 7 aprobado provisionalmente. Por lo demás, en el próximo informe de la Relatora Especial, los aspectos procesales de las inmunidades aquí tratadas, serán abordados en profundidad.

Como lo señala el párrafo 1 del proyecto de artículo 7 aprobado provisionalmente por la Comisión:

"La inmunidad *ratione materiae* respecto del ejercicio de la jurisdicción penal extranjera no se aplica en relación con los siguientes crímenes de derecho internacional:

a) crimen de genocidio;

b) crímenes de lesa humanidad;

c) crímenes de guerra;

d) crimen de *apartheid*;

e) tortura;

f) desapariciones forzadas"

Estamos de acuerdo con la aprobación provisional de este párrafo, el cual refleja adecuadamente la actual tendencia en esta materia en el derecho internacional. Si bien es cierto que los crímenes de tortura, apartheid y desaparición forzada de personas al tenor del artículo 7 del Estatuto de Roma de la Corte Penal Internacional ya se encuentran comprendidos dentro del concepto de crimen de lesa humanidad, entendemos que su tratamiento autónomo, como se propone, se debería a que no en todos los casos la comisión de estos crímenes -que están consagrados en Convenciones Internacionales específicas- cumplirá con el umbral necesario para considerarlo como un crimen de lesa humanidad, esto es, que sean cometidos como parte de un ataque generalizado sistemático contra una pobiación civil y con conocimiento de dicho ataque.

En todo caso, quisiera ahora manifestar que el informe que nos presenta la Relatora Especial, Sra. Escobar Hernández es excelente y merece todos nuestros elogios y felicitaciones. Esperamos con ansias su sexto informe sobre la materia y la alentamos a seguir adelante desarrollando este tema, de tanta importancia práctica hoy en diá.

b) English

Secondly, I'm going to refer to Chapter VII of the report on "Immunity of state officials from foreign criminal jurisdiction". This year, the Special Rapporteur Concepcion Escobar Hernandez presented her fifth report on the question of limitations and exceptions to the immunity of state officials.

The report mentions that with regard to immunity ratione personae, we have not identified a customary norm which accounts for limitations or exception. With regard to immunity ratione materiae, the Special Rapporteur concludes, that in cases of commission of crimes under international law, this immunity does not apply.

After the Commission had sent the Draft Article 7 to the Drafting Committee, the Commission adopted by vote Draft Article 7 referring to the cases in which immunity ratione materiae does not apply. Likewise, in the current session, commentaries to that article were approved.

As in all previous reports, the Special Rapporteur has undertaken rigorous work considering the practice of states, international jurisprudence and the previous work of the Commission as well as national legislations. It has also taken into account the information received by the governments in response to the questions raised by the Commission and the oral statements made by States in this Sixth Committee.

The fifth report of professor Escobar Hernandez has been the object of an interesting discussion in the Commission, which also considered the reach of the work of the Commission itself, be in its function of codification or progressive development of international law. As my delegation has affirmed last year, the matter of limitations and exceptions to immunity from foreign criminal jurisdiction is not easy, since in their respect fundamental principles enter into play such as the sovereign equality of states on the one hand and on the other, the fight against impunity in the case of serious crimes under international law.

My delegation shares the criterion mentioned by the Special Rapporteur in her report welcomed by the Commission on the existence of a clear trend in general international law to placing limits to the immunity ratione materiae enjoyed by state officials when they commit some of the more atrocious crimes known by mankind.

For this reason, in our view and as part of the work of the Commission, the limits and exceptions to the immunity ratione materiae must be well established, which is the trend in international practice. To accept otherwise, Mr Chairman, would bring immunity close to impunity.

While, as we have said, immunity is a procedural matter which could be separated from substantive rules on the commission of crimes, we believe that it is necessary to maintain the relevancy of the prosecution and punishment for crimes referred to in draft article 7 provisionally adopted.

Furthermore, in the next report of the Special Rapporteur, procedural aspects of immunities dealt with here will be addressed in depth.

As mentioned in paragraph 1 of draft article 7 provisionally adopted by the Commission:

“Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;

(f) enforced disappearance."

We agree with the provisional adoption of this paragraph which appropriately reflects a current trend of the matter in international law. While it is true, that the crimes of torture, apartheid and enforced disappearance under Article 7 of the Rome Statute of the ICC are already included in the concept of crime against humanity, we understand that the autonomous treatment as proposed would be due to the fact that not in all cases the commission of these crimes which are included in special international conventions would meet the necessary threshold to be considered a crime against humanity, that is for them to be committed as part of a systematic attack against civilian population and with knowledge of that attack.

In any event, I would now like to say that the report presented by the Special Rapporteur Mrs Escobar Hernandez is excellent and deserves our full praise and congratulations. We eagerly await her sixth report and encourage her to continue to develop this matter which is so important in practice today.

5. China

Mr. Chairman,

With respect to "Immunity of State officials from foreign criminal jurisdiction", the Chinese delegation thanks the Commission and the Special Rapporteur for their efforts. At this year's session, the Commission adopted by vote draft article 7, which identifies six crimes under international law as exceptions to the immunity ratione materiae of State officials, namely crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance. In our opinion, this draft article is very problematic, and we wish to make the following comments.

First of all, the hasty adoption of the draft article without thorough discussion seems inappropriate. We have noted that before the deliberation on this issue could run its course, the Commission rushed to a vote and adopted the draft article with almost one third of the members voting against it. We suggest that the Commission proceed with caution and prudence, and continue with in-depth exchange of views on the issue of exceptions to seek the broadest possible consensus. The Commission should avoid tabling a draft article on which there exists extensive controversy since it may undermine the authority of any potential outcome in this regard.

Secondly, the six exceptions to immunity provided for in this draft article are not grounded in general international practice. When arguing for the exceptions to immunity, the fifth report of the Special Rapporteur and the relevant commentaries of the Commission cite very few domestic cases, and the only examples that have been examined are mostly from European and American jurisdictions. The practice of Asian States is not fully taken into consideration.

Thirdly, the methodology used in the study is marred by tendentious selectiveness. For instance, many of the examples cited in the fifth report and commentaries in support of the establishment of exceptions to immunity are related to State immunity legislation or decisions of civil proceedings, and are irrelevant to the immunity of State officials from foreign criminal jurisdiction. Furthermore, there is a strong tendency toward selective invocation of international practice and judicial decisions, giving lopsided weight to a handful of cases in which immunity was denied while ignoring much more numerous instances of State practice and judicial decisions that upheld immunity. In addition, the references to certain judicial decisions selectively highlight the minority opinions against immunity, whereas the majority opinions in favour of immunity are not given due attention.

In light of the above, China does not believe that the provisions of draft article 7 qualify as codification or progressive development of customary international law. The unfair denial of immunity of State officials will seriously undermine the principle of sovereign equality and very likely become a tool for politically motivated litigations, which will result in grave damage to the stability of international relations. The Commission must fully recognize the seriousness of this issue and its potential harm, focus on comprehensively analyzing existing international practice and proceed in a cautious and prudent manner.

6. Cuba

a) Spanish

Señor Presidente,

Permítame pasar al proyecto de artículos sobre "Inmunidad de jurisdicción penal extranjera de los funcionarios del Estado". Quisiéramos felicitar a la relatora especial, Sra. Concepción Escobar Hernández, por el trabajo realizado. Este es un tema muy polémico y que a pesar del análisis jurídico que requiere, existe un matiz político que complejiza el mismo.

La delegación cubana está de acuerdo con la Inmunidad ratione personae durante el perído en que se encuentren en ejercicio de su cargo, como jefe de Estado, jefe de Gobierno y Ministro de Relaciones Exteriores.

Según el informe, en la práctica existe la tendencia a considerar la comisión de crímenes de derecho internacional como una barrera a la aplicación de la inmunidad ratione materiae de jurisdicción penal extranjera de los funcionarios del Estado, ya que esos delitos no eran actos

realizados a título oficial, eran graves o menoscababan los valores y principios reconocidos por la comunidad internacional en su conjunto.

Nos parece acertado que en el párrafo 1 del proyecto de artículo 1 se haya seguido el modelo de la Convención de las Naciones Unidas sobre las Inmunidades Jurisdiccionales de los Estados y sus Bienes. Preferimos una lista de delitos pues de lo contrario una formulación general pudiera dar lugar a interpretaciones diferentes en su aplicación.

Reconocemos que la cuestión más polémica es determinar si existe o no límites y excepciones a la inmunidad de los funcionarios del Estado por lo que consideramos que se debe profundizar por parte de la CDI en la práctica de los Estados y de Cortes o Tribunales internacionales al respecto.

Consideramos importante que se profundice en el aspecto procesal de la inmunidad en lo que se refiere a su examen, invocación, posibilidad de su renuncia y el procedimiento para dicha renuncia, entre otros elementos pertinentes.

Finalmente, la delegación cubana considera que es un tema que requiere mayor estudio y quedaría a la espera del sexto informe para su revisión.

b) English

Mister President, we would now like to continue with the draft articles on immunity of of State officials from foreign criminal jurisdiction. We wish to congratulate the Special Rapporteur Concepción Escobar Hernández for her work. This is a very controversial issue and despite the legal analysis that is requires, there is a somewhat political dimension that makes the process more complicated.

Our delegation is in agreement with immunity ratione personae and that it should apply to persons during their term of office, as head of State, head of government and minister of foreign affairs.

According to the report, in practice there is a current trend towards considering the commission of crimes under international law as a barrier to the application of immunity ratione materiae from foreign criminal jurisdiction, since these crimes are not carried out in their official capacity, rather they are serious and undermine the values and principles recognized by the international community as a whole.

Our view is that the approach in paragraph 1 is correct in that it follows the model of the UN Convention on Jurisdictional Immunities of States and Their Property. We prefer a list of crimes since without one, a general formulation could give rise to different interpretations during enforcement.

We recognize that the most controversial issue is determining whether or not there are limits and exceptions to immunity of state officials from foreign criminal jurisdiction and we believe this

requires further work in the ILC on the practice of States and International Courts and Tribunals.

We also believe it's important that we study further the procedural aspects of immunity where it refers to its review, invocation, possibility of waiver, and the procedure for such waivers, including other relevant elements.

Finally Sir, the Cuban delegation is of the view that this is a topic that requires further study and we await the opportunity to review the sixth report on this topic.

7. Czech Republic

Mr. Chairman,

Let me now turn to the topic "Immunity of State officials from foreign criminal jurisdiction". The Czech Republic would like to express once again its appreciation to the Special Rapporteur, Professor Concepción Escobar Hernández, for her fifth report containing extensive analysis of well-documented examples of State practice on exceptions to immunity *reatione materiae*.

This year's discussions in the Commission on this report and on draft article 7, concerning the crimes under international law in respect of which immunity *ratione materiae* should not apply, clearly demonstrate that it is sometimes an uneasy task to identify established rules of customary international law, since relevant State practice may be varied and legal issues complex and sensitive. The exceptions to immunity *ratione materiae* seem to be an example of such a controversial issue. Having said that, the Czech Republic welcomes the adoption of draft article 7, since, in our opinion, the draft article, in principle, properly reflects the trend in State practice which supports the existence of an exception to immunity *ratione materiae* when crimes under international law, as well as other so-called official crimes defined in relevant treaties, are committed. The Czech Republic also appreciates that the commentary to this draft article elucidates in clear terms several aspects of this contentious issue.

As indicated in the Commission's commentary, it seems that the exceptions to immunity *ratione materiae* are, inter alia, based on the existence of jurisdictional regimes providing for international cooperation and judicial assistance between States, imply that State officials should not be able to invoke immunity *ratione materiae* for such crimes in criminal proceedings before foreign courts. Therefore, it may be useful if the Commission further elaborated in more detail on the relationship between the concrete scope and application of extraterritorial criminal jurisdiction over these crimes, as reflected in the practice of States under relevant treaties and customary international law, and the respective exceptions to immunity *ratione materiae* from foreign criminal jurisdiction.

As regards the issues which are not contained in the draft article 7, the Czech Republic welcomes the decision *not to* include the crime of aggression and and the crime of corruption in the text of draft article 7. It seems that the crime of aggression is subject to special jurisdictional regime, as reflected, *inter alia*, in the Commission's 1996 Draft Code of Crimes against the Peace and Security

of Mankind, according to which the crime of aggression should be subject only to the jurisdiction of competent international criminal court or of the national courts of the alleged perpetrator. As regards the crime of corruption, the Czech Republic shares the view, expressed in the commentary to this draft article, that corruption should not be regarded as an act performed in an official capacity and therefore does not need to be included among the crimes for which immunity does not apply.

In addition, the Czech Republic regards as prudent that the Commission did not include in the text of draft article 7 the exception concerning crimes committed by foreign officials in the territory of the forum State. The Czech Republic shares the view that these crimes are subject to the territorial jurisdiction of the forum State and, as such, should be dealt with, in principle, as any other ordinary non-official crime. However, in this context, it may be advisable to study in more detail the legal consequences of a situation in which the home State of the perpetrator would assume the responsibility under international law for the illegal act committed by his official in the territory a foreign State.

Lastly, the Czech Republic would like to highlight the conclusion by the Commission according to which the exceptions to immunity *ratione materiae* do not apply to or limit in any way immunity of State officials *ratione personae*. In its commentary, the Commission expressly mentions this principle with regard to customary immunity *ratione personae* of Heads of States, Heads of Government and Ministers of Foreign Affairs. The Czech Republic would like to add that the same principle applies also to immunity *ratione personae* enjoyed by persons connected with special missions, diplomatic missions, consular posts, international organizations and military forces of a State. The preservation of these immunities is guaranteed by the draft article 1, paragraph 2 of the present draft articles; however, it seems useful to reaffirm this fact in the commentary to draft article 7.

Thank you, Mr. Chairman.

8. El Salvador

a) Spanish

Señor Presidente:

En relación con el tema de la "inmunidad de jurisdicción penal extranjera de los funcionarios del Estado", la República de El Salvador desea en primer lugar, agradecer a la relatora especial Sra. Concepción Escobar Hernández, por la presentación de su quinto informe, y por los avances realizados en cuanto al tema relativo a los limites y excepciones de la inmunidad de la jurisdicción.

En particular, deseamos reiterar nuestras felicitaciones por haber iniciado el estudio de los limites y excepciones a la inmunidad, el cual es un aspecto central de este proyecto de artículos que debe

ser analizado en coherencia con el derecho internacional contemporaneo y, en particular, con el conjunto de principios y valores de la comunidad internacional.

Desde el inicio del tema, nuestra delegación apoyó la necesidad de mantener una postura equilibrada respecto a la figura de la inmunidad de la jurisdicción penal extranjera, particularmente, cuando se trata de determinar los supuestos en los cuales, esta última no sería aplicable *ratione materiae*. En tal sentido, apoyamos la labor destinada a identificar, entre tales supuestos, aqueilos címenes más graves de trascendencia para la comunidad internacional en su conjunto.

Así, con la Identificación de tales supuestos de excepción a la inmunidad, consideramos que la Comisión respeta el fundamento de principios del derecho internacional, tales como: el principio de igualdad soberana de los Estados, contenido en el artículo dos, párrafo uno de la Carta de las Naciones Unidas; y, el principio de responsabilidad penal individual, cuya formación juridica deriva desde la antigua jurisprudencia del Tribunal de Núremberg, hasta constituir en la actualidad, una categoría juridica del derecho penal internacional.

Señor Presidente:

En cuanto a la formulación del listado de crimenes contemplados en el párrafo 1 del proyecto de artículo 7, tenemos dificultad en compartir la postura de algunos miembros de la Comisión, referida a exigir que se compruebe la tendencia de una práctica consuetudinaria respecto de cada uno de estos, ya que la labor de la Comisión no solamente se refiere a la codificación del Derecho Internacional, sino también a impulsar su desarrollo progresivo, según el artículo 1, párrafo 1 del Estatuto de la Comisión de Derecho Internacional.

Asimismo, observamos con satisfacción la decisión de la Comisión relativa a exceptuar la aplicación de la inmunidad *ratione personae* para aquellos casos en los que los funcionarios del Estado hubiesen cometido uno de los crímenes enlistados en el citado párrafo 1 del proyecto de artículo 7; por lo que la referida inmunidad no será aplicable cuando tales funcionarios cometan dichos crímenes en la ejecución de sus deberes oficiales y durante el ejercicio de su cargo.

La importancia de impulsar esta labor en la materia de los limites y excepciones a la inmunidad de la jurisdicción penal, reside particularmente en la necesidad de no dejar vacíos en los cuales pueda manifestarse la impunidad ante la comisión de graves crímenes internacionales.

En tal sentido, nuestra delegación comparte la inclusión del conjunto de delitos previstos en el Estatuto de Roma, es decir, los crímenes de lesa humanidad y el genocidio, así como la desaparición forzada, el *apartheid*, la tortura como categorías independientes; ello debido a que existen tratados internacionales que reflejan su especial gravedad y la obligación de proceder a su juzgamiento.

En cuanto al debate sobre la inclusión del crimen de agresión, nuestra delegación considera que

no es preciso concretar una decisión sobre su inclusión o no, al párrafo 1 del proyecto del artículo 7, dado que este es uno de los crímenes respecto de los cuales, la Asamblea de los Estados Parte del Estatuto de Roma, aún no ha adoptado decisión para activar la competencia de la Corte sobre este tipo de delito; por lo que no existe un consenso necesario al respecto.

Sobre la discusión relativa a la posibilidad de incluir o no el delito de corrupción, estimamos válida la decisión de la Comisión de no incluirlo en el párrafo 1 del proyecto de artículo 7; pues, si bien es cierto que la naturaleza de este delito representa uno de los problemas de especial gravedad que afecta la estructura institucional del Estado de Derecho, la diversidad de conductas típicas que el referido delito comprende, dificulta la configuración de supuestos en los que se limita o exceptúa la aplicación de la inmunidad de la jurisdicción penal extranjera *ratione materiae*.

Finalmente, nuestra delegación se permite reiterar que, en cuanto al lenguaje utilizado en el proyecto de artículos en su versión en español, la expresión: "los funcionarios se benefician de la inmunidad [...]" contiene una connotación negativa que genera problemas al momento de interpreter los alcances de la aplicación de dicha inmunidad; por lo que, sugerimos se utilice el término "gozan de inmunidad", en congruencia con la redacción que ha sido utilizada para otros instrumentos jurídicos, tales como: la Convención de Naciones Unidas sobre Inmunidades y Privilegios.

b) English

In relation to the topic of "Immunity of foreign criminal jurisdiction of State officials", the Republic of El Salvador wishes, first of all, to thank the special rapporteur, Mrs. Concepción Escobar Hernández, for the presentation of her fifth report, and for the progress made regarding the issue of limits and exceptions to the immunity from jurisdiction.

In particular, we wish to reiterate our congratulations for having initiated the study of the limits and exceptions to immunity, which being a central aspect of these draft articles must be analyzed in coherence with current international law and in particular, with the set of principles and values of the international community.

From the beginning of the topic, our delegation supported the need to maintain a balanced position regarding the immunity from foreign criminal jurisdiction, particularly when it comes to determining the cases in which immunity would not be applicable ratione materiae. In this respect, we support the work aimed at identifying among such cases those crimes which are most serious for the international community as a whole.

Thus, we think that the Commission by identifying such cases of exception to immunity, respects the basis of principles of international law, such as: the principle of sovereign equality of States, contained in article 2(1) of the Charter of the United Nations; as well as the principle of individual

criminal responsibility, the legal background of which derives from the old jurisprudence of the Nuremberg Tribunal and is nowadays a legal category of international criminal law.

Regarding the formulation of the list of crimes contemplated in paragraph 1 of the draft article 7, we have difficulty sharing the position of some members of the Commission, which refers to requiring that the tendency of a customary practice be verified with respect to each one of them, since the work of the Commission not only refers to the codification of International Law, but also to promote its progressive development, according to article 1(1) of the Statute of the International Law Commission.

We also note with satisfaction the decision of the Commission to exempt the application of immunity ratione personae in those cases in which State officials had committed one of the crimes listed in the cited paragraph 1 of draft article 7; therefore, the aforementioned immunity will not be applicable when such officials commit crimes in the execution of their official duties and during the exercise of their office.

The importance of promoting this work on the subject of the limits and exceptions to the immunity from criminal jurisdiction, resides particularly in the need to leave no gaps in which impunity for the commission of serious international crimes can manifest itself.
In this regard, our delegation shares the inclusion of all the offenses set forth in the Rome Statute, that is, crimes against humanity and genocide, as well as enforced disappearance, apartheid and torture as independent categories; this is because there are international treaties that reflect their special gravity and the obligation to realize their trial.

With regard to the debate on the inclusion of the crime of aggression, our delegation considers that it is not necessary to make a decision on whether or not to include it in paragraph 1 of draft article 7, given that this is one of the crimes in respect of which the Assembly of States Parties to the Rome Statute has not yet adopted a decision to activate the jurisdiction of the Court over this type of crime; since there is no necessary consensus in this regard.

As to the discussion regarding the possibility of whether or not to include the crime of corruption, we consider valid the decision of the Commission not to include it in paragraph 1 of draft article 7; therefore, while it is true that the nature of this crime represents one of the problems of particular gravity that affects the institutional structure of the Rule of Law, the diversity of typical behaviors that the crime includes makes it difficult to compose the cases of limitation or exception to the application of immunity from foreign criminal jurisdiction ratione materiae.

Finally, our delegation would like to reiterate that regarding the language used in the draft articles in the Spanish version, the expression "los funcionarios se benefician de la inmunidad […]" contains a negative connotation that generates problems for the moment of interpreting the scope of the application of said immunity; therefore, we suggest that the term "gozan de inmunidad" be used, which is consistent with the wording that has been used for other legal instruments, such as:

the Convention on the Privileges and Immunities of the United Nations.

9. El Salvador (on behalf of CELAC)

a) Spanish

La CELAC saluda la labor realizada por la Comisión durante su última sesión y toma nota del proyecto de artículos que fueron adoptados en el marco de los siguientes temas: 1) De los Crimenes de Lesa Humanidad, en primera lectura, se adoptó el proyecto de quince artículos, sus respectivos anexos y párrafos de preámbulo, entre los cuales, cabe destacar el reconocimiento que se le atribuyó a la prohibición de Crímenes de Lesa Humanidad como norma perentoria de derecho internacional general; 2) En cuanto a "la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado", la Comisión adoptó el proyecto de listado de crímenes respecto de los cuales, la inmunidad *ratione materiae* no procede y, 3) en "la sucesión de Estados en relación con la responsabilidad del Estado" examinó el primer reporte presentado por el relator en este tema y se adoptaron provisionalmente los artículos 1 y 2 contenidos en dicho informe.

b) English

CELAC welcomes the work done by the Commission during its last session and takes note of the draft articles adopted under the following themes: 1) Crimes against Humanity, at first reading, the fifteen draft articles, their respective annexes and preambular paragraphs, including the recognition attributed to the prohibition of Crimes against Humanity as a peremptory norm of general international law; (2) With regard to "Immunity of State officials from foreign criminal jurisdiction ", the Commission adopted the draft list of crimes in respect of which immunity ratione materiae is not applicable; and (3)" Succession of States in respect of State responsibility" the Commission examined the first report submitted by the rapporteur on this subject and articles 1 and 2 contained in that report were provisionally adopted.

10. Estonia

Mr Chairman,

On immunity of State officials from foreign criminal jurisdiction, I would firstly like to express Estonia's appreciation to the Special Rapporteur Ms Concepción Escobar Hernández for her efforts to prepare the fifth report on the immunity of State officials from foreign criminal jurisdiction.

This topic is clearly a sensitive and important one as all states have a shared responsibility to ensure that perpetrators do not escape justice. Immunities should not be implemented in a way that effectively seeks to shield individuals from accountability for the most serious crimes and defeats the purpose of important universal jurisdiction laws.

As regards the last report, we welcome the inclusion of torture, enforced disappearance and apartheid as separate crimes to the list of the draft article 7 (Crimes under international law in

respect of which immunity ratione materiae shall not apply). We only regret that the Drafting Committee decided not to include the crime of aggression, mostly due to the pending activation of the Kampala amendment on aggression by the Assembly of States Parties to the Rome Statute. We would be very interested to read the further comments from the states on this matter.

The topic of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction raises many questions and should therefore be analysed comprehensively as it is politically highly sensitive, and has at the same time a very important practical dimension. As the Drafting Committee also acknowledged at the outset of its deliberations on draft article 7, there is a need to consider close relationship between the question of limitations and exceptions to immunity and the procedural aspects of immunity that will be addressed in the Special Rapporteur's next report.

Estonia supports the position that the Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction. Despite of the different views on the Foreign Ministers category, we agree with the ICJ that the immunity ratione personae is intended to enable the conduct of international relations and the Foreign Minister has plenary competence in international relations (like Heads of State and Heads of Government).

We would like to thank the ILC for its work done which represents an important step towards a common understanding of the relevant international legal norms.

11. France

a) First Statement

The difficulties encountered this year regarding the "Immunity of State officials from foreign criminal jurisdiction"— and I will address this topic in more detail later in the week— must alert us to the risks of the Commission working too rapidly. Some of these difficulties could have been avoided if the Commission had been able to dedicate more time to the consideration of this topic, which it indeed required. A working group could have been tasked with carefully considering State practice, the interpretation of which divided the Commission's members. That would have assisted the Commission in reaching a consensus on draft Article 7.

b) Second Statement (French)

Je souhaiterai à présent aborder le sujet de l'« Immunité de juridiction pénale étrangère des représentants de l'Etat ».

La délégation française tient tout d'abord à rappeler toute l'importance de ce sujet pour les Etats. Ainsi que l'a souligné la Cour internationale de Justice, les règles coutumières relatives aux immunités n'exonèrent pas leurs bénéficiaires de toute responsabilité pénale et ne sauraient

aboutir à une situation d'impunité. Pour autant, ces règles sont solidement enracinées dans la pratique contemporaine des Etats et constituent un élément essentiel au développement des bonnes relations entre les Etats.

C'est donc à la lumière du rôle fondamental des règles relatives aux immunités dans les relations internationales que ma délégation souhaite appeler l'attention de la Sixième Commission sur les difficultés que soulève le dernier rapport de la Commission du droit international.

Ma délégation relève que l'examen du sujet, et en particulier du projet d'article 7, a suscité de vifs débats au sein même de la Commission, aboutissant à l'adoption de cette disposition par un vote à la majorité. Compte tenu des enjeux très concrets et importants liés à la question des exceptions aux immunités de juridiction pénale étrangère, la délégation française est d'avis que la Commission aurait dû prendre le temps de forger un consensus. Il est en effet difficile d'imaginer que le projet remporte l'adhésion de tous les Etats si la Commission elle-même n'est pas parvenue à une conclusion consensuelle. Cela est d'autant plus regrettable que les juridictions nationales sont attentives aux travaux de la Commission. L'absence de position de consensus ne favorise pas l'interprétation harmonieuse des règles de droit international et fait courir un grand risque de fragmentation de la matière.

Dans cette mesure, la délégation française considère que, sur un sujet d'une telle importance, il est particulièrement fondamental que la Commission indique clairement si ses travaux participent de sa mission relative à la codification du droit international ou à son développement progressif. A cet égard, la délégation française relève que la Commission indique elle-même s'être fondée sur l'existence d'une « tendance ».

De l'avis de ma délégation, les exceptions à l'immunité ratione materiae retenues par la Commission dans son projet d'article 7 ne constituent pas des règles de droit international coutumier, faute d'une pratique des Etats et d'une opinio juris suffisantes. La délégation française regrette d'ailleurs que la Commission n'ait pas mis en place un groupe de travail chargé d'examiner plus en détail la pratique étatique pertinente et dont l'interprétation a divisé la Commission, même parmi les membres ayant voté en faveur de l'adoption du projet d'article 7.

La Commission indique dans son rapport qu'elle souhaite achever la première lecture du projet en 2018. Le sujet des dispositions et garanties procédurales applicables, qui sera examiné l'année prochaine, exerce une influence directe sur la question des exceptions aux immunités. Au regard des vifs débats et des divisions sur le sujet, il paraitrait préférable que la Commission se donne le temps de dégager une vision cohérente de la pratique pertinente afin de parvenir à un projet plus consensuel. Je vous remercie, Monsieur le Président.

c) Second Statement (English)

I will now turn to the topic of "Immunity from foreign criminal jurisdiction of State

representatives".
The French delegation wishes first of all to recall the importance of this subject for the States. As the International Court of Justice has pointed out, the customary rules on immunities do not absolve their beneficiaries from criminal liability and can not lead to impunity. However, these rules are firmly rooted in the contemporary practice of States and constitute an essential element for the development of good relations between States.

It is therefore in the light of the fundamental role of the rules on immunities in international relations that my delegation wishes to draw the attention of the Sixth Committee to the difficulties raised by the last report of the International Law Commission.

My delegation notes that the discussion of the topic, and in particular of draft article 7, has provoked heated debate within the Commission itself, leading to the adoption of this provision by a majority vote. In view of the very concrete and important issues related to the question of exceptions to immunities from foreign criminal jurisdiction, the French delegation is of the opinion that the Commission should have taken the time to forge a consensus. It is difficult to imagine that the project wins the support of all the States if the Commission itself has not reached a consensual conclusion. This is all the more regrettable as national courts are attentive to the work of the Commission. The absence of a consensus position does not favor the harmonious interpretation of the rules of international law and runs a great risk of fragmentation of the subject.

To that extent, the French delegation considers that on such an important subject it is of particular importance that the Commission clearly indicates whether its work is part of its task relating to the codification of international law or its progressive development. In this respect, the French delegation notes that the Commission itself indicates that it has relied on the existence of a "trend".

In the view of my delegation, the exceptions to the immunity ratione materiae retained by the Commission in its draft article 7 do not constitute rules of customary international law, in the absence of State practice and a sufficient opinio juris. The French delegation also regrets that the Commission has not set up a working group to examine in more detail the relevant State practice, the interpretation of which has divided the Commission even among the members who voted in favor of the adoption of draft article 7.

The Commission indicates in its report that it wishes to complete the first reading of the draft in 2018. The subject of applicable procedural provisions and safeguards, which will be examined next year, has a direct bearing on the question of exceptions to immunities. Given the lively debates and divisions on the subject, it would seem preferable for the Commission to take the time to come up with a coherent vision of the relevant practice in order to reach a more consensual project. Thank you, Mr President.

12. Germany

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 70th 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 69th 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!

13. Greece

Chapter Vll: Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

With regard to the topic "Immunities of State officials from foreign criminal jurisdiction" and, in particular, the highly sensitive issue of exceptions to immunity ratione materiae, we would like to make the following observations:

In our intervention last year, while acknowledging the inherent difficulties of the issue and the dilemmas which might arise, we called on the Commission not to miss the opportunity to remove the lingering uncertainty which had caused tensions between States and to provide them with appropriate guidance. We also invited the Commission to do so in the context of its dual mandate, that is codification and progressive development of international law, and in the light of the purposive character of the institution of immunity.

In this respect, we note with concern that this year the apparently irreconciliable divergence of views on this issue did not allow the Commission to come up with a consensual proposal regarding Draft Article 7, and rendered inevitable the -rather unusual recourse to a recorded vote.

Having said that, we note that, despite the heated debate within the Commission, the majority of its members endorsed the systemic approach to the institution of immunity proposed by the Special Rapporteur, Ms. Conception Escobar Hernandez, in her fifth report and, as it is mentioned in the Commentary to Draft Article 7, and recognized the need for the rules on immunity not to overlook other existing standards or principles enshrined in other important sectors of contemporary international law such as international humanitarian law, international human rights law and international criminal law.

It is in this spirit that the Commission ultimately decided to bolster the discernible trend towards limiting the applicability of immunity ratione materiae in respect of certain types of behaviour, by including in Draft Article 7 certain crimes under international law in relation to which immunity ratione materiae shall not apply.

Mr. Chairman,

As we stated last year, we firmly believe that in contemporary international law, the rules on immunity should strike a balance between on the one hand the respect for the sovereign equality of States and the stability of international relations and, on the other hand, the need to preserve the essential interests of the international community as a whole, one of which is undoubtedly to combat impunity for the most serious crimes imder international law. From that point of view, we consider the Commission's decision a step in the right direction.

We are fully aware and we understand the concems expressed by some members of the Commission regarding, in particular the potential abuse of exceptions to immunity ratione materiae and the fear for politically motivated trials. In this respect, we welcome the fact that the Commission highlighted -both through the footnote inserted in Parts Two and Three of the Draft Articles and in the Commentary to Draft Article 7- the importance of procedural provisions and safeguards to prevent possible abuse in the exercise of foreign criminal jurisdiction over State officials. We would also like to commend the Special Rapporteur for her initiative to hold already this year informal consultations on this issue and we hope that the discussion next year of the procedural aspects of immunity, including guarantees and safeguards, will help to allay the above mentioned concerns.

Tuming now to the proposed wording of Draft Article 7, we welcome the deletion of cormption-related crimes from the list of crimes included therein. As we noted last year and as is also recognized in the Commentary of Draft Article 7, these crimes, despite their gravity, cannot be considered as "acts performed in an official capacity" and, therefore, one of the essential normative elements of immunity ratione materiae is not met in the case of these crimes.

We can also accept the reasoning on which the Commission based its decision not to include in Draft Article 7 the so called "territorial tort exception", a concept which up to now has been mainly invoked in the context of civil proceedings.

Regarding the list of crimes imder international law contained in paragraph 1 of Draft Article 7, we understand that, given the circiunstances, the Commission opted for a pragmatic approach based on what could ultimately be acceptable to States. We also understand that the inclusion of the crime of apartheid was deemed appropriate mainly for historical reasons.

Finally, we welcome the refinements made by the Drafting Committee to the wording of this Draft Article, aiming mainly at highlighting the fact that it concems immunity ratione materiae as well as the removal of the two "without prejudice" clauses initially proposed by the Special Rapporteur which, as rightly pointed out by the Drafting Committee, if they were to be included, ought to apply to the Draft Articles as a whole.

14. India

Mr. Chairman,

Now, turning to the topic 'Immunity of State Officials from foreign criminal jurisdiction', we commend the work of the Special Rapporteur, Professor Concepcion Escobar Hernandez for further elaboration of the fifth Report on the topic. We note that the Commission continued to consider the fifth Report which analyzed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Draft article 7 proposed by the Special Rapporteur lists out the crimes under international law in respect of which immunity from foreign criminal jurisdiction ratione materiae shall not apply. The list includes: crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.

We appreciate the methodology adopted in the Report, however, it provides less treaty practice with regard to limitations and exceptions to immunity. It is relevant to note that the widely accepted - Vienna Conventions on Diplomatic, and Consular Relations which expressly contain provisions on immunity for certain categories of State officials in the context of allegations of criminal conduct, contain no such exceptions to immunity.

Mr. Chairman,

The issues involved in the draft Articles are highly complex and politically sensitive for the States and therefore, diligence, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (lex lata or lex ferenda). This would be clear only when the Commission will be able to show consistent State and treaty practice to support the exceptions asserted in draft article 7. Any new system, if not agreed, would be likely to harm inter-State relations and also undermine the very objective of ending impunity of most serious international crimes.

Mr. Chairman,

The status of and the nature of duty being performed by persons claiming immunity is a factor of core importance at the time of the commission of offence. There could be a situation where certain persons, who though technically belonging to the category of officials immune by domestic law of a country from acts done during the course of official duty as State officials, may undertake certain contractual assignment other than or in addition to the original State official duty. In such situations, factors such as status of such officials at the time of the commission of offence, nature of their functions, the gravity of offence, position of international law concerning immunity, victims' interests, and the totality of circumstances, should be taken into account in determining immunity.

We look forward to the next Session of the Commission, when the Special Rapporteur would introduce procedural aspects of immunity of State officials from foreign criminal jurisdiction.

15. Indonesia

Mr. Chairman,

Moving to the issue of Immunity of State Officials from Foreign Criminal Jurisdiction, I would like to thank the Special Rapporteur, Ms. Escobar Hernandes, for her tireless work on this difficult topic. Allow me to briefly share an observation from my delegation regarding draft article 7 that was previously adopted by the Commission at its Sixty-ninth Session.

Indonesia's position is that there should be no impimity for grave international crimes.

We appreciate the fact that the Commission has been working cautiously on this sensitive and contentious topic, to strike a balance between the fight against impunity for the grave international crimes, and the need to foster inter-state relations through the principle of sovereign equality.

We need to bear in mind that prosecution of officials of one country, by the courts of foreign countries, will potentially raise problems in relation to the principle of sovereign equality. The complexity and sensitivity of the topic particularly in draft article 7 was obviously reflected in how the draft article was provisionally adopted by voting. The differing views on these important provisions, specifically concerning limitation and exception to immunity, make this provision worth revisiting.

Mr. Chairman,

My delegation wishes to observe that there are only a few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. In the case of Indonesia, up to now, no single case relates to the limitations and exceptions, except in civil proceedings.

Finally, Indonesia is of the view that given the sensitivity and complexity of the topic at hand, it is desirable to have a more extensive study and analysis of the draft articles, and we look forward to being at the next session to see further results of the work of the ILC.

16. Iran

Mr. Chairman,

On the topic "Immunity of State officials from foreign criminal jurisdiction", I would like to appreciate the Special Rapporteur Ms. Concepcion Escobar Hernandez, for her considerable efforts on the topic.

The immunity of State officials from foreign criminal jurisdiction is deeply grounded in the principle of sovereign equality of States and the premise that the State and its rulers are one and the same for the purposes of immunity as a result of which the states and their officials shall not be subject to the national jurisdiction of other states. That premise holds true with regard to State

officials other than the "troika" assuming greater importance in international affairs.

Draft article 7 proposed by the Special Rapporteur lists out the crimes under international law in respect of which immunity from foreign criminal jurisdiction ratione materiae shall not apply. We note the unusual way in which this draft article was provisionally adopted by the Commission. This indicates that there has been a fundamental division of opinions on certain issues among members, reflecting the difficulty and sensitivity of the topic as it involves highly complex and politically delicate issues for the States.

We believe that the Special Rapporteur has stepped into the path of progressive development of international law by proposing draft article 7 which does not benefit from sufficient State practice. This is why we do not agree that the draft article represents an appropriate means of addressing the issue.

We are also of the view and indeed propose that, instead of enlisting specific crimes, such exception is best to be applied solely with regard to the most serious crimes of international concern, as we have doubt whether State practice and jurisprudence support the inclusion of crimes of torture, enforced disappearance and apartheid under the scope of exceptions to the immunity ratione materie from foreign criminal jurisdiction.

In this line, we agree with some members of the Commission that the report does not provide a comprehensive pertinent jurisprudence on the non-applicability of immunity ratione materie by mostly relying on cases of civil proceedings and not penal.

We would also like to refer to paragraph 8 of the commentary on draft Article 7, that it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; and that further, immunity does not depend on the gravity of the act in question.

Regarding the annex on list of treaties referred to in draft article 7, since all the listed treaties are not universally accepted, definitions provided for in the annex fail to enjoy universal acceptance.

Accordingly, due to the sensitivity of the nature of immunity as the direct consequence of the principle of sovereign equality of States, we suggest that the Commission proceeds on the topic with more caution. In fact, though the Commission does not determine the legal status of draft provisions, the divergent views could be due to the fact that the fifth report did not afford convincing evidence to support its conclusion.

We look forward to the future work of the Special Rapporteur on procedural aspects of immunity which seems being more important and pertinent than the substantive matters for the topic under consideration. In this regard, it is important to respect the international legal order which is based upon the sovereign equality of States, as developing any new framework in dealing immunity of state official, if not agreed, would be likely to endanger inter-State relations and even the very

objective of ending impunity of most serious international crimes.

17. Ireland

Immunity of State Officials from Foreisn Criminal Jurisdiction

2. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction" Ireland again welcomes the fifth report of the Special Rapporteur, Ms Concepcion Escobar Hemandez. We would like to thank Ms Hernandez for the considerable work that has gone into this report, analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

3. We further note the provisional adoption by the Drafting Committee of draft Article 7 and its commentaries. Ireland acknowledges that this is a complex and difficult topic and accordingly believes that the work of the Commission on this subject is important. Therefore, Ireland wishes to voice our concern that the Commission was divided internally on the adoption of draft Article 7 and its commentaries, which led to a vote being held on its adoption.

4. Ireland is of the view that while the Special Rapporteur's report contained an extensive discussion of practice, the groundwork for detailed consideration of the question of nonapplication of immunity was not fully in place prior to this year's session. Accordingly, the resultant draft Article 7 may not be fully grounded in widely accepted State practice. In light of this, further information on practice relating specifically to the non-application of immunity would be helpful.

5. For these reasons, Ireland would like to express the wish that the Commission continue to consider the basis for and content of draft Article 7 in conjunction with the provisions on procedures and safeguards at its next session with a focus on State practice.

6. Ireland also notes the Special Rapporteur's comments (at paragraph 134 of the ILC Report) that the draft articles contain elements of both codification and progressive development. Ireland, however, believes it is unclear from the Special Rapporteur’s Report, the report of the Drafting Committee and the commentaries whether and in what respect draft Article 7 seeks to determine the scope of existing international law (lex lata) or the extent to which the Commission is following an emerging trend towards desirable norms (lex ferenda). Indeed, while the Special Rapporteur stated that the Commission was not engaged in crafting "new law", Ireland takes note of the comments made by some members of the Commission that the text does not reflect existing international law or identifiable trends.

7. Ireland recalls the mandate of the Commission to codify and progressively develop international law. Whilst both aspects of its work are equally valid, Ireland believes that the focus of the Commission on any given item should initially be on establishing the current state of the law and only then should it move on to assess proposals for progressive development. This is particularly

so with a topic such as the current one, which may give rise to practical issues that fall to be considered not only by Foreign Ministries and international lawyers, but also by domestic courts grappling with highly sensitive cases that may come before them.

8. Therefore, irrespective of the form of the outcome of the Commission's work on this topic, the Commission should — in our view — articulate in a granular way and in respect of each draft Article or part thereof identify whether it seeks to codify customary international law or progressively develop it. I should emphasise that this desire for clarity does not imply that my delegation is opposed to progressive development, but rather that elements of such development, based on emerging trends, should be clearly signposted.

9. My delegation looks forward to continuing to engage on this important topic and to receiving the Special Rapporteur's Sixth report on the procedural aspects of immunity.

18. Israel

Mr. Chairman,

With regard to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, Israel would like to state at the outset that we attach great importance to ensuring that the perpetrators of crimes are brought to justice and support international efforts to effectively fight crime and combat impunity.

At the same time, and alongside the mechanisms that exist to advance the aim of bringing criminals to justice, there is universal recognition of the longstanding legal principle of immunity of State officials from foreign criminal jurisdiction. As is well known, this immunity is procedural and is separate from the substantive question of the legality of the conduct in question which, in appropriate circumstances, could be prosecuted by the State of the official or, when such a State waives immunity, by foreign States.

But the fact that such immunity is procedural does not make it any less essential or fundamental as a legal principle. Indeed, the field of immunity is well established in international law and was developed to protect the important principles of the independence of States and their sovereign equality, to prevent political abuse, and to allow the proper functioning of State officials in the performance of their duties and the conduct of international relations.

Mr. Chairman,

Israel has significant concerns that the work of the ILC on this topic has failed to accurately reflect customary international law on this subject, and failed to adequately acknowledge this fact. Our concerns relate both to the Draft Articles themselves — which are inconsistent with widely recognized principles that govern this field - and to the manner in which they were adopted.

In particular, we share the view of many other States regarding the problematic nature of the

treatment of the issue of immunity ratione personae and the exceptions to immunity ratione materiae in Draft Article 7.

With respect to the issue of persons enjoying immunity ratione personae during their term of office, while the Draft Articles specify only three persons, known as the "troika" - Heads of State, Heads of Government and Ministers of Foreign Affairs - according to customary international law, the group of high-ranking State officials who enjoy such immunity is not limited to the troika.

This position was reflected in the decision of the ICJ in the Arrest Warrant Case of the Democratic Republic of the Congo v. Belgium and in decisions of national courts, and also expressed by some of the ILC Members as well as numerous Member States in previous Sixth Committee meetings.

As noted previously by some ILC Members, international relations have evolved in a way that high-ranking State officials other than the troika have become increasingly involved in international fora and make frequent trips outside their national territory. Thus, if immunity ratione personae is attached to certain high-ranking State officials because of the character and the necessity of their functions to the maintenance of international relations and international order, it follows that such immunity should not be limited to the troika, and should be granted to additional high-ranking State officials including, for example. Ministers of Defense and Ministers of International Trade. The non-exhaustive nature of the list of persons who enjoy immunity ratione personae was evident in the use of the term "such as" in the aforementioned Judgement of the ICJ, and recognizes that the rationale for immunity is associated with the function the State official fulfills and not only the title of his or her office.

With respect to Draft Article 7 which was recently adopted by the Commission, stipulating exceptions to the applicability of immunity ratione materiae, Israel shares the view that there are no established norms of international law regarding exceptions or limitations to immunity from criminal jurisdiction of State officials, nor is there a trend towards the development of such norms.

In fact, the inclusion of exceptions would have the practical effect of greatly diminishing and even nullifying the immunity of State officials, as immunity of State officials would be violated as a matter of practice from the very process of examining the applicability of exceptions. This, in turn, also creates the opening for abuse for political purposes - something which the doctrine of immunity was intended to prevent.

The fact that Draft Article 7 was adopted by the Commission by a vote rather than by consensus - in contrast to the long-standing practice of the Commission - itself reflects the problematic nature of this provision and its failure to reflect accurately the state of the law.

Accordingly, we believe that the Draft Articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction, and that Draft Article 7 should be deleted.

Without prejudice to this position, we believe that should the ILC proceed with a discussion of

exceptions - an effort which we do not encourage and which in any event would be an attempt to propose lex ferenda only - this must be done in conjunction with a discussion of safeguards rather than divorced from it.

Such safeguards could include, for example, the principle of subsidiarity, according to which criminal jurisdiction should be asserted by States with close and genuine jurisdictional links that are willing and able to genuinely apply such jurisdiction, in order to facilitate effective prosecution and promote the interest of justice; consultations with the sending State; the need for decisions on these matters to be taken by the most senior legal officials; and additional safeguards to ensure that foreign criminal jurisdiction is not exploited for political motives.

Israel will have more to say on this issue and on the subject of exceptions should the ILC continue on this course.

To conclude, while we appreciate the effort that has been invested, we believe that work of the ILC on this topic and the manner in which it has proceeded have unfortunately not been satisfactory. The Draft Articles do not reflect the current state of the law, and in fact undermine well established, well accepted and well-founded legal principles, that continue to be applicable to, and necessary for, contemporary international relations. If the ILC wishes to propose the progressive development of the law in a certain direction, then it should be transparent and clear that this is the purpose of the exercise and States will react accordingly. If it is seeking to give expression to the law as it is, and in our view as it should remain, then it has missed the mark. In either case, we believe that more detailed and robust engagement with Member States on this topic is necessary for the ILC's contribution to be more effective and better received.

19. Italy

I will now address the topic of "Immunity of State officials from foreign criminal jurisdiction". Italy would like first of all to congratulate the Special Rapporteur, Concepcion Escobar Hernandez, for her Fifth Report, and the Commission for the intense work on this important topic. Our comments on the ongoing work are to be considered provisional and without prejudice to our stand on the text of all draft articles when complete.

We note from the Commission's Report that the debate around the exceptions, or limitations, to immunity for State officials from foreign criminal jurisdiction largely reflects the lack of consensus among States with regard to some of the exceptions originally proposed for discussion.

On that score, Mr. Chairman, allow me to make two preliminary comments.

First, Italy is aware of the seriousness of the crime of corruption and finds itself in the forefront in the fight against it and in fostering international cooperation to that end. However, we concur with the view that the acts constituting corruption, since they are carried out for purposes of private gain, fall outside the objective scope of functional immunity ratione materiae and, therefore, do

not require to be exempted from it.

Second, as Italy has previously stated, it does not regard the so-called "territorial tort exception" in Draft Article 7 (1) (c), originally proposed by the Special Rapporteur, as reflecting either lex lata, or even a trend in a de lege ferenda prospect. Italy regards the elements of State practice referred to in her Fifth Report as insufficient to establish the existence of the exception in question to the customary rule of immunity of State officials ratione materiae. Furthermore, it may be noted that most of the domestic case law relied upon concerns civil, rather than criminal, proceedings, or revolves around clandestine conduct, such as espionage or sabotage.

Against this background, my delegation welcomes the choice of the Drafting Committee of curtailing the list of crimes in relation to which immunity ratione materiae does not apply, while changing the title of Article 7(1), which we find evidentiaiy of customary international law. In the same vein, we are also in favour of the choice of referring to those crimes as strictly defined in the relevant treaties to be listed in an armex to the draft articles.

Mr Chairman,

Italy welcomes the deletion of Paragraph 2 of Article 7, proposed by the Special Rapporteur, on the understanding that this is without prejudice to Draft Article 4(2) on the scope of the immunity ratione personae. My delegation also supports the deletion of Article 7(3), originally proposed by the Special Rapporteur, in view of spelling out the deleted "without prejudice" clauses in a separate article, hence, expanding their scope of application to the whole text of the draft provisions on this topic.

Finally, Mr. Chairman, Italy looks forward to the next report by the Special Rapporteur, addressing the procedural aspects of immunity. Italy trusts that the third report by Special Rapporteur Kolodkin will serve as a very useful basis for Special Rapporteur Escobar Hernandez' Sixth Report.

20. Japan

Mr. Chairman,

Turning to the topic of "Immunity of State officials from foreign criminal jurisdiction", I express my gratitude to the efforts of the Special Rapporteur. It should be noted that the draft article 7 was provisionally adopted by a recorded vote in the Commission. This indicates that there was a fundamental division of opinions on certain issues among members, reflecting the difficulty and sensitivity of the topic. Based on the conclusion drawn from discussion in the Commission, I would like to make some preliminary comments.

First, there was debate on whether "limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction" is an established customary international law (lex lata) or development of a new law (lex ferenda). The Commission could not reach common ground on this matter. Although the Commission does not necessarily determine the legal status of draft

provisions, the divergent views could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion.

Second, concerning the list of crimes to which immunity does not apply, more explanation is needed on the reason for the selection of these crimes as opposed to other crimes not on the list. It is still unclear in particular whether limitations and exceptions of immunity would be restricted to the listed crimes or not. For these reasons, although draft article 7 was provisionally adopted by the Commission, clarification is needed on the aforementioned aspects. It is also necessary to continue observing state practice in order to determine whether the draft article reflects the actual view of international society.

Lastly, in the future work on this topic, the proper balance between State sovereignty and the fight against impunity requires great attention. In this regard, the responsibility of States should not be confused with that of individuals: at the same time, it is also important to respect the international legal order which is based upon the sovereign equality of States. During the current session, there were some discussions on procedural aspects of immunity and safeguards. However, it was not clear what the procedural aspects and safeguards would mean. Japan hopes that the sixth report of the Special Rapporteur will provide a rich explanation and references on these issues.

21. Korea (Republic of)

Mr. Chairman,

Turning to the topic of Immunity of State officials from foreign criminal jurisdiction, My delegation welcomes the fifth report prepared by the Special Rapporteur, Ms. Concepcion Escobar Hernandez and would like to thank her for her efforts. We would also like to extend our sincere appreciation to the ILC members, and in particular the Drafting Committee, for their work in adopting draft article 7.

The Scope of possible limitations and exceptions to State officials' immunity from foreign criminal jurisdiction is one of the most important issues on this topic. However, last year the Commission did not have enough opportunities to deal with this issue due to a delay in the translation of the Special Rapporteur's report into other UN official languages. Thus our government considers it appropriate that the Commission continues to discuss exceptions to immunity this year.

My delegation takes note of the fact that the Commission adopted draft article 7 provisionally by recorded vote (vote by roll call) on July 20, 2017. This voting method is an exception to the ordinary process for adoption of the draft articles by consensus in the Commission. The fact that draft article 7 was provisionally adopted with twenty-one votes in favour, eight votes against and one abstention reveals that there was substantial disagreement on limitations and exceptions to immunity within the Commission.

My delegation basically agrees with the position taken by the Special Rapporteur and the

Commission that there exist neither limitations nor exceptions with respect to immunity ratione personae. Meanwhile, our government would like to point out the divergence of opinions regarding limitations or exceptions in respect to immunity ratione materiae such as the rule of lex lata or lex ferenda.

My delegation fully supports global efforts to combat impunity, but it is necessary to pay attention to the jurisprudence of the ICJ on this issue. In the case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V. Belgium), ICJ confirmed that the nature and gravity of crimes in question belonging to substantive matters do not constitute a bar to immunity, which is a procedural matter.

In this regard, my delegation requests that the Commission and the Special Rapporteur collect and examine relevant practices in a thorough manner. Meanwhile, the Special rapporteur is expected to present its next report concerning the procedural aspect of immunity. This issue is directly related to application of draft article 7 provisionally adopted this year. However, given the fact that criminal proceedings vary depending on States' criminal juridical structures (for example, the division of power between prosecutor and police, and preliminary examination of the judicial organ), thorough comparative study about this issue is required.

22. Malawi

Mr Chairman,

On immunity of States Officials from Criminal jurisdiction, my delegation notes with concern, the departure from the ILC's established procedure of adopting its work by consensus. Article 7 contains exceptions of crimes on which immunity does not apply. The fact that it was adopted by a recorded vote is a sign that it merits further study. My delegation therefore wishes to urge the Commission to revisit this article. My delegation also wishes urge the Commission to exercise caution not conflate this topic with the scope and application of the principle of universal jurisdiction.

23. Malaysia

Mr. Chairman,

8. Turning to the topic of immunity of state officials from foreign criminal jurisdiction, Malaysia notes that the Commission had continued its consideration of the fifth report on the subject matter at its sixty ninth session and voted to adopt draft article 7 and annex to the draft articles and the footnote to two of its headings, together with the commentaries thereto.

9. On this point, Malaysia would like to take this opportunity to recapitulate its position expressed at the seventy first session of United Nations General Assembly concerning the limitations and exceptions to the immunity of state officials from foreign criminal jurisdiction, of which Malaysia had agreed with the view expressed by the Special Rapporteur in his fifth report that there are

discrepancies in the characterization of a particular act as a limitation, especially in the case of international crimes in each state.

10. Malaysia would also like to reiterate its position that the formulation of draft article 7 should be dealt with cautiously by the Commission. Based on the fifth report, the scope and parameter of the crimes committed that cause harm to persons in the territory of the forum state is still unclear as it has yet to be defined and has not attained the status of customary law. In addition, Malaysia had highlighted that the application of functional immunity (rations materiae) and personal immunity (rationae personae) in paragraphs 1 and 2 of draft Article 7 respectively need to be addressed clearly.

11. Due to the aforesaid reasons, Malaysia views that draft article 7 (1) should be studied and deliberated further since the existing states' practices vary on the definition and characterization of the offences, in particular torture and enforced disappearances. Therefore, Malaysia maintains its reservations on these offences as an exception to immunity.

Mr. Chairman,

12. Malaysia notes that cooperation between states and international organizations or tribunal under draft article 7(3)(ii) plays a vital role in resolving criminal cases that involve two or more states. Therefore, further studies and deliberation should be done since states and international organizations have different legal status.

13. Finally, Malaysia takes note that the Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session. Malaysia records its support to the Commission's effort to continue its deliberation on all the aforementioned draft articles and Malaysia looks forward to the relevant commentaries to enable a better understanding of the purpose and intention of the draft articles. Malaysia also looks forward to the sixth report by the Special Rapporteur.

24. Mexico

a) Spanish

Capítulo VII: “Inmunidad de jurisdicción penal extranjera de los funcionarios del Estado”:

México celebra el enriquecedor debate generado en torno al tema de la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado, así como los comentarios y aclaraciones formulados por la Relatora Especial sobre este tema.

México advierte que en la versión aprobada de artículo 7 fueron incluidos los crímenes de apartheid, tortura y desaparición forzada dentro del catálogo de crímenes de derecho internacional que constituyen una excepción a la inmunidad de jurisdicción. Lo anterior, teniendo

presente que éstos cuentan con un régimen jurídico propio a nivel internacional, que compele a los Estados a adoptar las medidas internas necesarias para su prevención, represión y sanción.

México también observa que la Comisión decidió abstenerse de incluir el crimen de agresión en el catálogo de excepciones a la inmunidad de jurisdicción penal extranjera. Ello, tomando en consideración la naturaleza del tipo penal, misma que exigiría a los tribunales nacionales determinar la existencia de un acto previo de agresión de un Estado extranjero.

De igual forma, México coincide en que la corrupción en ningún caso puede ser considerada como un acto realizado a título oficial, toda vez que se trata de actos realizados por un funcionario del Estado con la única finalidad de obtener un beneficio propio. La Delegación toma nota de que el crimen de corrupción también fue descartado de aquéllos que constituyen una excepción al ejercicio de la jurisdicción penal extranjera.

Finalmente, la Delegación mexicana observa que si bien el principio de "excepción territorial" tampoco fue incluido, se considera que determinados crímenes cometidos en el territorio del Estado del foro, están sometidos al principio de soberanía territorial y que, por regla general, respecto a ellos no procedería invocar la inmunidad *rationae materiae*.

México continuará apoyando activamente los esfuerzos realizados por la Relatora Especial para llevar a cabo un examen exhaustivo de la práctica de los Estados, su legislación interna, la jurisprudencia internacional y la labor previa de la Comisión, mismos que han permitido alcanzar avances sustantivos en la materia.

Asimismo, México coincide con la Relatora Especial, en el sentido de que la Comisión debe continuar abordando el tema de la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado, desde una perspectiva tanto de codificación como de desarrollo progresivo del derecho internacional. Lo anterior resulta congruente con el mandato de la propia Comisión.

Finalmente, la identificación de las normas procesales relativas a la investigación y el enjuiciamiento de un funcionario que goce de inmunidades reviste gran importancia para México. Dichas normas son cruciales para evitar abusos derivados de conflictos políticos que redunden en una interferencia indebida en las actividades de un oficial estatal, así como en un detrimento al debido proceso.

Por ello, México expresa su interés en conocer el sexto informe que la Relatora Especial presentará en 2018 sobre estos aspectos y, al tiempo de reafirmar su compromiso con este tema, hace un llamado a los demás Estados parte, a fin de que continúen allegando a la Relatora Especial de información sobre su legislación y práctica nacional, conforme a lo solicitado.

b) English

Chapter VII: "Immunity of State officials from foreign criminal jurisdiction":

Mexico celebrates the enriching debate generated around the issue of immunity of State officials from foreign criminal jurisdiction, as well as the comments and clarifications formulated by the Special Rapporteur on this matter.

Mexico notes that in the approved version of article 7 the crimes of apartheid, torture and enforced disappearance were included in the catalog of crimes under international law that constitute an exception to the immunity from jurisdiction. The foregoing, bearing in mind that they have their own legal regime on the international level, which compels the States to adopt the internal measures necessary for their prevention, repression and punishment.

Mexico also notes that the Commission decided to abstain from including the crime of aggression in the catalog of exceptions to immunity from foreign criminal jurisdiction; this, taking into consideration the nature of a criminal offence, which would require the national courts to end the existence of a previous act of aggression by a foreign State.

Similarly, Mexico agrees that corruption can in no case be considered as an act performed in an official capacity, since it is acts performed by a State official with the sole purpose of obtaining own benefit. The Delegation notes as well that the crime of corruption was also ruled out of those which constitute an exception to the exercise of foreign criminal jurisdiction.

Finally, the Mexican delegation observes that although the principle of "territorial exception" was not included either, it is considered that certain crimes committed in the territory of the forum State are subject to the principle of territorial sovereignty and that, as a general rule, in their respect immunity rationae materiae would not be invoked.

Mexico will continue to actively support the efforts made by the Special Rapporteur to carry out an exhaustive examination of State practice, domestic legislation, international jurisprudence and the Commission's previous work, which have made it possible to achieve substantive progress in the matter.

In addition, Mexico agrees with the Special Rapporteur that the Commission has to continue to address the issue of immunity of State officials from foreign criminal jurisdiction from a perspective of both codification and progressive development of international law. The foregoing is consistent with the mandate of the Commission itself.

Finally, the identification of the procedural rules related to the investigation and prosecution of an official who enjoys immunities is of great importance for Mexico. These rules are crucial to avoid abuses arising from political conflicts that result in undue interference with the activities of a state official, as well as to the detriment of due process.

For this reason, Mexico expresses its interest in the sixth report that the Special Rapporteur will present in 2018 on these aspects and, at the same time reaffirming its commitment to this issue,

calls on the other State parties to continue to bring together information on their national legislation and practice for the Special Rapporteur, as requested.

25. Netherlands

VII – Immunity of State Officials

1. Mr Chairman, I will make a few remarks on the topic of immunity of state officials from foreign criminal jurisdiction.

2. Let me first extend my compliments to the Special Rapporteur, Professor Concepción Escobar Hernández, for her fifth report on this topic. I shall limit my comments to draft Article 7.

3. We welcome the increased attention to national legislative practice in the fifth report of the Special Rapporteur. As we have stated before, national legislation, in addition to national court decisions, is highly relevant for the determination of the existence of a rule of custom. My Government would support the Special Rapporteur's view that there is a trend towards the recognition of exceptions to immunity *ratione materiae* at the international and national level. Indeed, my Government would support this trend.

4. Therefore, my Government welcomes the concept as proposed in draft Article 7, on crimes under international law, in respect of which immunity *ratione materiae* shall not apply. It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity.

5. Nevertheless, my Government shares the concerns of some members of the Commission regarding the choice of the Drafting Committee to include a limitative list of crimes. This list includes important crimes, but leaves out other crimes under international law, such as the crime of slavery. Also, the inclusion of a list of crimes will hamper the development of the notion of crimes under international law to which immunity would not apply. We would therefore prefer a general reference to 'international crimes' as the crimes to which the immunity *ratione materiae* shall not apply. This will allow for the interpretation of the concept of 'international crimes' in light of customary international law and the development of international criminal law. Examples of these crimes may be mentioned in the commentary, as long as it is clear that these are examples and not a limitative list.

6. In support of some members of the Commission, I believe that it is important to consider the substantive aspects of immunity *ratione materiae* in conjunction with the procedural aspects, as immunity remains a procedural matter.

7. My Government looks forward to the next report of the Special Rapporteur that will focus on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, and will provide the Special Rapporteur with answers to the specific questions raised in this regard at a later time.

26. New Zealand

New Zealand would like to thank the Special Rapporteur for the fifth report analysing the question of limitations and exceptions to the immunity of state officials from foreign criminal jurisdiction and notes the debate that went into the provisional adoption of draft article 7. We support the view that there are limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction rationae materiae, particularly in respect of certain types of behaviour that constitute the most serious crimes under international law. We note the concerns expressed by many representatives in this Committee and ask the Commission to consider the issues raised.

In this regard, New Zealand would be Interested to see further consideration by the Special Rapporteur of the suggested alternative approach of reformulating draft article 7 on the basis of an obligation to waive or prosecute International crimes. This could explore a possible duty of a State either to waive the Immunity of Its officials before the criminal courts of a foreign State, or to undertake to fulfil Its obligation to prosecute Its own officials, thereby reducing any Impunity gap. Fighting Impunity and ensuring responsibility for International crimes Is an essential Interest for the International community as a whole. Limitations and exceptions are closely linked to the procedural aspects of Immunity, and we look forward to the Special Rapporteur's next report on this topic.

27. Norway (on behalf of Nordic Countries)

The Nordic countries would again like to thank the Special Rapporteur, Ms. Concepcion Escobar Hernandez, for her fifth report focusing on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. The issues addressed in the report have been the subject of recurrent debate in the Sixth Committee.

Chair, In essence, Chapter VII addresses limitations and exceptions to immunity before national jurisdictions for core international crimes. I will share a few comments on behalf of the Nordic countries.

Firstly, we would like to reiterate our view that for the gravest international crimes no rules of immunity should apply in national jurisdictions. In this respect, we encourage the Commission to strike a balance between the fight against impunity for serious international crimes within the sphere of national jurisdictions, and the need to preserve a legal framework for stability in inter-State relations.

It is an important, but complex and contentious topic, the ILC is working on, and we note the Commission's desire to proceed cautiously and prudently.

Secondly, the Nordic countries appreciate the analysis of practice, in the fifth report. We acknowledge the difficulty in drawing clear conclusions regarding some of the issues, and note the differing views in the Commission.

The Nordic countries put particular emphasis on the importance of rules pertaining to immunity before international courts. We would like to underline our commitment to the Rome Statute of the International Criminal Court, and in this respect in particular article 27, which declares the irrelevance of official capacity.

The irrelevance of official capacity in relation to individual responsibility for the gravest international crimes before international courts was recognized already in article 7 of the charter of the Nuremberg tribunal and should today be regarded as part of customary international law.

Thirdly, we support draft article 7, which the Commission provisionally adopted after a vote. We wish to underline the importance of including genocide, crimes against humanity and war crimes. We acknowledge the ongoing debate about the remaining categories. The Nordic countries support paragraph 2 about understanding the crimes according to their definition in the enumerated treaties. We would also support the inclusion of a "without prejudice" provision, as described in the fifth report.

Finally, the Nordic countries recognize that the question of limitations and exceptions is related to that of procedural aspects of immunity. The Nordic countries would support procedural safeguards applicable to decisions made by independent prosecutors, in order to ensure that all relevant aspects of cases involving claims of immunity are taken into consideration. Further, we remain convinced that robust mechanisms based on the rule of law are important to avoid politically motivated proceedings or an illegitimate exercise of jurisdiction.

The Nordic countries look forward to the continued work of the ILC on this topic and the sixth report of the Special Rapporteur. We encourage the Commission to seek to reach consensus on the most difficult aspects of this important topic, thereby creating the best possible conditions for its work to be taken further by States. Thank you.

28. Peru

a) Spanish

4. Acerca del Capitulo VII del Informe de la Comisión de Derecho Internacional, relativo al tema "Inmunidad de jurisdicción penal extranjera de los funcionarios del Estado", cuya Relatora Especial es la Profesora Concepción Escobar Hernández, queremos poner de relieve su labor que ha tomado en cuenta la práctica de los Estados, la jurisprudencia Internacional, y la labor previa de la Comisión - Incluyendo el trabajo llevado a cabo desde 2007 por el primer Relator Especial sobre la materia, Sr. Roman Kolodkin- deseamos formular los siguientes comentarios preliminares referidos a su quinto Informe, en particular, lo concerniente a los límites y excepciones a la inmunidad de jurisdicción penal extranjera de los funcionarios del Estado.

5. Mi delegación estima importante distinguir entre la aplicación de límites y excepciones respecto de la inmunidad ratione personae y ratione materiae. En el primer caso, el goce de la inmunidad

ratlone personaene tiene naturaleza temporal, y no está sujeto a límltes o excepciones mientras que los Jefes de Estado, Jefes de Gobierno y Ministros de Relaciones Exteriores (la denominada "troika") se encuentren en el ejercicio de sus funciones.

En cambio, en el caso de la inmunidad ratione materiae sí parece posible determinar la existencia de una tendencia para considerar límites y excepciones a la Inmunidad de jurisdicción a propósito de graves crimenes que repugnan la conciencia de la humanidad. En ese sentido, resulta fundamental establecer un equilibrio entre dos valores: el respeto a la igualdad soberana de los Estados, que constituye un factor de estabilidad en las relaciones internacionales, de un lado, y, de otro, la lucha contra la impunidad por la comisión de crímenes atroces.

Al mismo tiempo, es necesario diferenciar la inmunidad del Estado a título de tal, de la inmunidad penal de sus funcionarios ratione materiae. La inmunidad de jurisdicción tiene una naturaleza procesal, pero en algunos momentos puede acabar revistiendo caracter sustantivo si aquella acaba siendo un medio para eludir la acción de la justicia contra la impunidad.

No obstante, el Perú estima oportuno recalcar la relevancia de los aspectos de naturaleza procesal, que la Relatora Especial ha anunciado serán materia de su siguiente informe. Ello, en la perspectiva de asegurar la existencia de adecuadas garantías al momento de evaluar la invocación de la inmunidad de jurisdicción penal y considerar la posibilidad de eventuales límites y excepciones a dicha inmunidad, así como de evitar los riesgos de una manipulación política.

6. Las reflexiones que acabo de manifestar guardan correspondencia con la propuesta de proyecto de artículo 7 relativo a los crímenes respecto de los que la inmunidad ratione materiae no se aplica, que mi delegación ha recibido con agrado y especial interes.

b) English

4. Regarding Chapter VII of the Report of the International Law Commission on the topic "Immunity of State officials from foreign criminal jurisdiction " of which Professor Concepción Escobar Hernández is the Special Rapporteur, we would like to highlight her work which has taken into account the practice of States, international jurisprudence and the previous work of the Commission - including the work carried out since 2007 by the first Special Rapporteur on the subject, Mr. Reman Kolodkin – we would like to make the following preliminary comments referred to its fifth report, in particular, to the limits and exceptions to immunity of State officials from foreign criminal jurisdiction.

5. My delegation considers it important to distinguish between limits and exceptions which apply to immunity ratione personae and those which apply to ratione materiae. In the first case, the enjoyment of immunity ratione personae is temporary in nature and is not subject to limits or exceptions while the Heads of State, Heads of Government and Ministers of Foreign Affairs (the so-called "troika") are in the exercise of their functions. On the other hand, in the case of immunity

ratione materiae it does seem possible to determine the existence of a tendency to consider limits and exceptions to the immunity from jurisdiction for serious crimes that repel the conscience of mankind. In this sense, it is essential to establish a balance between two values: on the one hand, the respect for the sovereign equality of States, which constitutes a factor of stability in international relations and on the other hand, the fight against impunity for commission of atrocious crimes. At the same time, it is necessary to differentiate between the immunity of the State as such and the criminal immunity of its officials ratione materiae. The immunity from jurisdiction is procedural in nature, but in some moments it may end up being of a substantive nature if immunity ends up being a means to avoid the action of justice against impunity. Nonetheless, Peru considers it appropriate to emphasize the relevance of the aspects which are procedural in nature, which the Special Rapporteur has announced will be the subject of her next report; this, in the perspective of ensuring the existence of adequate guarantees when evaluating the invocation of immunity from criminal jurisdiction and considering the possibility of possible limits and exceptions to such immunity, as well as avoiding the risks of political manipulation.

6. The reflections that I have just mentioned are in keeping with the draft article 7 proposal concerning crimes for which immunity ratione materiae does not apply, which my delegation was pleased to receive and has received with special interest.

29. Poland

Immunity of State officials from foreign criminal jurisdiction

Allow me now to turn to the topic “Immunity of State officials from foreign criminal jurisdiction”.

We have noticed that the Commission adopted by recorded vote the draft article 7 relating to crimes in respect of which immunity does not apply. This is quite unusual, taking into account the practice of the Commission. But apart from this procedural observation, in our view this provision can be considered as an effort, which tries to strike a balance between the law related to immunities, rooted in the principle of sovereign equality on the one side, and the need for combating impunity for the most heinous crimes under international law on the other side.

We agree that this issue goes to the heart of the understanding of international law as a system. In this context we have to remember that despite the important developments in international criminal justice in the last three decades, it is unquestionable, that still it is a state and its organs, who are tasked with ensuring observance of international law. Implementing prevention and punishment with regard to the most serious crimes under international law is without doubt in the interest of the international community as a whole. Nonetheless, whether draft article 7 indeed draws balance between codification and progressive development needs further evaluation, particularly after assessing draft articles on procedural character of the immunity, that are to be discussed by the Commission in future.

30. Portugal

Mr. Chairman,

I wish to now address the second topic of this cluster which Is "Immunity of State Officials from Foreign Criminal Jurisdiction".

At the outset, Portugal would like to take this opportunity to thank the Special Rapporteur, Ms. Escobar Hernandez, for her work on the topic. This Is Indeed a topic of the utmost Importance and In relation to which we hold high expectations.

Mr. Chairman,

Portugal believes that the basis for this complex and challenging topic has to be a very clear and value-oriented approach. Law is not neutral and it has to reflect the fundamental values of a given society. To best serve the overall interests of the international community a careful balance has to be struck between State sovereignty and equality, the rights of individuals and the need to avoid impunity for serious crimes under international law.

It is our conviction that, to strike this balance, the Commission has to identify the existing rules of International Law, but it has also - as it is foreseen in its mandate - to embark upon an exercise of progressive development. This progressive development has to take into account that immunities are an important tool for the conduct of foreign relations, but they should be interpreted and applied within the context of the current evolution as far as fundamental human values that have a jus cogens status are concerned.

Mr. Chairman,

For the reasons above, Portugal commends the Commission for having adopted draft Article 7 concerning international crimes in respect of which immunity ratione materiae does not apply.

Concerning the international crimes covered by draft Articie 7, however, we do believe that the immunity should also not apply to the crime of aggression - a crime that is also recognized in the Rome Statute. Not only the crime of aggression is one of the most serious crimes of international concern, but the rationale behind the inclusion of the other crimes listed applies entirely to the crime of aggression. We thus call upon the Commission to revise its position regarding this matter during the second reading on the topic.

Mr. Chairman,

To conclude, we encourage the Commission to continue its work on this topic and to complete next year its work on first reading, after considering the extremely important issue of procedural aspects and safeguards.

Thank you, Mr. Chairman.

31. Romania

Chapter VII – Immunity of State officials from foreign criminal jurisdiction

The sensitivity of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction was mirrored by another vivid and wide-ranging discussion within the Commission, following last year's partial debate on the same topic.

We express our appreciation to the Special Rapporteur, Ms. Conception Escobar Hernandez, for her rich report and for her efforts in further advancing considerations on this important subject.

We take note of the Commission's decision to deal with this issue from the perspective of both codification and progressive development of international law. Against this backdrop and in light of limited relevant practice and *opinio juris*, we appreciate the more cautious approach exercised in proceeding towards a decision on draft article 7.

As stated last year, we were in favour of making a distinction between *immunity ratione personae* and *immunity ratione materiae* for the purpose of the exercise of foreign criminal jurisdiction, on the premises that immunity as a procedural mechanism to guarantee respect for sovereign equality of States should not undermine values and principles recognized by the international community as a whole. Therefore, we saw merit in identifying the acts which, even if performed in an official capacity, cannot fall within the immunity *rationae materiae* and, as a consequence, could be prosecuted under foreign criminal jurisdiction once the immunity *rationae personae* has ceased.

Taking into account the dissenting views on the category of crimes proposed for inclusion in this draft article, we appreciate the approach followed by the Commission to circumscribe such limitations and exceptions to a prescriptive list of the most serious crimes under international law for which there is a broad international consensus on their definition and which are also prohibited by customary international law. In this context, we welcome the clarifying addition that the reference to a specific treaty for the definition of each of these crimes is included only for the reasons of convenience and appropriateness and in no way affects the other relevant rules of customary or treaty-based international law.

We agree that the lingering uncertainty over the scope of immunity requires the guiding work of Commission. However, as we move forward, we need to carefully consider the risk of inter-State tensions by asserting limitations and exceptions to immunity that States are not expected to accept by means of a treaty and for which there is no sufficient and coherent State practice.

Therefore, in view of the potential of clearly defined procedural safeguards to prevent abuse in the exercise of jurisdiction by other States, we look forward to the next report of the Special Rapporteur on the procedural aspects of immunity and the Commission's considerations on the procedural safeguards applicable to the current draft articles, including article 7.

32. Russia

a) Russian

Тема «Иммунитет должностных лиц государства от иностранной уголовной юрисдикции» является одной из ключевых в текущей повестке дня КМП. Положения международного права относительно иммунитета должностных лиц от иностранной уголовной юрисдикции распространяются на всех должностных лиц и являются нормой обычного права, вытекающей из государственного суверенитета – основополагающего института международного права.

В этом году Комиссия, по предложению Спецдокладчика г-жи Эскобар Эрнандес, рассмотрела вопрос исключений из иммунитета. Прежде чем давать комментарии по существу выводов Комиссии хотелось бы с сожалением отметить, что исключения стали предметом изучения Комиссии до процедурных аспектов иммунитета. Поскольку иммунитет имеет процессуальную природу (и таким образом полностью отличен от материального права, которое определяет правомерность поведения лица), процедурные аспекты его применения имеют первостепенное значение. На наш взгляд, формулирование процедурных правил применения иммунитета могло бы снять целый ряд тезисов, которые используются в пользу необходимости закрепления исключений из иммунитета должностных лиц.

Российская делегация разделяет вывод Комиссии о том, что исключения из иммунитета должностных лиц не применимы к лицам, обладающим иммунитетом ratione personae. В этой связи хотели бы еще раз отметить: мы исходим из того, что круг лиц, обладающих иммунитетом ratione personae, не ограничивается «тройкой» (глава государства, глава правительства, министр иностранных дел), но распространяется и на других высших должностных лиц – например, на министра обороны.

На этом наше согласие с выводами Комиссии по этой теме заканчивается. Изучив доклад Комиссии, а также доклад Спецдокладчика, мы исходим из того, что в них не было приведено доказательств - прежде всего в практике государств - наличия в действующем международном праве исключений из иммунитета ratione materiae. Равным образом не прослеживаются тенденции к исключениям в практике государств. Исключения, перечисленные в проекте статьи 7, принятой Комиссией путем голосования, не подтверждаются ни последовательной практикой национальных или международных судов, ни национальным законодательством.

Не увидели также согласия в Комиссии по вопросу, считает ли Комиссия такие исключения нормой lex lata или lex ferenda, что также не свидетельствует об объективном рассмотрении вопроса.

Таким образом, приходится с сожалением констатировать, что при рассмотрении данного вопроса объективный подход уступил место субъективному желанию создать новую норму для привлечения к ответственности должностных лиц государств. Вопросы, существуют ли в международном праве исключения из иммунитетов и должны ли они существовать, не тождественны, как не тождественны понятия иммунитета и безнаказанности.

Перед Комиссией стоит не вопрос, как привлечь должностное лицо к ответственности, а вопрос о том, существуют ли исключения из общего правила иммунитета должностного лица одного государства от национальной (а не международной) уголовной юрисдикции другого государства (а не того, на службе которого он находится). Из одного только названия темы очевидно, что существуют иные способы привлечения виновного лица к ответственности за преступления, например, в своем собственном государстве, в надлежащим образом созданных международных судебных инстанциях. Кроме того, государство может решить отказаться от иммунитета соответствующего должностного лица.

Исходим из того, что искусственное создание международно-правовой нормы, не отражающей действительности и встречающей настойчивое возражение государств, не может являться ни кодификацией, ни прогрессивным развитием права и не отвечает целям работы Комиссии.

b) English

The topic: “Immunity of State officials from foreign criminal jurisdiction” is one of the key issues in the current agenda of the ILC. The provisions of international law regarding immunity of state officials from foreign criminal jurisdiction are extended to all officials and are a norm of common law deriving from state sovereignty as a fundamental institution of international law.

This year the Commission examined the issue of exceptions to the immunity following the proposal by the Special Rapporteur Ms. Escobar Hernández. Before giving comments on the substance of the Commission’s conclusions we would like to note with regret that the exceptions became a subject for consideration by the Commission before the procedural aspects of immunity. Since immunity is of a procedural nature (and thus it is totally different from material law, which determines the legitimacy of the person’s conduct), the procedural aspects of its application are of priority importance. We believe that the formulation of procedural rules of application of immunity could remove a number of provisions that are used in favor of the need to record exceptions to the immunity of the officials.

The Russian delegation shared the view of the Commission that exceptions to the immunity of the officials are not applicable to persons possessing ratione personae immunity. Let us emphasize once again we do believe that the persons possessing ratione personae immunity are not limited by the “troika” (head of state, head of government and foreign minister) but is extended to other high officials, for example the minister of defense.

Our agreement with the conclusions of the Commission ends at this point. Having reviewed the report of the Commission as well as the report of the Special Rapporteur, we would like to note that they did not provide proof, especially regarding the practice of states, of the presence of exceptions to ratione personae immunity in the existing international law. Equally we cannot observe the trends toward exceptions in the practice of states. Exceptions listed in draft article 7 adopted by vote in the Commission are not confirmed by consistent practice of national or international courts or national legislation.

We did not see either the agreement in the Commission on the issue whether it considered such exceptions to be lex lata or lex ferenda rule which also does not prove that this issue had been considered objectively.

Thus, we have to recognize with regret that during the consideration of this issue the objective approach was substituted by a subjective wish to create a new rule for prosecution of state officials. The questions whether international law contains exceptions to immunities and whether they should exist at all are not similar as the notions of immunity and impunity are not similar either.

It is not a question before the Commission as to how prosecute a state official but the question whether there are exceptions to the general rule of immunity of an official of one state from national (rather than international) criminal jurisdiction of another state (i.e. not the state on whose service this person works). It follows just from the name of this topic that there are other ways of prosecuting the perpetrator of a crime, for example in his own state in duly established international judicial institutions. Moreover, the state may waiver the immunity of the state official in question.

We believe that the artificial creation of an international legal norm that does not reflect the reality and confronts continuous objections of states cannot be either codification or progressive development of international law and is inconsistent with the goals of the Commission's work.

33. Singapore

Immunity of State officials from foreign criminal jurisdiction

9. Turning to Chapter VII of the Report on the topic "Immunity of State officials from foreign criminal jurisdiction", my delegation is deeply interested in the work of the Commission on this topic. We reiterate our appreciation to the Special Rapporteur Ms Concepcion Escobar Hernandez for her continued work on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

10. We, however, note the unusual manner in which draft article 7 was provisionally adopted by the Commission; that is by way of recorded vote. The dissension within the Commission on draft article 7 reflects that the propositions contained within could benefit from further consideration. My

delegation is of the view that there are legitimate concerns, and we would invite the Commission to reconsider draft article 7.

11. First, my delegation is of the view that, while the temporal scope of immunity ratione materiae is not controversial, the material scope has benefited and would still benefit from further study and elucidation. In this vein, we have concerns as to whether there is sufficient State practice, in terms of case law, national statutes and treaty law, which would justify the codification of the specific list of crimes under international law in draft article 7 for which immunity ratione materiae shall not apply. If, instead, it is the Commission's intent to state a conclusion de lege ferenda, this intent should be clearly articulated.

12. Second, given the manner in which draft article 7 is currently framed, my delegation reiterates our suggestion that the Commission may wish to revisit, as a matter of progressive development of the law, the extension of immunity rationae personae to high officials beyond the troika, following completion of its work on immunity rationae materiae.

13. Third, Singapore has previously suggested a more pragmatic way to approach the analysis on possible limitations and exceptions to immunity ratione materiae instead of specifying a list of crimes. Our full comments are contained in the document A/C.6/71/SR.27 at paragraphs 131-132. Singapore is of the view that framing the analysis in this way will avoid procedural hurdles. We agree particularly with paragraph 8 of the commentary on draft Article 7, that it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; and that further, immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law.

14. Finally, we empathise with the concerns expressed by several members of the Commission concerning the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction. In this respect, our delegation wishes to underscore the need to focus on safeguards to ensure that exceptions to immunity ratione materiae are not applied in a wholly subjective manner.

15. My delegation is of the view that more in-depth analysis should be given to the draft articles, given this intrinsically complex area of international law, and we look forward to studying the further outcomes of the Commission on this topic.

34. Slovakia

Mr. Chairman,

I will now turn to the topic Immunity of State officials from foreign criminal jurisdiction. We would like to commend Special Rapporteur Escobar Hernández for the presentation of her report in 2016. At the outset allow me to present some concerns on how the ILC proceeded in procedurally solving

the apparent deadlock in consideration of question of limitations and exceptions to the immunity *ratione materiae*. Although voting is a legitimate procedural tool, the ILC shall use it only as a last resort and only with extreme caution especially in highly politically charged questions. Therefore, we are not entirely convinced that the Commission was supposed to force the adoption of draft article 7 through recorded voting. In our view, the ILC should have continued the discussion and to explore further possible consensual solution. No one can realistically expect that division in the ILC with regard this particular draft article will go unnoticed in the General Assembly. The situation will make a potential consensual action of the GA with regard draft articles almost impossible.

Slovakia supports the concept of immunity *ratione materiae* of State officials from foreign criminal jurisdiction, as well as the existence in current general international law of limitation and exception to this immunity. We therefore support inclusion of draft article 7 on the limitation and exceptions, which in our view shall not go beyond core crimes under international law. It seems that this concept was reflected in the title of article 7, but we continue to wonder, if original purpose, i.e. define limitations and exceptions, shall not be reflected in the title.

We strongly support the relationship between *ratione personae* and *ratione materiae* immunities with regards the exemptions in draft article 7, as explained in paragraph 3 of the draft commentary. We question however, whether this important concept should not be also reflected as a normative provision in draft articles.

With regard the question of listing the crimes under international law, we are leaning towards the approach chosen by the Commission. A clear list of international crimes will help to achieve legal certainty, although opens natural questions, whether the list reflects customary international law or is an attempt towards developing the law.

We are however convinced that the list shall not go beyond *de lege lata* international crimes and not to include crimes that are not firmly part of general international law or those that fall into a broader category of particular international crimes, namely crimes against humanity. With that in mind, we think that the Commission should review, based on those criteria, if crime of apartheid, torture or enforced disappearance shall be, for one or other reason, included in the list of crimes, for which immunity *ratione materiae* shall not apply. What also shall be taken into account is, whether the ambition of the ILC with regards article 7 is not redefining or rewriting the concept of crimes under international law.

We welcome the intention of the Special Rapporteur to deal in her sixth report to be presented at the next session of the Commission procedural provisions and safeguards. This will be an important issue to complement the material provisions adopted so far, and may be crucial for having workable and meaningful set of draft articles to be adopted and accepted by the States. We note further the intention of the Commission to complete the draft articles on first reading next year, however we call for caution not to proceed towards premature completion by any cost.

35. Slovenia

Mr Chairperson,

It is my pleasure to address the Sixth Committee regarding the work of the International Law Commission on Cluster 2 topic 'Immunity of State officials from foreign criminal jurisdiction'.

Slovenia notes that the Commission continued its consideration of the fifth report of the Special Rapporteur, which analysed the question of limitations and exceptions to the immunity of state officials from foreign criminal jurisdiction.

Slovenia agrees that the aspect of limitations and exceptions to immunity requires a detailed and careful examination which takes into account state practice, *opinion iuris*, and trends in international law. The provisional adoption by the Commission of draft article 7 by a recorded vote attest to the complexity of this question. Given the importance of the topic to states, Slovenia considers that these deliberations require appropriate attention, enough time and thoroughness. Moreover, we believe that as a general rule the Commission should strive to avoid recourse to a recorded vote when provisionally adopting draft articles. We would thus advise an approach that emphasises diligence over swiftness in deliberating on critical and challenging aspects of a topic.

Slovenia would like to reiterate its view that, while the immunity of state officials from foreign criminal jurisdiction is based on the principles of the sovereign equality of states, non-intervention, and the interest of states in maintaining friendly relations, this matter should also be addressed against the background of the growing prominence of legal humanism and the fight against impunity, in particular through the prism of the progressive development of international law and developments in international criminal law.

Slovenia considers that the Special Rapporteur reflected these underlying guiding aspects by making a clear distinction between the immunity regimes *ratione materiae* and *ratione personae* and their distinct rationale. We therefore share the views expressed within the Commission that, while today the status of customary international law does not allow for limitations and exceptions to immunity *ratione personae* in the context of inter-state relations, the opposite trend exists with respect to immunity *ratione materiae* and the most serious international crimes.

Slovenia supports the approach defined in draft article 7, paragraph 2, which focuses on the traditional 'troika', namely heads of state, heads of government, and ministers for foreign affairs, and emphasises that the enjoyment of immunity *ratione personae* is time-bound.

Furthermore, Slovenia welcomes the inclusion of a without-prejudice provision in the proposed paragraph 3, which takes into account, inter alia, a general obligation to cooperate with international tribunals.

At the same time, Slovenia appreciates, on the one hand, the delicate nature of the issue and the need to ensure a balance between the sovereign equality of states and stability in international

relations, and on the other hand, the need to prevent and punish the most serious crimes under international law.

Slovenia considers that this balance would be achieved through a prudent approach to dealing with situations in which limitations and exceptions apply, as well as through a thorough examination of the procedural aspects of immunity, including procedural safeguards and guarantees, in order to address concerns regarding possible abuse.

With respect to the proposed list of crimes, Slovenia considers that, in order to strike the right balance between ensuring stability in international relations and the common interest in combatting impunity, the list of crimes quite rightly includes the core crimes of genocide, crimes against humanity, and war crimes. In this respect, Slovenia notes the decision of the Commission not to include the crime of aggression on the list of crimes at this time. While appreciating the specific nature of the crime of aggression, as well as the fact that the jurisdiction of the International Criminal Court over the crime of aggression is yet to be activated, Slovenia wishes to underline that the crime of aggression is the most serious crime under international law. Therefore, Slovenia considers that the inclusion of the crime of aggression on the list of crimes would merit reconsideration at the appropriate time.

Moreover, Slovenia notes that the crimes of apartheid, torture, and enforced disappearances are included in paragraph 1 as separate categories of crimes under international law, despite the fact that these crimes are included in the Rome Statute. Slovenia understands that the Commission reached this decision with a view to avoiding the threshold set in the Rome Statute. We consider that the choice of approach in this respect – that is, whether to follow the Rome Statute or include the three additional crimes as separate categories of crimes – should correspond to the common understanding of the level of gravity of crimes for which limitations and exceptions to immunity would be acceptable to the majority of states. For example, while the Rome Statute has been ratified by more than 120 states, the International Convention for the Protection of All Persons from Enforced Disappearance has been ratified by 57 states.

Furthermore, Slovenia wishes to point to the link between this matter and the on-going discussions within the Commission on the peremptory norms of general international law. Given that *jus cogens* rules are rules from which no derogation is permitted, Slovenia would welcome further examination of the possibility of considering violations of *jus cogens* norms in the context of limitations and exceptions to the immunity.

Concerning draft Article 7, paragraph 2, Slovenia agrees that the scope of this topic does not include the drafting of the definitions of crimes, and at the same time appreciates the Commission's mindfulness with respect to the principle of legal certainty. However, while we understand the selection criteria used by the Commission in enunciating the draft annex, the limited approach in referring to the existing relevant sources of definitions of the crimes might

appear unusually selective. For example, the annex does not list the Geneva Conventions and protocols thereto. Furthermore, listing the various conventions under specific subheadings, while omitting them from others, could give the impression, for example, that the Rome Statute does not proscribe the crimes of apartheid, torture, and enforced disappearances. What is more, not all states are parties to the listed conventions and not all states have transposed the relevant definitions into their domestic legal order. Slovenia proposes that the idea of an annex be considered again, both in terms its content and format. Alternatively, if not more advisably, the Commission could consider whether it would not be more appropriate to make a general reference to the sources of the definitions of the crimes as contained in widely accepted and contemporary treaties when guiding states to appropriate definitions of crimes. We would also welcome additional consideration of the consequences arising out of the differences between monist and dualist legal systems as well as the matter of the lack of universal transposition of the relevant definitions into domestic legal orders in the context of the present topic.

Slovenia wishes to reiterate the importance of the topic and to express support for the Special Rapporteur as she continues with her endeavours.

36. South Africa

Mr Chairman, We now turn to the topic entitled "immunity of state officials from foreign criminal jurisdiction". Once again, thank you for affording us the opportunity to share some thoughts on this topic. My delegation congratulates the Special Rapporteur, Professor Concepcion Escobar Hernandez, on her well-researched and comprehensive report and commends her for the noteworthy progress that has been made on this topic. We welcome the Commission's consideration of this topic and the fact that on the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and commentaries thereto. My delegation once submitted in one of our previous statements that a careful study must be made by the Commission on the possible limits to be set to immunity ratione personae and ratione materiae in the Draft Articles. We therefore welcome the fact that at its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 which was eventually adopted by majority vote. We subscribe to the view that Draft article 7 refers to crimes under international law in respect of which immunity from foreign criminal jurisdiction ratione materiae does not apply. The draft article contains two paragraphs, one that lists the crimes in paragraph 1 and one that identifies the definition of those crimes in paragraph 2. Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her period in office. Thus, draft article 7 complements the normative elements of immunity from criminal jurisdiction ratione materiae as defined in draft articles 5 and 6. Paragraph 2 of draft article 7 establishes a link

between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, in paragraph 2". My delegation welcomes with appreciation the fact that, while the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of apartheid', "torture" and "enforced disappearance" belong to well established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

Mr Chairman

In its wisdom, which is highly appreciated and welcomed by my delegation, the Commission decided to include draft article 7 for the following reasons. First, there has been a discernible trend towards limiting the applicability of immunity from jurisdiction ratione materiae in respect of certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction ratione materiae in relation to certain international crimes. In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity ratione materiae in relation to the commission of international crimes. This trend has also been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals. Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to operate within an international legal order whose unity and systemic nature cannot be ignored.

Mr Chairman

A lot has been said about Article 7 and during the intense debate among the ILC members within the Commission. We also heard what some delegations have said in this room in their statements about Article 7. We, once again, wish to re-iterate what we said in one of our previous statements that a careful balance must be struck between the need to protect the traditional norm of immunity of representatives of States from the jurisdiction of foreign States, based on fundamental international law principles such as the equality of States, and the norms of the protection of human rights and the prevention of impunity for international crimes. We subscribe to the view that such a delicate balance is only possible if the current state of the law is thoroughly investigated and understood. Finding the appropriate balance requires us to critically assess, and not just assume, the existence in law and state practice of immunity, the extent of such immunity as well as available exceptions if any. My delegation is of the view that Article 7 has a potential of being a good starting point that will bring to the fore the aforementioned careful and delicate balance, I repeat, between the need to protect the well-established norm of immunity

of representatives of states from the jurisdiction of foreign states, while preventing impunity for serious crimes. Article 7 is therefore really a point of departure and definitely a step in the right direction towards achieving and striking the aforementioned careful and delicate balance.

37. Spain

a) First Statement:

Furthermore, also on a general level, we would like to manifest the deep concern of our delegation regarding the fact that the adoption of certain draft articles has been carried out through voting. We are not unaware that the Commission has adopted decisions through voting in the past. But we believe this entails a risk of dividing the Commission, with a possible future impact on its work. The Commission's authority is consolidated if it acts on consensus. And, if consensus were not possible, perhaps the discussion should continue until such consensus is reached. If the Commission intends to present a draft *lex ferenda*, the very least to be demanded is for there to be an internal agreement about the question.

In this same order of things, we also consider that, in the ILC's work, it is important to distinguish clearly when it acts as lex late and when as lex ferenda. States need to have certainty as to whether a Commission proposal represents a codification or a development of International Law. This is particularly necessary when we face sensitive topics. We deem this is always important. This also applies to the case of draft articles, even though States can obviously later accept or not to include them in a treaty.

b) Second Statement:

Chaptei: VII: Immunity of State officials from foreign criminal jurisdiction

Mr Chairman,

Regarding Chapter VII, on the immunity of State officials from fareign criminal jurisdiction, the Delegation of Spain would lilce, firstly, to repeat its congratulations to our fellow Spaniard Ms. Concepción Escobar Hemández, far the submission in 2916 of her fifth report. We would also like to express our recognition of the Commission far having completed its analysis during this session, and far the provisional approval of draft Alticle 7.

Nevertheless, Mr. Chairman, as we have already brought forward more generally in our previous intervention, we believe that on this subject, as in all the others, the Commission should make a clear distinction on whether it is acting on a *de lege lata* or a *de lege ferenda* basis. And, in any case, it should avoid giving the irnpression of being creating Law. Otherwise, the final effect will be precisely the opposite of the intended one.

With regards to the particular issue we are now dealing with, my delegation has no doubts, for example, about the consideration as customary international law of the immunity of former Heads

of State and of Government and former Ministers of Foreign Affairs. However, if we are being honest, we cannot say the same thing about the exceptions and limits to the immunity *ratione materiae.* In this regard, identifying (and perhaps also analysing) both State practice and *opinio iuris* proves particularly difficult. State practice is scarce and the necessary legal consensus cannot be found either. Such a lack of consensus can be discerned, firstly, from the fact that the International Court of Justice has avoided, at least twice, to pronounce itself on the customary nature (or not) of this issue. As we all know, the lack of consensus became clearly evident within the Commission itself.

As we already brought forward in our intervention on Wednesday on the general issues of the report, it is really striking that the approval of article 7 resulted from a vote in the Commission, and it is no less striking that the Commentary reflects the discrepancy of those members who were in the minority. Yesterday, we listened with attention to the explanations given by the President of the Commission. However, we still think that both circumstances, certainly exceptional, weaken the draft Article, and above all, they place States in an impossible position: forcing us to decide whether or not there is a trend toward the inapplicability of immunity for certain international crimes. If the Commission intends to make a *de lege ferenda* proposal, the least that can be asked is that within the Commission there be agreement on this; otherwise, we greatly fear, and we are very sad to say it, that the proposal will be stillborn.

In any case, it wouldn't be an obstacle to confirm, at the same time, that if there is a "trend", the most recent Spanish legislation would certiainly be in line with it. The Law on Immunity of States and International Organisations based in Spain, approved on October 27th 2015, which regulates, *inter alia,* the immunity of former Heads of State and of Government and former Ministers of Foreign Affairs, excludes immunity from the crimes of genocide, forced disappearance, war crimes, and crimes against humanity that they may have committed while in office. These four crimes are included in paragraph 1 of draft Article 7, which completes the list with the crime of apartheid and torture.

When defining the crimes in paragraph 1, there were two options: referring to the definitions contained in the treaties of reference, or restating said definitions. In this case, the former option was chosen. However, in the draft Articles on crimes against humanity, the definitions used in the 1998 Rome Statute are restated. We cannot quite understand the reason for the Commission's different approach.

Moving on to different considerations, we agree with Ms Escobar Hemández in that the issue of the limits or exceptions to immunity (or, if prefened, of the identification of the cases in which immunity *ratione materiae* does not operate) is an issue that is prior to the procedural aspects of immunity. However, issues such as State officials' waiver of immunity would not be part of those procedural issues, the treatment of which may be left for the end. Moving to the sphere of State

immunities, here we can mention, as an example, the *United Nations Convention on Jurisdictional Immunities of States and Their Property* of 2004, which addresses the waiver of immunity in Part II, on General Principles, and not in Part V, which includes procedural aspects.

Lastly, the reference in the draft Article's heading and text to immunity *ratione materiae* leads us to insist on what we pointed out last year at this same forum with regard to paragraph 3 of draft Article 6: That in this provision it is necessary to explicitly classify the immunity of Heads of State and of Govemment and Ministers of Foreign Affairs after the end of their mandates as immunity *ratione materiae*. To the arguments we presented then, we can add another: that there be no doubt that the provision in draft Article 7 would be applicable to them.

38. Sri Lanka

Mr. Chairman,

Permit me to join all other speakers in extending, on behalf of my delegation, our warm appreciation to the Chairman of the Commission Mr. Georg Nolte, for his comprehensive presentation of the Second Cluster of topics in the Commission's Report. I also take this opportunity to extend to him our sincere congratulations on the work that has been accomplished at the 69th Session of the ILC under his stewardship.

My intervention today is primarily on Ch. VII of the Report on the topic, "Immunity of State Officials from Foreign Criminal jurisdiction" – a topic of critical importance to Member States and one on which there has been an intense debate within the Commission.

We welcome the Fifth Report of the Special Rapporteur Ms. Concepción Escobar Hernández and appreciate the efforts that have been made on the question of limitations and exceptions to immunity of State Officials from Foreign Criminal Jurisdiction. We wish to underline in this regard, the need to proceed with circumspection, on a difficult topic, given both the legal complexity and the political sensitivity of the issues at hand and their critical importance to Member States.

The Report, concludes that it had not been possible to determine the existence of a customary rule that allowed for the application to immunity and exceptions in respect of immunity ratione personae or to identify a trend in favour of such a rule.

On the other hand, the Report concludes that the limitations and exceptions to the immunity of State Officials from foreign criminal jurisdiction, were extant in the context of immunity ratione materiae. Special Rapporteur states that "although varied, the practice showed a clear trend towards considering the commission of international crimes, as a bar to the application of immunity ratione materiae of State officials from foreign criminal jurisdiction …"

It is this conclusion and the approach adopted through Draft Article 7 that has generated a sharply divisive debate within the Commission and has led, unfortunately, to a decision through recourse to a vote, on an issue, which, in our view must by its very nature, be the subject of further critical

analysis and a decision to be taken by consensus.

Questions have been raised in the course of the debate as to whether the report does contain sufficiently cogent evidence to support the conclusion that has been reached on the existence of limitations and exceptions in respect of acts ratione materiae that has been proposed.

While recognizing that the discussion of the practice in the Report was indeed extensive, the criticism has been made, inter-alia, that examples cited in the Report related to State immunity or immunity in civil proceedings rather than criminal prosecutions; that they were taken from different contexts and that the report selectively discussed cases that supported the establishment of limitations and exceptions while disregarding evidence indicating the opposite.

Without delving too much into all these aspects, I intend to flag few important issues on which my delegation feels strongly and wish to put on record our positon.

Firstly, the extent of the Treaty Practice that has been cited, with regard to limitations and exceptions to immunity, is problematic. Treaties dealing with 'international crimes of a serious nature', as reflected in those criminal law enforcement treaties providing for an 'extradite or prosecute' regime, do not expressly provide 'limitations and exceptions' to immunity in respect of crimes covered under these Conventions. In our view such Treaties cannot be considered as contributing towards the existence of a customary rule. To establish the existence of such a customary rule, requires much more cogent and clear and unequivocal evidence of Treaty Practice.

Secondly, it is a matter of concern that considerable reliance is being placed on treaties expressly providing for individual criminal responsibility for international crimes, where immunity is denied in proceedings before international courts or tribunals. Such treaties, by definition, should not have a bearing on the question of immunity of State official before domestic Courts of a foreign State. The blurring of the distinction between the application of limitations and exceptions in proceedings before an International Court on the one hand and in proceedings before the domestic courts of a foreign State on the other, makes the basic approach of Draft Art 7, somewhat problematic. The draft article is by and large grounded on the ICC Statute and, consequently, cannot be considered as reflective of a Customary Law principle establishing limitations and exceptions to immunity of State officials in foreign criminal jurisdictions. In the case of the ICC Statue, States who have subscribed to the Instrument, have as a matter of sovereign discretion, voluntarily renounced the right to claim immunity in respect of the core crimes under the Statue, even in respect of the Troika. The Statute therefore should not have a bearing on the question of the immunity of State officials from prosecution before national Courts.

This fundamental point of distinction between prosecution before a domestic Court of a foreign state and one before an international court or tribunal has a critical bearing on the overall approach with regard to draft Art.7. In our view aligning draft Art. 7 with the approach of instruments relating to International Courts/tribunals would run the inevitable risk of affecting the

peace and stability in relations among states, when one State opts to exercise criminal jurisdiction over the officials of another State, before their own national courts, as cogently pointed out by some members of the Commission. This approach in our view militates against the sanctity of the principle of sovereign equality of States enshrined in the charter, and could jeopardize the broad acceptability of the draft articles as a whole, a scenario that should, as a matter of prudence, be carefully avoided.

In our view, it would be necessary to focus on existing law (lex lata) and to build up a solid foundation of existing State practice, as the starting point. The aspect of progressive development (lege ferenda) could be addressed at a subsequent stage.

Finally, Mr. Chairman my delegation wholeheartedly agrees with the views that have been expressed in the Commission on the need to recognize the crucial relationship between possible exceptions to immunity ratione materiae and the procedural safeguards that would ensure that such exceptions would not be abused for partisan political purposes. In our view too, this Article should have been adopted only in conjunction with such safeguards - a view that has also been clearly expressed around this room during this debate.

My delegation notes with satisfaction, however, that the Special Rapporteur has reiterated her conviction that the Commission should deal thoroughly with procedural issues, including necessary procedural guarantees and safeguards to prevent politicization and possible abuse in the exercise of criminal jurisdiction and that the Sixth Report would be devoted to procedural questions. We would emphasize the importance of the right of waiver in appropriate circumstances, as a key element in this regard.

While we as Member States look forward to the Sixth Report, we wish the Special Rapporteur Ms. Escobar Hernández, with whom I have had the pleasure of working over the years, both in the Committee as well as during my tenure in the Commission, the very best as she proceeds with the challenging task of dealing with the complex question of immunity of State Officials from foreign criminal jurisdiction.

39. Sudan (Transcript)

Mr Chair,

we took note of the commission's report regarding the fifth report of the special rapporteur and we also took note of the suggestion of having a single article in this regard and to adopt the draft article 7. And we would like to thank the Commission and the Special Rapporteur in particular for this valuable effort. No doubt, we will submit to the Commission with our detailed statement regarding immunity and our national practices in this regard as soon as possible.

Mr Chair,

The issue of the immunity of State Officials from foreign criminal jurisdiction has been taken a lot

of importance as the enjoyment by the State or the representatives or the property thereof with immunity is derived from the equal sovereignty and we have to differentiate between the rules that govern the jurisdiction of national courts and the rules that govern the immunity from jurisdiction, because being subject to jurisdiction does not negate immunity and vice versa.

Mr Chair,

We would like to refer to the UN Convention on Jurisdicitional Immunities of States and Their Property of 2004, which provides that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law. And also, it believes that an international convention would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons and would contribute to the codification and development of the international law and the harmonization of practice in this area.

Mr Chair,

The International Court of Justice, in its advisory opinion on the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights, stated that this is an established customary rule to the effect that the act by any State, body or apparatus is neccesarily considered an act by the respective State and given that the apparatus is made up of a person or an entity having that status under the domestic law, the expression “State Official” does not only cover the persons constituting an official State body, but also the persons and entities that exercise elements of the government authority. The term might also cover persons or categories of persons who act de-facto upon the instructions or directions of or under the control of a State or the persons or categories of persons who excersie elements of the governmental authority in absence of or on behalf of the government. The immunity from foreign jurisdiction should be prima facie subject to the jurisdiction of another country and it should be reasonably addressed and if however the ICJ has itself addressed the issues of jurisdiction without any decision in this regard. And in any legal system whether it is national or international the exercise by the State of its jurisdiction is a manifestation of its sovereignty as it is the means whereby the law is enforced.

Mr Chair,

In draft article 6, we find that the issue of the immunity of the Head of State is very controversial and we would have hoped that the ILC would have decided upon this controversy. However, it has adopted the Rome Statute condition and we find that there is some sort of conflict between Art. 10 and Art. 27. Whereas Art. 10 provides that “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” we find that Art. 27 thereof provides for the irrelevance of the official capacity, so what is the source here of the international law? Because we find that the immunities of Heads of States are established in the customary and codified international laws and it is also

established by the decisions, verdicts, rulings and the documents of courts, especially the rulings of the ICJ in this regard. It is also established according to the general principles of the law. Don't you think that these are all the sources of international law?

Thank you Mr Chair.

40. Switzerland

a) French

Monsieur le President,

Notre délègation a lu avec grand intérêt le dernier rapport de la Commission du droit international (CDI) sur l'immunité de juridiction pénale étrangère des représentants de l'État. Nous prenons acte de l'adoption provisoire du projet d'article 7, et tenons à remercier la commission pour important travail qu'elle a accompli.

Avant de commenter le projet d'article 7 en particulier, nous tenons à souligner que certaines questions méthodologiques devraient, à notre avis, être clarifiées.

Premièrement, le caractère procédural de l'immunité oblige les tribunaux à traiter la question de l'immunité à titre préliminaire. S'agissant de l'immunité des l'États, la Cour Internationale de justice (CIJ) a indiqué en 2012, dans l'affaire *Allemagne c. Italie*, que « l'idée de subordonner, dans une certaine mesure, le droit à l'immunité à la gravité de l'acte ilicite en cause pose un problème de logique». Selon la CIJ, deux interprétations sont possibles. Selon la première, le tribunal national saisi devrait d'abord établir si l'État a véritablement commis l'acte ilicite grave en question afin de déterminer s'ilpeut ou non se prévaloir de l'immunité juridictionnelle. À ce stade, l'État étranger aurait déjà été soumis à la juridiction de l'autre l'État. Selon la seconde interprétation, la simple allégation qu'un acte ilicite grave a été commis serait suffisante pour refuser l'immunité, auquel cas des procédures engagées pour des motifs même improbables et dénués de tout fondement factuel pourraient être poursuivies. À notre avis, aucune de ces solutions n'est pleinement satisfaisante pour ce qui est des procédures pénales contre des représentants d'un État étranger. Il serait utile que la CDI prenne position sur cette question.

Deuxièment, nous constatons que la CDI ne fait aucune distinction entre les diverses raisons pour lesquelles un tribunal national est arrivé à la conclusion qu'un représentant de l'État ne jouit pas de l'immunité de fonction devant une juridiction pénale étrangère lorsqu'une procédure à été ouverte en relation avec des crimes internationaux. Dans certains cas, des tribunaux ont considéré que l'immunité ne s'appliquait pas en raison de la gravité des actes en question; dans d'autres, ils ont jugé que lesdits actes ne pouvaient pas être considérés comme ayant été accomplis dans l'exercice de fonctions officielles. Cette distinction est importante à nos yeux. Il ne serait approprié de parler d'exception à la règle générale de l'immunité que dans le premier cas. Dans le

deuxième cas, ces actes n'entreraient pas dans le champ d'application de l'immunité *ratione materiae* telle que définie dans le projet d'article 6. Alors que la question se pose de savoir si les exceptions proposées a l'immunité *ratione materiae* reflètent le droit international coutumier, il est généralement admis que la portée de l'immunité *ratione materiae* se limite aux actes accomplis dans l'exercice de fonctions officielles.

Troisièmement, la CDI mentionne certaines affaires où des tribunaux nationaux ont jugé des représentants d'un autre État pour des crimes internationaux sans statuer expressèment sur l'immunité. À notre avis, avant d'évaluer la pertinence de ces affaires en vue de l'établissement d'exceptions, il est nécessaire de clarifier si l'immunité des representants de l'État existe indépendamment de son invocation par l'État, ou si l'absence d'invocation peut être interprétée comme une renonciation implicite à cette immunité. En effet, si l'État en question n'a jamais invoqué l'immunité de son représentant, il est difficile de savoir si l'immunité n'a pas été considerée comme un obstacle parce que l'affaire concernait des crimes internationaux, ou parce que l'État ne semblait pas se prévaloir de l'immunité. Ce dernier point illustre pourquoi il pourrait être nécessaire, à nos yeux, de revenir ultérieurement sur les différents projets d'articles et sur le commentaire, une fois que toutes les questions de procédure et de fond auront étét raitées.

Monsieur le President,

Le mandat de la CDI consiste à la fois à codifier et à développer progressivement le droit international. Nous estimons qu'il est important de faire une distinction aussi claire que possible entre ces deux aspects des travaux de la Gommission. En effet, c'est bien connu, les projets d'articles de la CDI jouissent d'une grande autorité dans la pratique et sont souvent interprétés comme des énoncés de droit par les tribunaux nationaux.

Le projet d'article 7, tel qu'il a été provisoirement adopté par la CDI, considère que l'immunité *ratione materiae* de juridiction pénale étrangere ne s'applique pas en ce qui concerne le crime de génocide, les crimes centre I'humanité, les crimes de guerre, le crime d'apartheid, la torture et les disparitions forcées. Nous estimons qu'il est primordial qu'un article sur les exceptions à l'immunité de fonction des représentants de I'État devant la juridiction pénale étrangère soit ou bien solidement étayé par une pratique des États généralisée et quasiment uniforme ainsi que par l'*opinio juris*, ou bien clairement identifié comme relevant du développement progressif du droit.

Après un examen approfondi des différentes sources citées à l'appui du projet d'article 7, la Suisse est d'avis que ces critères exigeants pour l'établissement d'une règle de droit international coutumier ne sont pas satisfaits en l'espèce. Nous encourageons la Commission à fournir des éléments plus probants pour soutenir le projet d'article 7 ou à indiquer clairement que celui-ci s'inscrit dans le développement progressif du droit.

Nous attendons avec intérêt les futurs travaux de la Commission sur le sujet. Monsieur le President, nous vous remercions.

b) English

Mr Chairman,

Our delegation has read with great interest the ILC's most recent report on the immunity of State officials from foreign criminal jurisdiction. We take note of the provisional adoption of draft article 7 and would like to thank the Commission for its important work.

Before commenting on draft article 7 specifically, we would like to stress that certain methodological questions should in our view be further clarified.

First, the procedural nature of immunity obliges courts to address immunity as a preliminary matter. In relation to State immunity, the ICJ stated in the 2012 Germany v Italy case that 'the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem'. According to the ICJ, a national court would either be required to first establish whether the serious offense in question had been committed in order to determine whether the State could rely on its immunity from jurisdiction. At that point the foreign State would already have been subjected to the other State's jurisdiction. Or, the mere allegation that a grave offense had been committed would be sufficient to deny immunity, in which case even far-fetched proceedings with no grounding in facts would be allowed to continue. In our view, neither solution is fully satisfactory when it comes to criminal proceedings against foreign State officials. It would be useful for the ILC to comment on the matter.

Second, we note that the ILC does not distinguish between the various reasons for which a domestic court came to the conclusion that a State official did not enjoy functional immunity from foreign criminal jurisdiction in relation to international crimes. In some cases, courts found that immunity did not apply because of the gravity of the acts in question; in other cases, they found that the acts in question could not be considered official acts. In our view, the distinction is important. Only in the first case would it be appropriate to speak of an exception to an otherwise existing immunity. In the latter case, the acts would fall outside of the scope of immunity ratione materiae as defined in draft article 6. Whereas the status of the proposed exceptions to immunity ratione materiae under customary international law is contested, it is generally accepted that the scope of immunity ratione materiae is limited to acts committed in an official capacity.

Third, the ILC mentions certain cases in which national courts have tried officials of another State for international crimes without expressly ruling on immunity. In our view, before assessing the relevance of these cases for the purposes of exceptions, it is necessary to clarify whether the immunity of State officials exists independently of its invocation by the State, or respectively, whether a lack of invocation can be interpreted as an implicit waiver. For if the State in question

never invoked immunity on behalf of its official, it is not clear whether immunity was not considered an obstacle because international crimes were in question, or because the State did not seem to claim it. This last point illustrates why in our view, it might be necessary to come back to the individual draft articles and commentary at a later stage, once all procedural and substantive questions have been addressed.

Mr. Chairman,

The ILC's mandate includes both the codification and the progressive development of international law. We believe that it is important to distinguish the two aspects of the Commission's work as clearly as possible. For it is well known that the ILC's draft articles enjoy great practical authority and are often interpreted as statements of the law by domestic courts.

Draft article 7 as provisionally adopted by the ILC holds that immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance. We believe that it is of paramount importance that an article on the exceptions to functional immunity of State officials from foreign criminal jurisdiction is either solidly based in extensive and virtually uniform State practice and opinio Juris or clearly labelled as a progressive development of the law.

After a careful review of the different sources cited in support of draft article 7, Switzerland is of the view that this high threshold has not been reached. We encourage the Commission to provide stronger evidence in support of draft article 7 or to indicate unambiguously that it falls within the area of progressive development.

We look forward to the Commission's further work on the subject. Thank you, Mr Chairman.

41. Thailand

Chapter VII Immunity of State officials from foreign criminal jurisdiction

Mr. Chair,

On the topic of immunity of State officials from foreign criminal jurisdiction, Thailand wishes to thank the Special Rapporteur, Ms. Concepcion Escobar Hernandez, for her fifth report, which attempts to analyse the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

We take note of draft article 7 as provisionally adopted by the Commission, listing out crimes which immunity does not apply, with the exception for persons enjoying immunity ratione personae, based on the Special Rapporteur's finding that no customary international law exists in relation to limitations or exceptions to such type of immunity. My delegation is of the view that the work on this complicated and highly sensitive topic should be based on lex lata and State practice. In this respect, de lege ferenda proposals should only be made where there is international

consensus in support of such proposals.

Thailand will continue to follow closely the Commission's work on this topic and we encourage the Commission to explore the matter further, taking into account the views expressed by States in the Sixth Committee.

42. Ukraine (Transcript)

Regarding chapter VII, immunity of State officials from foreign criminal jurisdiction, my delegation would like to thank the commission and Special Rapporteur for their efforts and work done. Ukraine has carefully followed the work of the ILC on this issue and we took note of the disagreement between its members on draft article 7 as well as the explanations of their dissenting opinions. In this vein we would like to focus on the following issues:

Indeed, the national case law is not uniform in its approach to this question. Attitudes used by domestic courts were based on the case by case methods. In addition, we do not have to shy away from the fact that there were instances, where domestic courts ruled to upheld immunities due to rather political motivations. In the context of proposed measures by dissenting members on ending impunity through the prosecution of state officials in their own state, international court or foreign court with a waiver of immunity, we would like to underscore the following: Perhaps no State will act in such way. Especially the question is whether a totalitarian State would be willing to prosecute its head of State for these crimes or provide an immunity waiver in a foreign court. Such countries follow the practice of impunity for their leadership regardless of the gravity of the offences perpetrated by them. The same goes for the international courts. What if the country X is not a party to the statutes of international courts and does not recognize their jurisdictions? Art. 34 of the VCLT remains relevant in these cases, as it states that no obligations arise for third States without their consent. Here I would like to exclude the cases of Security Council referals to the Courts. Thus, in our view, a voted (?) proposal by the Commission sheds some light on this long-standing, controversial issue.

In addition, we took note of the list of the crimes included by the Commission to draft article 7 and command an approach used by the members who decided to use a list of international treaties in order to omit the need to draft Commision’s definitions of the crimes listed in the above mentioned draft article. Also, we took note of the decision of the Commission not to include the crime of aggression, although we still deem that the perpetration of this crime should fall under the non-applicability of immunity ratione materiae, as it is the most serious of crimes under international law.

43. United Kingdom

9. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, the United Kingdom notes the developments in the Commission on this topic this year, as reflected in

Chapter VII of its 2017 annual report, in the summary records, and in the report of the Drafting Committee.

10. This year, the Commission continued its debate of the fifth report of the Special Rapporteur, Professor Concepci6n Escobar Hernandez. The United Kingdom welcomes the Special Rapporteur's conclusion in that report that no exceptions exist under customary international law in respect of immunity rationae personae.

11. In addition, the Commission also provisionally adopted draft article 7, which proposes six exceptions to immunity rationae materiae: the crime of genocide; crimes against humanity; war crimes; the crime of apartheid; torture; and enforced disappearance.

12. In the view of the United Kingdom, the exceptions to immunity ratione materiae listed in draft article 7 lack sufficient support in State practice to be regarded as established under customary international law.

13. Not only is there a lack of State practice to justify drawing this conclusion, it is clear that the Commission itself is deeply divided on the issue. Indeed, it is striking that the provisional adoption of draft article 7 was achieved only on the basis of a recorded vote of the Commission's members. That is very unusual for the Commission nowadays. The divergence in views of the members of the Drafting Committee itself was reflected in the statement of its Chairperson, Mr. Rajput. Moreover, the footnote to draft article 7 states that the Commission will consider the procedural provisions and safeguards applicable to the draft articles at its seventieth session.

14. In light of these circumstances surrounding its provisional adoption, the United Kingdom considers that draft article 7 cannot be considered as reflecting existing international law (lex lata), or even the Commission's settled view of existing international law on this topic. Whilst the United Kingdom welcomes the decision of the Drafting Committee not to include the crime of corruption in draft article 7, it remains difficult to discern the rationale on which all of the remaining suggested exceptions have been selected for inclusion.

15. As noted in the Commission's annual report this year, the Special Rapporteur appears to consider that this topic should be approached from the perspective both of codification and the progressive development of international law (lex ferenda). As a general proposition, that is not inconsistent with the Commission's mandate; however, the Commission's annual report records that some members of the Commission queried whether draft article 7 in fact aimed to set out "new law".

16. As the United Kingdom has stated previously in the Sixth Committee, this topic is of great practical significance: the immunity of State officials from foreign criminal jurisdiction occupies a pivotal role in the day-to-day conduct of international relations where, for example, international travel by State officials, of whatever rank, is now commonplace. It should also be recalled that

such immunity does not exist for the personal benefit of the individual, but to ensure the efficient performance of the functions of State officials on behalf of their respective States.

17. Accordingly, the United Kingdom considers it to be of vital importance with this particular topic that the Commission clearly indicates those draft articles which it considers to reflect existing international law (lex lata) and those which it does not, whether on the basis of representing the progressive development of international law, or whether amounting to proposals for "new law".

18. Indeed, if the underlying aim of producing these draft articles is to provide a set of guidelines for use in domestic courts, States, as well as their judges and practitioners, surely need to know what the Commission considers existing international law is. If the aim is to make proposals for States for "new law" to be adopted by them, as they see fit, in treaty form, that that should be clearly stated. It is unfortunate that the Commission has not provided this clarification to date.

19. If the Commission's work on this topic is going to contain proposals for progressive development of the law or "new law", the United Kingdom considers that the appropriate form for the outcome of the Commission's work should be a treaty.

20. Finally, the United Kingdom notes that the Special Rapporteur's sixth report, to be submitted in 2018, will cover the procedural aspects of immunity. These aspects were ably dealt with by the former Special Rapporteur, Mr. Kolodkin, in his third report and will, as the Commission seems to accept, form a crucial part of the Commission's output on this topic.

44. United States

Mr. Chairman, the United States has followed with great interest the Commission’s work on the important topic of the immunity of state officials from foreign criminal jurisdiction. We appreciate the effort that Special Rapporteur Escobar Hernandez has put into addressing this complex and, at times, controversial issue.

As we have indicated in past statements, the United States is in general agreement with the Commission’s work on immunity ratione personae, the status-based immunity that protects incumbent heads of state, heads of government, and foreign ministers. Despite some residual disagreement on precisely which officials enjoy status-based immunity, the Commission’s draft articles on this topic can be seen to rest on customary international law.

The same cannot be said for the Commission’s work on immunity ratione materiae. As the combined work of two Special Rapporteurs has shown, there are basic methodological disagreements about how to identify customary international law, if any, in this area. In evaluating state practice, does one begin with a baseline of immunity, and then look for examples of exceptions? Or does one begin with a baseline of no immunity, and then look for examples of

immunity? And how does one account for prosecutions that are not brought to begin with, where the exercise of prosecutorial discretion could conceivably rest on considerations of immunity, but could also rest on completely different grounds, such as the lack of available evidence, or the absence of probable cause?

The categorical propositions on immunity set forth in draft Articles 5 and 6 on immunity ratione materiae do not reflect the full extent of State practice: there have, in fact, been prosecutions of foreign officials, including by the United States, for a range of conduct including corruption, violent crimes, and cyber crimes. Premature generalizations such as those contained in draft Articles 5 and 6 risk being inaccurate and potentially misleading.

In part because of the difficulty of identifying and evaluating state practice and opinio juris in the form of prosecutions, or lack thereof, there is a tendency to focus on caselaw. However, the decisions of national courts on ratione materiae immunity remain sparse. As the Special Rapporteur observed in her Fifth Report, "there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes" that Draft Article 7 identifies as exceptions to immunity. Moreover, these few decisions may be based on treaties, as in the Pinochet case, or on other considerations. Attempting prematurely to draw broad conclusions from a few decisions is both unwarranted as a legal matter and, in our view, unwise.

The Commission's work on this topic reached a critical phase last year, when the Special Rapporteur issued her Fifth Report, which includes Draft Article 7. The Fifth Report claims that there is a "clear trend" based on treaties, case law, legislation, and other state practice toward recognizing exceptions to immunity ratione materiae for certain international crimes. However, the Fifth Report, and state practice in this area, do not actually provide evidence of a "trend" in any particular direction. Perhaps surprisingly, the Commission, by majority vote at its 69th Session, ratified the idea of an asserted trend toward recognizing exceptions to immunity ratione materiae for certain international crimes. The Commission reached this conclusion despite the Special Rapporteur's finding that there are very few cases on point. In the view of the United States, there is insufficient state practice to illustrate a "clear trend," let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal.

The other rationale offered by the majority of Commissioners for adopting Draft Article 7 was that it declines to recognize immunity for the "most serious crimes of concern to the international community . . . ." We share the commitment to deterring and punishing these crimes, which we agree are very serious. However, the majority's approach in this instance does not acknowledge that immunity is procedural, not substantive, in nature. As emphasized by the International Court

of Justice in the Arrest Warrant and Jurisdictional Immunities cases, immunity is purely procedural in nature, and operates irrespective of whether the alleged conduct is lawful or unlawful. In both cases, the ICJ held that the nature of the allegations does not affect whether immunity exists under customary international law. Draft Article 7 ignores this basic proposition.

In addition to serious concerns about the lack of consistent state practice and opinio juris supporting Draft Article 7, we are troubled by the article's statement that immunity ratione materiae "shall not apply" to specified crimes. We understand that the Commission chose this language because of uncertainty about whether to characterize serious international crimes as involving "official acts" to begin with. But one cannot assess whether there is an exception to immunity without determining whether immunity would ordinarily attach to an act to begin with—the very question Draft Article 7 explicitly begs.

We are also concerned by the cursory explanation in the Commentary about why Draft Article 7 does not include an exception for crimes by foreign officials in the territory of the forum state. This fundamental issue of territorial conduct and its effect on criminal jurisdiction warrants much more serious attention and analysis. The Commission's limited discussion of this important and complicated issue makes its approach even more difficult to comprehend, and will create confusion rather than clarification. Likewise, the Commentary's brief treatment of corruption further confuses, rather than clarifies, the basis for the Commission's decision to exclude corruption from Draft Article 7.

The Committee's debate on Draft Article 7, which began last summer and continued into this summer, itself demonstrates that no consensus yet exists regarding the contours of immunity ratione materiae. The unusual split vote that led to the Committee's provisional adoption of the Draft Article further demonstrates that this topic does not command a true consensus of the Commission, and that the resulting language cannot be said to represent customary international law or even the progressive development of existing law.

This is not to say that all states have adopted an absolutist position regarding ratione materiae immunity; to the contrary, as noted above, there have indeed been prosecutions of foreign officials in some circumstances. Nor is it to say that there should not be any exceptions, even if immunity would ordinarily attach. However, in our view, the inconsistent nature of state practice means that premature attempts at codification can do more harm than good in this area.

We are deeply concerned that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to Draft Article 7 as THE definitive and comprehensive expression of international law. With all due respect to the Commission, the development of law in this area properly belongs in the first instance to States. The Commission's

work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7 exhibits none of these features, and risks creating the impression that the Commission is creating new law.

The United States looks forward to the Special Rapporteur's next and final report on procedural provisions and safeguards, which the Commission is expected to take up next summer. The Special Rapporteur has recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States is very interested in this final report and supports a full discussion of its proposals. The United States feels strong that after the debate on procedural safeguards takes place, Draft Article 7 should be suspended until a consensus of the Commission can endorse all of the draft articles as sound and principled. After discussion of the final report, we believe it would be prudent for the Commission to put this project on hold without further action by the Commission, until additional State practice provides a sufficient basis for meaningful generalizations to be drawn, and for the Commission's work to re-establish itself on a firmer footing.

Sometimes a group of talented legal scholars and practitioners can develop a well- supported set of guidelines to address a difficult international legal issue. But sometimes the best answer, at least to part of the question, is: we don't know – the law is unsettled, State practice is sparse and uneven, and the issue is not capable of being properly resolved at this time. In that situation, we lawyers should follow a principle of our medical friends and resolve to do no harm. I suggest that the Commission revisit Draft Article 7, and the timeline for this project, with that important principle in mind.

45. Viet Nam

2. Turning next to the topic of "Immunity of State officials from foreign criminal jurisdiction", at the outset we wish to extend our appreciation to Ms. Concepción Escobar Hernández for her fifth report, which focuses on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Immunity from criminal jurisdiction originates from customary international law. Thus, the codification of the rules in this matter needs to be carefully undertaken with due regards to the principles of sovereign equality, non-intervention into the domestic affairs of States, as well the need for the maintenance of international peace and security, ensuring the balance between the benefits of granting immunity to State officials and the need to address impunity. The drafting of the articles need to ensure the mentioned principles and reflect the codification of established norms. In this context, we believe that the exceptions to criminal jurisdiction warrant further debate.

First, Viet Nam concurs with the rules established under draft Article 7(i) as it reflects existing legal principles enshrined in various international treaties dealing with international criminal liability.

With regards to exceptions related to the crime of corruption, my delegation is of the position that corruption should not be considered as an exception to the immunity of state officials as it reflects the conduct of an individual serving personal agenda and for personal gains. Furthermore, such a rule has not been well established in customary international law.

Finally, on the so-called "territorial tort" exception, we believe that more consideration needs to be given in addressing this issue as it relates more to the civil jurisdictional aspects than criminal.

II. States that did not comment on immunity

1. Algeria

2. Argentina

3. Brazil

4. Bulgaria

5. Croatia

6. Jordan

7. Lebanon

8. Marshall Islands (on behalf of Pacific Small Island Developing States)

9. Micronesia

10. Mozambique

11. Paraguay

12. Senegal

13. Timor-Leste

14. Tonga

15. Trinidad and Tobago (on behalf of CARICOM)

16. Turkey

III. Observers that did not comment on immunity

1. Council of Europe

2. EU

3. International Chamber of Commerce

4. Permanent Court of Arbitration

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

Freie Universität Berlin

Hertie School of Governance

Humboldt-Universität zu Berlin

Universität Potsdam

WZB Wissenschaftszentrum Berlin für Sozialforschung