Постоянное представительство
Российской Федерации
при Организации
Объединенных Наций

136 E 67th Street
New York, NY 10065

Permanent Mission
of the Russian Federation
to the United Nations

Phone: (212) 861-4900
Fax: (212) 628-0252
517-7427

Unofficial translation

Check against delivery

1 November 2016

STATEMENT
by the representative of the Russian Federation
in the Sixth Committee of the 71st UN GA session on agenda item
"Report of the International Law Commission on the work of its 68th session"
(Topics: "Immunity of State officials from foreign criminal jurisdiction",
"Provisional application of treaties")

Mr. Chairman,

We have reviewed with great interest the new report by Ms. Escobar Hernandez on **"Immunity of State officials from foreign criminal jurisdiction"** and studied the summary of preliminary debate in the Commission. We thank Prof. Escobar Hernandez for serious food for thought ideas presented in the report.

We note with great regret that at the time of its consideration the report was not translated into all UN official languages against the existing rules. Naturally, this affected the results of the Commission's work on this topic during its session. We believe that until the document have been translated into all working languages of the Commission, it should not be discussed and we hope that this incident will not create a precedent for the future work of the Commission.

The issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (further on – exceptions) is not an easy task taking into account among other things an increasingly heated political debate on personal responsibility for international crimes. Therefore, as we have already repeatedly stated, this topic should be examined with caution. We are glad to see that the call for caution is reflected in the opinions of the members of the Commission as if follows from its report.

The fifth report of the Special Rapporteur proposes the Commission to use quite a specific approach to the issue of exceptions to immunity. The report attempts to present exceptions as an established rule suitable for codification. However, this approach is superposed with the idea that there might be almost objective need for exceptions from immunity, which is not based on the practice of States and *opinio juris.* However, the Rapporteur proposed to use as the basis the subjective ideas about certain sought-for balance between various components of the system of international law when all these elements can exist and operate without prejudice to each other. Apparently, the Special Rapporteur hopes to achieve a "progressive development" of international law in this area using this technique.

We cannot support this shift of focus in the work of the ILC. First of all, we do not agree that the proposed provision on the exceptions to the immunity reflects the established norm of customary international law. The Special Rapporteur failed to convincingly demonstrate the existence of such a norm while the practice referred to in the report shows that we cannot even say that such a norm is in process of being established.

We do not share the view that the solution proposed by the Special Rapporteur would be a "progressive development" of international law. This is a move towards the erosion of one of the basic norms of international law which can only create new tensions in the interstate relations since, inevitably, there will be even more attempts to criminally prosecute the State officials of one State in another State. We would like

to recall that the issue of violation of the immunity of State and its officials for the last years has become repeatedly the subject of litigations in the International Court of Justice, the fact that only proves the sensitivity and conflict-prone character of this topic.

The desire to eradicate impunity for grave international crimes is a noble goal but it should not be used as an instrument for manipulating the rules of international law that constitute the foundation of contemporary international relations.

The immunity does not at all exclude responsibility. The immunity is not equal to impunity. The prosecution of the perpetrators of the most grave international crimes should be carried out for example by the international judicial bodies (common or specially established). An official can be put on trial in a court of foreign State if his State waivers the immunity that this official had enjoyed. Naturally, there are no limitations whatsoever to criminally prosecute the official in his own State.

Under these circumstances when we have quite traditional means of prosecuting the officials who perpetrated grave crimes, the introduction of exceptions to immunity from foreign jurisdiction would become just another means of political pressure by one State on another State under the slogan of fighting the impunity. This had been said, there are no grounds whatsoever to expect that impunity would actually be abated in this way. Perhaps, this explains as well the absence of a common desire of States to limit as soon as possible the immunity of foreign and, naturally, their own officials.

We hope that the Commission would hold a productive debate on the topic of exceptions to the immunity and that it would keep to the established working procedure in the future. We are looking forward to the results of the debates at the future session of the Commission.

We would like to start our comments on the topic of **“Provisional application of treaties”** by thanking the Commission and first of all the Special Rapporteur Mr.

Juan Manuel Gomez-Robledo for their work. This topic has a great practical significance which has been confirmed in the comments of the States.

From the methodological viewpoint the work of the Commission this year has been slightly complicated by the need to examine, at the request of States, some rather different levels of provisional application. We will try to make briefly some points on the issues that are the most important in our view.

Taking into account the consistent position of the Commission that the provisional application creates the same legal consequences as in the case of the entry of the treaty into force, we proceed from the understanding that nothing prevents the State from making reservations at the time when it expresses its consent to the provisional application of the treaty. Moreover, we should like to note that Article 19 of the 1969 Vienna Convention on the Law of Treaties implies the possibility to formulate a reservation at the stage of signing a treaty.

In the context of the analysis of the interrelationship between the regime of provisional application and other provisions the Vienna Convention on the Law of Treaties, we believe that an interesting idea had been expressed during the debates on the applicability of Article 60 to a provisionally applied treaty if it is used as the grounds for suspension or termination of the provisional application of the treaty in the relations between the affected State and the State that breached the treaty, despite the fact that Article 25 generally implies a simplified regime for the termination of the provisional application by sending a notification on the intent to terminate participation in the treaty.

By the way, it would be interesting to learn the ILC's opinion on whether it is possible to terminate the provisional application of the treaty by other ways without indicating the intent of not becoming a party to the treaty, and how, and on what grounds the provisional application can be terminated by the State, for which the treaty entered into force in the relations with the State, for which it has not yet come into force but has been applied provisionally.

The draft guidelines preliminarily adopted by the Commission up to date have been quite consistent with the existing practice. We should note however that most of presented draft guidelines have been of a rather general character and almost have not added any specifics yet to the 1969 Vienna Convention on the Law of Treaties.

However, the examples provided in the report and during the debate allow us to make a conclusion that there are some urgent issues in this area, which require additional reflection and further examination. In particular, we believe that the restrictive clause and the principles of its formulation and expression are among such issues. We should like to suggest that the Commission should focus its future work precisely on such aspects of the provisional application.

Perhaps, it would be also useful to study the specifics of the provisional application regime for the treaties of different nature (bilateral, multilateral, and multilateral with limited participation).

We welcome the intent of the Special Rapporteur to prepare the model provisions of provisional application. We expect that during this work it would be possible to a certain extent to systematize the relevant practice and its relevant benchmarks.

Thank you, Mr. Chairman.