STATEMENT BY
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Chapter VI
(Immunity of state officials)

Mr. Chairman,

1. We have taken note of this year's work of the Commission on the topic 'Immunity of State officials from foreign criminal jurisdiction' with great interest. We would like to commend the Special Rapporteur Professor Concepción Escobar Hernández with her first report and with the way in which she has continued the important work done by her predecessor, Ambassador Kolodkin.
2. The key theme in the discussions on this topic is the relationship between two areas of international law: international immunity law and international criminal law. International immunity law is a long standing branch of international law. The ILC has greatly contributed to its codification in a number of Conventions, and most recently in the 2004 State Immunity Convention. International criminal law deals with individual responsibility for international crimes. It is an area of international law that has evolved considerably during the last two decades, in particular through the creation of international criminal tribunals and the International Criminal Court.
3. The Netherlands submits that the ILC should approach its work on the topic of immunity of state officials from foreign criminal jurisdiction not in

isolation, as if it were a self-contained regime. It should take into account what has already been achieved, long ago and in more recent times, in the two mentioned areas of international law, so as to ensure coherence and consistency in international law. This is true both for issues of substance and for terminology. For example, the Special Rapporteur has questioned the appropriateness of the term "official" (para. 66 of her report). Perhaps a more suitable term is "representative of the state", which is also used in the 2004 State immunity convention and clarified in the ILC commentary.

4. More specifically, a key question in the ILC discussions on this topic is the following: if international crimes are committed by state officials, should national courts of another state play a role in holding to account these foreign state officials, because international crimes must not be left unpunished? Or should these officials enjoy immunity, because otherwise they cannot perform their functions as representatives of a foreign state? There is a wide variety of views amongst states, and even amongst courts within the same state, when this key question emerges in concrete cases. So it is not surprising that there is diversity of opinion on this within the ILC as well.

5. Given this diversity of opinion we support the Special Rapporteur in what she calls in her report an *"attempt at conceptual and methodological*

clarification" (paras. 51-52). Hopefully, stepping back and putting the issues at stake in a larger perspective will enable the ILC to move forward in this area. This would be *'reculer pour mieux sauter',* and should result both in a better understanding of the *lex lata* in this area and in better informed decisions on the *lex ferenda*.

6. The ILC has asked states to provide information on national law and practice relating to two specific questions. The first question is: "Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently"?

7. The key provision of Dutch law that is relevant here is Article 16 of the International Crimes Act (2003). According to Article 16, criminal prosecution for the crimes is excluded with respect to two categories of persons. The first category is: "foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognized under customary international law". The second category is: "persons who have immunity under any convention applicable within the Kingdom of the Netherlands". This provision as such therefore does not distinguish between immunity *ratione personae* and immunity *ratione materiae*. However, the Explanatory Memorandum to the International Crimes Act refers to this distinction. It

indicates that immunity *ratione personae* entails immunity for both official and private acts. Without such far-reaching, full immunity the persons entitled to personal immunity could not perform their functions.

8. But the Explanatory Memorandum also indicates that, in general, rules of international immunity law have gradually become less absolute and more relative, for example by accepting that heads of state and government and foreign ministers, after they have ceased to hold office will no longer enjoy immunity for private acts committed while in office.

9. This trend towards more limited immunity has continued in the Netherlands in recent years. Last year the independent Advisory Committee on Issues of Public International Law (CAVV) has presented a report on the immunity of foreign state officials[1]. The Advisory Committee draws a clear distinction between immunity *ratione personae* and immunity *ratione materiae*. One of the findings in this report is that immunity *ratione materiae* does not extend to international crimes committed in the course of duty. Only persons enjoying immunity *ratione personae* are entitled to full immunity, including immunity for the exercise of jurisdiction over international crimes. The Dutch Government has agreed to these findings.

[1] http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/rapporten/2011/05/01/cavv-advies-nr.-20-immuniteit-buitenlandse-ambtsdragers.html

10. The second question raised by the ILC is "What criteria are used in identifying the persons covered by immunity *ratione personae*?" In the Netherlands, such criteria have not been explicitly mentioned. However, in general, the approach has been to refer to international law: those persons who under international law enjoy immunity *ratione personae* are entitled to full immunity in the Dutch legal order. This approach is reflected in Article 16 of the International Crimes Act, to which I referred earlier. The advantage of this approach is clearly that new developments in international law in this area may therefore directly be applied in the Dutch legal order. At present, the following categories of persons enjoy full immunity from criminal jurisdiction in the Netherlands: the troika, accredited diplomats, members of 'official missions', and persons who have such immunity under any convention applicable to the Netherlands.

11. We strongly encourage the ILC to bring as much clarity as possible in the *lex lata* and to be courageous to develop *lex ferenda*, in harmony with the existing rules and principles in the relevant branches of international law. We fully support the workplan proposed by the Special Rapporteur, we look forward to the coming discussions on this topic, and very much hope they will lead to some tangible results.

Chapter VII

(Provisional Application of Treaties)

Mr. Chairman,

12. Turning to the topic of the Provisional Application of Treaties, we note the decision of the Commission to include this topic in its Work programme. We read the report of Special Rapporteur Gómez-Robledo and the ensuing discussion in the Commission, with interest.

13. It is clear from the many points addressed by the Commission, that the identification of the issues to be covered is still in the initial stage. The decision to take Article 25 of the Vienna Convention of the law of treaties and its *travaux* as the starting point makes sense, and we would welcome an analysis of the customary status of article 25, since, as yet, only 128 States are Parties to the Vienna Convention. A clarification on the customary status of Article 25 would thus be of importance for our understanding of the issue.

14. We consider provisional application an important instrument of international treaty practice. However, we would like to draw attention to the importance of domestic law in this respect. It is after all for individual States to determine whether or not their legal system allows for provisional

application and, if so, on what conditions and to what extent. It may be difficult to draw any general rules from this diversity. We therefore call into question, for example, whether the ILC should take up questions such as which organs would be competent to decide on provisional application. This would seem to surpass the mere stock-taking of state law and practice. In the same vein we would advocate, at least at this stage of the discussions, that the ILC-study on this topic should result in guidelines and model clauses rather than in draft articles.

Chapter VIII

(Formation and Evidence of Customary International Law)

Mr. Chairman,

15. It is with pleasure that I now turn to address the ILC's initial steps in discussing the formation of customary law. We would like to commend the Special Rapporteur, Sir Michael Wood, on his introductory steps, highlighting the key questions in this field. The formation of customary international law is a complex matter. It is elliptical, and those of us who have tried to teach the subject know that this is difficult and at times untransparent.

16. States may at times have an interest in not being too specific about which rules they would consider to be rules of customary law, or how such rules have come to be customary law. The evaluation of the formation of a customary law rule will normally take place behind closed doors. Clarity will often only appear if a particular situation specifically calls for a determination. While there may be academic interest, there is often no need for precise or explicit determinations, which suggests the absence of a pressing need for the ILC to consider this subject.
17. However, the formation and evidence of customary international law is a fundamental issue at the very heart of international law. It is thus an issue *par excellence* for the ILC to discuss. The Commission is aware of the risk that this subject too broad in scope, and we trust that this project will be well managed in terms of its duration and the size of the work. Today, I wish to address three specific issues we feel have not been raised by the ILC so far.

Mr. Chairman,

18. The discussion in the ILC seems to focus on the role of domestic judges in the determination of what is (or is not) customary law. We have some hesitation with respect to whether this should be such a dominant

perspective. It should be noted that whether domestic judges have the ability to even make such determinations, depends on the domestic legal system and whether or how it is possible to rely on international law before domestic courts.

19. We note that in national legal systems – even if they may be very open to international law – it is not a given that domestic courts have the ability to refer to customary international law. On the basis of established caselaw domestic courts in the Netherlands may be prevented from taking customary law into account in certain situations, whereas courts will be able to rely on custom in other instances. Thus the role of domestic courts is much more related to the parameters set by domestic law than by customary law itself.

20. Also, I would note that it is not be correct to assume that governments necessarily have the possibility to present their views on customary law before domestic courts. Often domestic systems will prevent States from participating in a case between two parties, and the option of submitting *Amicus Curiae* briefs or similar legal opinions does not always exist. This again is an issue determined within domestic law, and indeed constitutional law. For these reasons we are hesitant with respect to the ILC primarily relying on the evaluation by domestic judges as their primary perspective.

Mr. Chairman,

21. I wish to address another issue that has not yet appeared in the discussions, and it is related to language. The rules on the formation of customary law hold no requirements as to the language in which the component elements of customary law need to be expressed.

22. Yet, a language bias may be developing. It would appear that in current practice, the evaluation of the evidence of customary international law tends to focus on practice that is available in one of the official languages of the UN. We would note that – even if article 38 of the ICJ Statute is authoritative in the six official languages – there is no requirement in international law for practice to be accessible in any of these six languages. Relevant practice or indeed relevant *opinio iuris* may be expressed in many languages, and it will not legally be any less relevant to the formation of customary law.

23. Clearly there is also a financial aspect to this – many institutions (whether governments or academia) produce well-organized and extremely useful overviews of recent state practice. States using other than the official (UN) languages, may make efforts to translate relevant practice when the financial means exist. But such means do not always exist in reality, so practice is

unrecorded or not accessible. The same goes for judicial decisions that may not be available in any of the UN's official languages.

24. We would suggest the Commission gives consideration to the language used in the expression of the *opinio iuris* (which we understand will be discussed at a later stage) and in the presentation of practice – whether it be in government statements before courts or in academic overviews of official practice and the like.

25. A final comment goes to the role of international organizations. We believe that the ILC's work on the formation and evidence of customary international law in this day and age will require consideration of the role of international organizations in order to be realistic. This issue is to come up at a later stage of the work, but I would at this time already like to point to what is an important issue in our view.

26. While international organizations and their growing practice have developed over the years and occupy a specific place in the international system, the understanding of their role in the formation of customary international law is still developing. We therefore suggest that the ILC will pay adequate attention to the 'international organizations dimension' of its work on this topic. For example: if, or to what extent, is it necessary to take into account the practice of international organizations when establishing whether there is

extensive or virtually uniform practice? Can international organizations be persistent objectors and in this way not become bound by rules of customary law? We would also suggest to include the specific question whether the practice of international organizations, and indeed legal opinions expressed by them, should be attributed to the international organization only, as it is a legal person separate from its members. Or could such practice and legal opinion also under certain circumstances be attributed to member states members?

Chapter IX

(Obligation to Prosecute or Extradite)

Mr. Chairman,

27. Turning to the topic of the Obligation to Prosecute or Extradite, let me thank the Commission for the work it has done so far. My Government would like to stress out the importance of this topic in the fight against impunity for international crimes. At the same time I would like to - again - express our disappointment about the apparent lack of progress.
28. As we stated before, the work of the Commission in this field can potentially be a significant contribution to the development of an effective international

criminal justice system. We therefor note with some concern that the Commission is considering whether or not to continue with this topic. We would urge the Commission to the Commission to continue the work in this field, as a matter of priority. My Governments' position remains that the work of the Commission should eventually result in presenting draft articles, based on the general framework agreed in 2009.

Chapter X

(Treaties over Time)

Mr. Chairman,

29. With regard to the topic of Treaties over Time, we thank the Commission for its work so far, and more specifically the Special Rapporteur, Professor George Nolte. In our view the inclusion of this topic to the work programme of the ILC is of great importance. It is well-known that the founding fathers of the Vienna Convention of the law on treaties, when discussing the present Article 31 of the Convention, more or less abandoned the issue of inter-temporality and we believe that time is right that this subject be revisited.

30. Although we understand that the ILC decided to limit its present study to special regimes related to subsequent agreements and subsequent practice, we would certainly welcome a decision of the ILC to include other issues

related to treaties over time in its study. We therefore ask the ILC to consider to continue its work on the topic after finalizing its present study.

Thank you, Mr. Chairman.