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STATEMENT

By the Representative of the Russian Federation
In the Sixth Committee of the 68th session of the UN General Assembly
on Agenda item:
Report of the International Law Commission on the work of its 65th session
(Topics: «Subsequent agreements and subsequent practice in relation to the interpretation of treaties»; «Immunity of State officials from foreign criminal jurisdiction»; «Protection of the environment»; «Crimes against humanity»)

Mr. Chairman,

Allow me first of all to thank the Chairman of the Commission Mr. Niehaus for presenting the Report of the Commission on the work of its 65th session. We note with satisfaction that this year the Commission made a significant progress on a number of issues.

We would like to begin this statement with the topic of "**Immunity of State officials from foreign criminal jurisdiction"**. We believe this is one of the key topics on the ILC Agenda. It can be seen from the utmost interest of States to this topic demonstrated during the meetings of the Sixth Committee.

During the last session the Commission made an important step forward in examining this topic: the four draft articles with comments were preliminary adopted. This is a small step, but important step forward. However, there shouldn't be any haste in this regard. The Commission needs to be extremely accurate in developing this complex and controversial topic.

Before I make comments on the draft articles let me dwell on some methodological issues.

We agree with Special Rapporteur Mme Hernandez in her approach confirmed in paragraph 7 of the Second Report. First, it is important for the Commission to move forward based on the previous work of the Secretariat and previous Special Rapporteur. Second, a very carefully measured approach is required to the question

whether to examine this topic from the viewpoint of codification or progressive development. The development of the topic *de lege ferenda* should it take place must be done with extreme caution. Indeed it should start with codification of existing norms of the international law and then as the gray areas and insufficiently settled issues are encountered the progressive development could be resorted to on the basis of consensus. We think that this approach already enjoys significant support in this Committee. As regards the areas of progressive development, something could be added in terms of procedural aspects of invoking or waiving immunity and similar issues.

It seems that in the area of substantive issues of immunity the conditions are not ripe for progressive development. Thus, we do not see grounds in international law in order to come to the conclusion that there are exceptions from immunities of state officials.

In this connection we have concerns with paragraph 7 (c) of the Second Report on the principles and values of international law relating to this topic and considered as an analytical paper. We don't think that such parallels should be drawn in the context of this topic. This will only complicate the elaboration by the Commission of an utmost clear document on this topic that we expect from it.

We believe that the issue of immunity from international criminal jurisdiction should not be encompassed within this topic. There are differences of principle here – immunity from foreign jurisdiction derives from the principle of sovereignty of states, therefore, the exercise of this jurisdiction under a general rule requires consent of a State of the official. However, in case of international jurisdiction the States voluntarily agree from the very beginning, usually by way of concluding an international treaty, to international jurisdiction and relevant rules pertaining to immunity. Moreover these rules may vary in depending on a given case. In some cases it is a matter of implementation of the Security Council's decisions, which also is hardly related to the institution of immunity as such.

We support the idea of distinguishing between immunity *ratione personae* and immunity *ratione materiae*. This difference is widely recognized in the doctrine and is reflected in the judicial practice.

Further on, let me make some comments on the draft articles provisionally adopted by the Commission.

(a) The scope of the topic

In principle we agree with the content of this article. In paragraph 1 of Article 1 we noticed a footnote stating that the term "officials" will be subject to further consideration. The definition of the term "state official" acquires a particular importance in the sphere of *ratione materiae* immunity. We believe however that it

is also important in the context of *ratione personae* immunity. It is true especially if a decision is taken not to make a close list of persons who enjoy the immunity *ratione personae*, which seems to be right (I will comment on this issue later).

It seems that it makes sense here to make an accent on official representation *ex officio* of the interests of a State. Paragraph 2 on the whole goes in the right direction.

We would like to separately address the issue of the definition of "criminal jurisdiction of a state" formulated in paragraph 5 of the commentary to draft Article 1. We consider that interpretation of criminal jurisdiction as "the set of acts linked to judicial processes" is too restrictive. In our view, it should encompass all other measures of coercive nature. In addition, it would be useful if the Commission could bring specific examples of legal acts that should be regarded as violating immunity.

We agree with the provision formulated in paragraph 8 of the comments to Article 1 that immunity is a procedural impediment to establishing the responsibility of an official and cannot exempt that person from responsibility. It seems however it is worth mentioning in the commentary a provision formulated by the International Court of Justice in the case of Germany vs Italy stating that the absence of alternative remedy should not be an impediment to the exercise of immunity.

(b) **Draft Article 5**

Regarding the scope of *ratione personae* immunity of persons who enjoy it would be important not to forego the idea to study the issue whether personal immunity can apply to other persons besides the "troika". The work in this direction would correlate with the opinion of the International Court of Justice in the *Arrest Warrant* case, and the practice of States, and would allow the Commission to adequately react to the developments in the world when essential international functions, including representation of a State in international relations often are not focused exclusively on the "troika". This being the case it is necessary to examine not the close list but rather elaborate the criteria of inclusion thereto. Such criteria would allow establishing a narrow circle of persons enjoying immunity *ratione personae* in addition to “troika”.

We carefully studied the ILC commentary to the draft of that Article, especially paragraphs 8 – 12. We tend to believe that the phrase "such as" as applied to persons included in the "troika" in the *Arrest Warrant* case means an unrestricted character of the list under international law. In our understanding based *inter alia* on this and a more recent decision by the International Court of Justice on *Djibouti vs France* case the existing international Law attributes the *ratione personae* immunity at least to the members of the "troika" but not only them – other high-

ranking officials depending on circumstances may also fit into the criteria of the "troika". The Commission in its Report cited the examples of national practice, which confirms the possibility and appropriateness of such an extension. In particular, immunity was extended to the Ministers of Defense (the case *Re Mofaz* in UK, et al.). We believe on the other hand that the practice referred to as a counter-argument (Ref. 285) does not prove the "closeness" of the list. It pertains to either the civil jurisdiction or unrecognized Heads of States, or the Heads of constituent territories of the Federal States etc, -- i.e. irrelevant for this topic.

We also took note of case of *Adamov* in Switzerland, also mentioned in footnote 285 of the ILC report. The Government of Russia indeed was trying to prove in 2005 that the Former Minister of Atomic Energy of enjoyed immunity from former criminal jurisdiction. However, the issue of *ratione personae* immunity in the meaning of definition in draft Article 3 was not considered then at least because at the time of litigation in Switzerland Mr. Adamov already ceased to be a Minister. While the *ratione personae* immunity can be extended only to active state officials. The Federal Tribunal of Switzerland in its Judgement of 22 December 2005 did not make any conclusion on the existence or absence of immunity in Mr. Adamov's case leaving this issue open (I'm quoting paragraph 4 of that decision – "es kann offen bleiben"). The case was decided upon based on the priority of Russia's extradition request rather than the norms of immunity.

In light of the above we are not quite convinced that the conclusion made in paragraph 12 of the comments to the article is justified stating that other high-ranking officials do not enjoy immunity *ratione personae* for purposes of the present draft articles.

We would recommend the Commission to look anew at this issue.

(c) We support in general draft Article 4.

We believe that the ILC gave a good impetus to the examination of this topic in the framework of the 2013 session. The Commission should carefully work out the remaining draft articles based on the practice of states, the International Court of Justice, also using to the fullest extent the groundwork of Special Rapporteurs.

Let us turn now to the topic: "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties".**

The Russian Federation carefully follows the work of the Commission on this topic and hopes that upon the results of this work the Commission will adopt useful recommendations for states and other entities involved in the interpretation of treaties.

We would like to give general recommendations to the Commission on this topic. We consider it a matter of principal importance that recommendations prepared by the Commission follow the letter and spirit of the Vienna Convention on the Law of Treaties.

In this regard we would suggest that the Commission reflect in its conclusions the main goal of the interpretation of a treaty, which lies, according to the commentary of the Commission to the draft articles on the Law of Treaties, in “elucidating the meaning of the text”. As the International Court of Justice said in the its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, “If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."

We would also suggest drawing the distinction between the general and supplementary rules of interpretation reflected in Article 31 and 32 of the Vienna Convention, respectively, in a more decisive manner.

Draft Conclusion 3 has a great practical value, which in the final analysis calls on the writers to use the evolutive interpretation of the treaty terms with certain caution – otherwise there is a great risk to go beyond “the letter and spirit" of the treaty or original intent of the states parties. We fully share this approach.

We also agree with the Conclusion of the Commission that the subsequent practice envisaged in Articles 31 and 32 of the Vienna Convention may be originated only by a state party to the treaty to which a relevant conduct is attributed by the international law.

With regard to the relevance of the conduct of non-state actors we would suggest to use a more restrictive wording. In this context we would like to note that if a non-governmental or an international organization issues a report on the practice of states in certain area, it is the reaction of states to such report that is of greater importance rather than the report itself.

As it follows from the presented Report the Commission at the current stage decided not to address for the time being Article 33 of the Vienna Convention containing the provisions on interpretation of treaties authenticity of which had been established in more than one language. In our view this Article should not be forgotten not only because there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself, but also because the relevant "subsequent agreement" or "subsequent practice" envisaged in paragraph 3 of Article 31 of the Vienna Convention may be the result of eliminating differences in the meaning of the treaty in different languages that was expressly or tacitly agreed upon by the parties to the treaty.

In conclusion we would like to touch upon new topics that the Commission decided to include in its current and long-term program of work.

The Russian Federation already last year expressed doubts regarding the idea of developing topic "**Protection of atmosphere"** by the Commission. Our concerns remain with regard to the decision of the Commission to include this topic in its programme of work.

The restrictions put on this topic by the Commission, on the one hand, do not alleviate the problems that might arise in its consideration (we have pointed them out on a number of occasions) and, on the other hand, narrow the subject-matter of the topic to such extent that doubts arise as to whether there is any point in studying the theme in its present form.

The problem of the protection of atmosphere is complex. It includes norms of the international air law as well as norms of the international environmental law. In each of these branches of law the work is underway on eliminating gaps and creating flexible legal norms, including in areas that have been identified by the Commission as not being subject to consideration under the topic of "Protection of atmosphere". However, codification attempts in these areas will inevitably interfere with these processes and will undermine their integrity.

In light of the above, we consider that it would hardly be worthwhile continuing the work on this topic.

The Commission also decided to include the topic: "**Crimes against humanity"** to its long-term program of work.

In this regard we would like to note that the customary international law gives sufficiently clear understanding of what is the crime against humanity. This understanding was reflected in the Statute and the Judgment of the Nuremberg Tribunal, then this understanding was confirmed by the General Assembly of the United Nations in its resolution 95 (I). Crime against humanity was also defined by the International Law Commission as one of the Principals of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Crime against humanity is also a crime under the international humanitarian law, which is mentioned in the Protocol I to the Geneva Conventions. There is also the Statute of the International Criminal Court, which also contain the relevant definition.

In this regard we should ask ourselves questions what the goal of elaborating a new document on crime against humanity is and how this document would be related to the exiting norms of customary and treaty law.
Thank you, Mr. Chairman