STATEMENT BY
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Report of the International Law Commission
Part 1

PART 1

Chapters I – III, IV, V and XII

Mr. Chairman,

1. Let me first of allcongratulate the International Law Commission on the progress of its work this year. The report gives us an interesting overview of the discussions about a broad range of questions of international law. And I also wish to congratulateMr. Vázquez-Bermúdez who was elected to the Commission to fill a casual vacancy. We wish himwisdom in his workin the Commission.

Chapter IV
(Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

2. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, we thank the Commission, and more specifically the Special Rapporteur, Professor George Nolte, for his work.The work is still in its early stages. So far, it demonstrates that the commentaries of the ILC on the rules it formulates are as important, or perhaps even more important than the rules themselves. The initial draft conclusions presented by and large restate existing provisions of the

Vienna Convention on the Law of Treaties, but the commentaries provide a rich and considerate analysis of the interpretation and application of these provisions.

3. In recent times, the focus of the international community seems to shift from the development of norms, towards the implementation of norms that the international community has agreed upon. It befits this paradigm shift in international relations that the Commissionfocuses on the implementation of, and compliance with international law. As an expert body of the General Assembly, the Commission can avail itself, through the Secretariat, of the necessary assistance of United Nations member states to provide the materials required to analyze state practice and *opinio juris* of states. Their collection, analysis and presentation by the Commission are valuable input for the work of international courts and tribunals.

4. This being said, my government hopes, as work on the topic continues, that it will be possible for the Commission to distill conclusions from state practice and *opinio juris* of states that go beyond restating existing provisions and have added value.

Chapter V
(Immunity of state officials from foreign criminal jurisdiction)

Mr. Chairman,

5. I would like to turn to the topic of immunity of state officials from foreign criminal jurisdiction. Allow me first of all to commend the Special Rapporteur, professor Concepción Escobar Hernández, for her second report on the topic;her thorough analysis of the matter has obviously contributed substantially to the discussion in the Commission on the drafting of the first four articles. Although the Special Rapporteur broached many highly important and interesting questions concerning the topic, I will concentrate on the Commission's draft articles and commentaries thereto.

6. The scope of the draft articles deliberately leaves open an important issue of terminology for later discussion and decision; that is to say the desirability of the term "State officials". We would like to reiterate what we said last year, that is that we consider the term "representative of the State acting in that capacity" probably a more suitable wording which can also be found in the 2004 Convention on Jurisdictional immunities of States and their property. This wording would indeed cover the intention,of the Commission (and States), to extend immunity from criminal jurisdiction to officials other than the traditional troika (the Head

of State, Head of Government and Minister of Foreign Affairs) and to those(diplomats and others) falling under specialimmunity regimes. My Government is of the opinion that under customary international law all members of official missions are entitled to immunity from criminal jurisdiction. They must be regarded as temporary diplomats who need immunity to be able to perform their duties. Of course, the term "official mission" requires further definition. These missions should (a) be temporary in nature, and (b) represent a State, (c) be a mission to the Government of the receiving State, who has (d) consented to receiving that mission.

7. A second element on which I would like to comment is the deliberate restriction of the work to immunity from the criminal jurisdiction "*of another State*." As the Commission considers in a commentary "*the immunities enjoyed before international criminal tribunals…will remain outside the scope of the draft articles*". That may be true, but it cannot imply that international criminal law is completely outside the scope of the draft articles. After all, international criminal law entails obligations which are in many countries incorporated in national criminal law. The Commission was not in a position to definitively address this issue yet since diverse views were expressed with regard to possible conflicting

obligations. Certainly for my country, being hoststate tothe International Criminal Court and many other international criminal tribunals, this question is of great importance.

8. We have to recognize that functional immunities are immunities which cling to those who enjoy immunity *ratione personae*, even after they have left office. The Commission's commentary correctly reminds us of the fact that Heads of State, Heads of Government or Ministers of Foreign Affairs may, during their term of office have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*.

9. The Netherlands Government assumes however that there is international law developing to exclude functional immunities of State officials suspected of international crimes committed in the course of their duties. Thus national courts may at times not be precluded from exercising criminal jurisdiction over such persons.

10. Even where the Dutch International Crimes Act does not distinguish between immunity *ratione personae* and immunity *ratione materiae,* the Explanatory Memorandum to this legislation 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 Ministers of Foreign Affairs, after they have ceased to hold office, will no longer enjoy immunity for private acts committed while in office. This trend towards more limited immunity has continued in recent years. I would like to recall that the independent Dutch Advisory Committee on Issues of Public International Law in a 2011 report on immunity of foreign state officials drew 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.

Chapter XII

(Other decisions and conclusions of the Commission)

Mr. Chairman,

11. Some final words on the idea to include in the long-term program of the Commission the topic of Crimes against humanity. There is no doubt that the prevention and prosecution of this horrendous crime is of the utmost importance, and we do believe this is an issue that requires the constant vigilance of the

international community. Thus we appreciate that the Commission has been looking into the desirability of formulating a specific instrument with respect to crimes against humanity. However, we consider that this issue needs to be addressed in the light of the Rome Statute, and the need to ensure its universality in the near future.

Mr. Chairman,

12. The formulation of article 7 of the Statute of the International Criminal Court has greatly contributed to specifying and defining the crime against humanity. It has been an achievement to agree to this provision, and indeed to establish the Statute. We would suggest this is a definition applicable to States parties to the Rome Statute and States not party alike.Furthermore, let us not forget that crimes against humanity are part of the jurisprudence of among others the Tribunal for the former Yugoslavia, and as such a well-established part of customary international law.

13. In our view, therefore, what is needed for the prevention and prosecution of crimes against humanity at this stage is a reinforced focus on improving the international capacity to prosecute such crimes at domestic level. Also because of the importance of the principle of complementarity, we must build on the system of the Rome Statute and facilitate cooperation between the judicial authorities of our

States in order to strengthen the investigation and prosecution of crimes against humanity at the domestic level, while maintaining the integrity of what was agreed in the Rome Statute.

14. We consider that it is not the definition of the crime that is missing, but the operational tools to ensure prosecution. Particularly in situations where crimes have taken place in another State than the prosecuting States, and in cases with many international aspects, it is of key importance that we connect the relevant judicial systems so as to promote inter-state cooperationto ensure prosecution. Thus the missing link is an international instrument on mutual legal cooperation covering all the major international crimes, including crimes against humanity. This, we believe could provide a hands-on and operational approach to ensuring prosecution for an absolutely abhorrent crime. Together with Argentina, Belgium and Slovenia my country has taken the initiative to propose the opening of the negotiations for such an instrument at the UN Crime commission in Vienna.We hope that others will join us in this effort.

Thank you, Mr. Chairman