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**IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL
JURISDICTION**

Statement of the Chairperson of the Drafting Committee,

Mr. Aniruddha Rajput

20 July 2017

Mr. Chairperson,

It gives me great pleasure to introduce the fifth report of the Drafting Committee for the sixty-ninth session of the Commission. This report concerns the topic “Immunity of State officials from foreign criminal jurisdiction” and is contained in document A/CN.4/L.893, which reproduces the text of the draft article, together with an annex, provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted 7 meetings – the 18th to 20th meetings on 30 and 31 May 2017, and the 21st to 23rd and 25th meetings, on 3, 4, 5 and 7 July – to its consideration of the draft article 7. It examined the draft article as proposed by the Special Rapporteur in her fifth report (A/CN.4/701). It also considered a number of suggested reformulations, as well as a proposed annex, that were presented by the Special Rapporteur in response to suggestions made, or concerns raised, in the course of the work of the Drafting Committee. The Drafting Committee provisionally adopted draft article 7, together with an annex to the draft articles, at its 25th meeting on 7 July 2017.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Ms Escobar Hernández, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I also wish to thank the Secretariat for its valuable assistance. And, as always, the interpreters have continued to perform, behind the scenes, a challenging task for the Drafting Committee.

Mr. Chairperson,

Similar to the plenary debate on this topic, the Drafting Committee had a detailed discussion on the draft article proposed by the Special Rapporteur. Before focusing on text of the draft article, members of the Committee made general comments on the text as whole, which helped to contextualise the work on the draft article. The comments related, *inter alia*, to the structure of the draft article and its relationship to other, existing and future, draft articles on the topic; to the scope and nature of the crimes referred to in paragraph 1 and their possible definition; as well as the scope of paragraphs 2 and 3 of the draft article as referred to the Drafting Committee. Comments also addressed the distinction between limitations and exceptions to immunities, including the question as to what extent the crimes listed constituted “acts performed in official capacity”.

Let me mention a few central points that the Drafting Committee considered worth highlighting:

First, the Drafting Committee proceeded in its work on the general understanding that the outcome of its work was without prejudice to, or taking a position on, the question whether the text of draft article 7, or any part thereof, codified existing law – reflecting *lex lata* – or whether the result constituted an exercise in progressive development, reflecting *lex ferenda*. Indeed, some members of the Drafting Committee underlined that their participation was without prejudice to the fundamental problems that they had with the text as proposed, as well as the text as finally adopted. The view was expressed that the Drafting Committee was essentially embarking on a policy-making exercise as opposed to seeking the codification or progressive development of the law. Some of those members would have preferred that the draft article was retained in the Drafting Committee until next year, to be further considered with any other proposals on the procedural aspects to be made by the Special Rapporteur. However, other members considered that this was an appropriate time for the Drafting Committee to proceed with the issue.

Second, the Drafting Committee agreed that the procedural aspects of immunity of State officials from foreign criminal jurisdiction are closely related to the question of limitations and exceptions, as well as the draft articles as a whole. The procedural aspects will be addressed next year in the sixth report of the Special Rapporteur. In its work during the current session, the Drafting Committee stressed the importance of procedural safeguards and guarantees for the draft article under consideration, and for the draft articles as a whole. As I will discuss in more detail towards the end of my statement, this concern is reflected in a footnote that the Drafting Committee decided to insert in the text.

Mr. Chairperson,

Let me now turn to draft article 7. You have before you a report containing the text of the draft article, together with an annex, as provisionally adopted by the Drafting Committee. I will introduce each paragraph of the draft article separately.

Paragraph 1 of draft article 7 consists of a chapeau and six subparagraphs, numbered (a) to (f). The **chapeau** reads: “Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:”

The Drafting Committee decided to make explicit in the chapeau that the limitations and exceptions set out in the draft article have a bearing on immunity *ratione materiae* only. This reflected a desire by members to be as specific as possible when dealing with matters in the sphere of criminal law. The Drafting Committee underlined the restricted application of the limitations and exceptions by placing draft article 7 within Part III of the draft articles, which deals with immunity *ratione materiae*.

The Drafting Committee considered that, by explicitly limiting the scope of draft article 7 to immunity *ratione materiae* in paragraph 1, the reference to immunity *ratione personae* in paragraph 2 of the draft article as proposed by the Special Rapporteur had become superfluous and could be deleted. The commentaries will further emphasize that the limitations and exceptions listed in draft article 7 do not apply with respect to immunity *ratione personae*. The commentary will also clarify that these limitations and exceptions are applicable to those officials that enjoyed immunity *ratione personae* whose term of office has come to an end.

The desire for specificity also informed the Committee’s decision to include the phrase “from the exercise of foreign criminal jurisdiction” in the chapeau. This indicates that immunity does not apply to the crime itself, but relates to the exercise of foreign criminal jurisdiction. . The placement of the phrase, directly after the words “immunity *ratione materiae*”, corresponds to the wording of draft articles 3 and 5.

After considering various options, the Drafting Committee decided to retain the phrase “shall not apply”, as originally proposed by the Special Rapporteur. The term “shall” was preferred over “should”, “will” or “does”, as it was considered the most appropriate term. It corresponds to language used in the United Nations Convention on Jurisdictional Immunities of the State and Their Property, 2004, particularly in articles 10 and 11. The Drafting Committee entertained the possibility of starting the paragraph with the phrase “State officials do not enjoy”. Although this would have reflected the language used in draft article 6, paragraph 1, members expressed concern that this wording could be interpreted as to exclude from the scope of draft

article 7 former State officials, to which the limitations and exceptions set out in the draft article are also intended to apply. The Drafting Committee also decided against including the phrase “cannot be invoked”, as this would have introduced procedural elements into the text. Draft article 7 does not deal with procedural questions of invocation, but rather with substantive issues of applicability: it identifies types of activity to which immunity *ratione materiae* does not apply.

The Drafting Committee replaced the phrase “in relation to” with “in respect of” in order to harmonize the text of the chapeau with the proposed title of the draft article.

The phrase “the following crimes under international law” anticipates the list of crimes provided in the subparagraphs of paragraph 1. After some debate, the Drafting Committee decided to include the phrase “crimes under international law”, to highlight that draft article 7 only relates to crimes that have their foundation in the international legal order and that are defined on the basis of international law, rather than domestic law. The phrase reflects the language previously used by the Commission, for example in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950 (Principles I to III and V to VII), the Draft Code of Offences against the Peace and Security of Mankind, 1954 (Article 1) and the Draft Code of Crimes against the Peace and Security of Mankind, 1996 (Article 1, paragraph 2). The commentaries will emphasize that the phrase “under international law” relates to “crimes”.

Mr. Chairperson,

I now turn to **the list of crimes included in subparagraphs (a) to (f) of paragraph 1.**

The Drafting Committee debated, extensively, whether it should list specific crimes, and if so, what crimes ought to be included, and whether or how such crimes ought to be defined. Some members favoured a general reference to “the most serious crimes recognized under international law”, or a similar formulation, instead of listing specific crimes. This would leave open the scope of the paragraph and allow it to incorporate new developments in international law, in particular in international criminal law. The commentaries would then specify which “serious crimes” fell within the scope of the paragraph.

Other members were of the view that a reference to “serious crimes” was too vague. They preferred the inclusion of a detailed list of crimes, noting that criminal law demanded specificity. This was the position, the Drafting Committee eventually agreed to. Further, it was decided to list the crimes *seriatim*, in individual subparagraphs, rather than to group them together in a sub- paragraph.

The discussion then turned to the crimes to be included in the draft article. Members considered whether there was need to agree first on an underlying theory, basis or criterion or criteria, on which certain crimes would be included and not others. In the final analysis, the preponderance of views favoured the inclusion of genocide, war crimes and crimes against humanity, which appear in subparagraphs (a) to (c). These are the core crimes contained in the Rome Statute of the International Criminal Court and their prohibition is reflected in customary international law. For some members their prohibition is constitutive of *jus cogens*.

A suggestion to refer to the “crime of genocide” rather than genocide, was adopted by the Drafting Committee, in order to mirror the language used in the 1948 Genocide Convention and the Rome Statute.

Looking beyond the ‘core crimes’, some members reiterated that the Drafting Committee ought to justify its selection on the basis of a set of predetermined criteria, for example crimes that could only be committed by governments, crimes whose prohibition concerned peremptory norms of general international law (*jus cogens*), crimes listed in the Rome Statute, or crimes that were subject to a conventional *aut dedere aut judicare* regime. It was noted that all possible theories had their shortcomings. Some members stressed the need of adopting a more pragmatic approach, based upon what could be acceptable to States should be adopted.

In this regard, the Special Rapporteur clarified that the crimes had been selected on the basis of their status in treaties and in practice. On this basis, the fifth report proposed the inclusion of torture and enforced disappearance. Some members argued that these crimes fell within the scope of crimes against humanity and that their inclusion here was superfluous. Other members maintained that crimes against humanity were subject to a threshold, as they had to be committed as part of a widespread and systematic attack directed against a civilian population.

These members maintained that acts of torture and enforced disappearance might not always reach such a threshold.

The same was said about the crime of *apartheid*, the inclusion of which was supported by some members. A view was expressed that the crime of *apartheid* a “historical” crime and doubted the need for its inclusion. Some viewed that *apartheid* was covered under crimes against humanity. However the majority felt that *apartheid* must be mentioned separately. Some members questioned why *apartheid* should be included but not slavery and human trafficking as a modern form of slavery, since both of them were also the subject of international conventions.

Ultimately, the prevailing view within the Drafting Committee was to include torture, enforced disappearance and *apartheid* as separate crimes. For historical reasons, it listed the crime of *apartheid* directly under the core crimes, under (d), followed by (e) torture and (f) enforced disappearance. It also decided to refer to enforced disappearance in the singular, in line with the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

Members also debated whether to include the crime of aggression. Some members expressed their strong support for inclusion. They considered the crime of aggression to be the supreme international crime and pointed to its inclusion in earlier work of the International Law Commission in the field of international criminal law, such as the 1950 Nürnberg Principles, the 1954 Draft Code of Offences and the 1996 Draft Code of Crimes. Members also referred to the pending activation of the Kampala amendment on aggression by the Assembly of States Parties to the Rome Statute, and suggested that any action on inclusion or non-inclusion should be kept pending until next year. It was asserted that the crime of aggression was not necessarily more political than other crimes included in the list, such as war crimes and crimes against humanity, since these crimes are often also perpetrated by political leaders.

Other members expressed their reservations regarding the inclusion of the crime of aggression. They noted that national courts were not necessarily well placed to prosecute all crimes falling under the jurisdiction of an international court. Members also raised concerns about the political nature of the crime of aggression and the potential for abuse were it to be included as a crime to which immunity *ratione materiae* does not apply. Furthermore, it was

pointed out that there was no practice of national courts prosecuting the crime of aggression. In the end, the Drafting Committee decided not to include the crime of aggression, but suggested that the Special Rapporteur should reflect the various viewpoints on this issue in the commentaries. Such a course of action would afford an opportunity to States to comment on the matter.

In her fifth report, the Special Rapporteur had proposed including **corruption** as a crime to which immunity does not apply. Some members supported this proposal, pointing out that corruption, particularly wide-scale or “grand” corruption, severely affects the stability and security of States and societies. Those members drew attention to the close link between corruption and official acts. In their view, the dividing line between public and private acts was very difficult to draw in cases of corruption, as the crime was typically committed on the basis of official authority or under cover of authority, by individuals taking advantage of their public position. Members also noted that corruption was already the subject of various treaties, including the United Nations Convention Against Corruption, 2003.

Other members questioned the inclusion of corruption. They argued that corruption could never constitute an official act or be performed in an official capacity, as it was always committed with the objective of private gain. In their view, corruption was accordingly already excluded from the domain of immunity *ratione materiae* on the basis of draft article 6, paragraph 1. The view was also expressed that corruption was not an international crime, as it did not derive its criminal character from international law. Rather, it was a crime under domestic law that often required transnational cooperation for its effective prevention and punishment. In that regard, it was recalled that the United Nations Convention on Corruption did not actually define corruption, but rather called for measures to prevent and combat it more efficiently. There were many crimes dealt with in treaties that did not qualify as ‘crimes under international law’.

In the end, the Drafting Committee decided not to include the crime of corruption in draft article 7, even though it underscored the seriousness of the crime. The exclusion of corruption from the list does not mean that the crime is not a serious crime. The removal of corruption from the list only means that it is not crime in relation to which immunity does not apply.

The Drafting Committee heard several other suggestions for crimes to be included, including the crimes of slavery, human trafficking, child prostitution and child pornography, piracy and terrorism. Upon reflection, it decided not to incorporate these crimes into draft article 7. Non-inclusion of these crimes is not a disagreement with the seriousness of these crimes.

The Drafting Committee also discussed whether it should refer to modes of perpetration or ancillary crimes, such as attempt to commit an international crime, aiding and abetting and complicity. Ultimately, the Committee considered that immunity is a preliminary issue which typically arises before questions on modes of liability are dealt with. For this reason, it did not deem it necessary to include language on the issue.

Mr. Chairperson,

Turning to **paragraph 2**, the Drafting Committee extensively debated whether draft article 7 and/or its commentaries should include definitions of the crimes listed. Various suggestions were made; namely: including the definitions in the text or in the commentaries or not providing any definitions at all.

Several members emphasised that the crimes listed had to be defined according to international law, otherwise it would result into confusion before domestic courts and that domestic judges should not be left with any discretion to interpret the relevant crimes according to national law. For that reason, it was felt necessary that the definitions should be included in the text of the draft article, rather than in the commentaries.

Since putting the definitions in the text would have burdened the text, the Drafting Committee decided not to include definitions in the draft article but to attach an annex to the draft articles. This would ensure that the annex is to be read as a part of the text. The annex would provide definitions of the crimes listed in paragraph 1. This drafting exercise was inspired by the past project of the Commission on the Draft Statute for an International Criminal Court and in the Articles on the Effect of Armed Conflicts on Treaties.

Accordingly, paragraph 2 provides the link between paragraph 1 and the annex. It confirms that the crimes listed in paragraph 1 must be understood according to international law, in particular to their definition in the treaties enumerated in the annex to the draft articles.

The phrase “for the purposes of the present draft article” indicates that the draft article and the annex do not provide definitions of the crimes for the purposes of criminal prosecution, but only for determining whether or not immunity *ratione materiae* applies. It also makes clear that the references to treaty definitions in the annex are without prejudice to the status of the crimes under customary international law.

The words “the crimes under international law” reflect the wording of the chapeau paragraph 1. The phrase “mentioned above” refers to the crimes listed under (a) to (f) in paragraph 1. The phrase “are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles” emphasises that national judges or prosecutors must interpret the crimes listed as defined in international law, not as defined in their respective domestic legal system.

Turning to the **annex** itself, the Drafting Committee decided to limit the list of treaties to international or universal conventions, and not to include regional instruments. For each of the crimes listed in paragraph 1 of draft article 7, the annex identifies the relevant provision in one or two treaties that define the crime. Some members suggested including references to all treaties that provided definitions of the crimes, in order to be as comprehensive as possible. Members noted that this would demonstrate wide participation in the treaties, and wide acceptance of the definitions. Other members maintained that participation was irrelevant for the purposes of the annex, as it was only concerned with definitions. They also pointed out that different treaties provided different definitions of the crimes, which might be confusing to domestic judges and prosecutors. For these reasons, the Drafting Committee decided to only refer to the most pertinent treaties.

With regard to the crime of genocide, the Committee listed both article 6 of the Rome Statute and article II of the 1948 Genocide Convention, on the understanding that the definition of genocide in the two instruments is identical. It also referred to the Rome Statute for the definitions of crimes against humanity and war crimes, respectively in articles 7 and 8, paragraph

2. The Committee considered that the Rome Statute provided the most modern definition of these types of crimes, particularly war crimes. It noted that the Rome Statute contains the most updated list of war crimes. It incorporates “grave breaches” of the 1949 Geneva Conventions and the 1977 Additional Protocol I, war crimes under customary international law, including crimes committed in non-international armed conflict, as well as war crimes flowing from other treaties on international humanitarian law.

Due to the threshold concern that I alluded to earlier, the Rome Statute is not listed as relevant for the definition of the other crimes, namely *apartheid*, torture and enforced disappearance. In these cases, the annex lists the pertinent provisions of the relevant international conventions, namely the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the Convention for the Protection of All Persons from Enforced Disappearance, 2006.

Mr. Chairperson,

In her fifth report, the Special Rapporteur had proposed to include a version of the “**territorial tort exception**” as a ground for the non-application of immunity *ratione materiae*. It was pointed out that the United Nations Convention on Jurisdictional Immunities does not contain such an exception for crimes, and that in any case the exception could not apply to acts *jure imperii*. Since it would only cover acts not performed in official capacity, some members considered the provision superfluous. Some members expressed the view that this was not an issue covered by ‘exceptions’ because there would be no immunity at all. Therefore there was no need to create an exception to something that did not exist in the first place. For these reasons, the Drafting Committee did not incorporate the proposed provision in draft article 7. Instead the commentaries will clarify that to the extent that these acts are subjected to the principle of territorial sovereignty, they do not enjoy immunity *ratione materiae*.

Another proposal made in the fifth report was the inclusion of two “without prejudice” clauses, in what was originally paragraph 3 of the draft article. The Drafting Committee decided that, if these were to be included, the clauses ought to apply to the draft articles as a whole. To

this end, it was decided to take the clauses out of draft article 7 and to consider their inclusion, possibly in a separate draft article, together with other procedural aspects at the Commission's next session.

Mr. Chairperson,

As I have already indicated, the Drafting Committee acknowledged, at the outset of its deliberations on draft article 7, the need to consider close relationship between the question of limitations and exceptions to immunity and the procedural aspects of immunity, which will be addressed in the Special Rapporteur's sixth report. In addition to a reference to the issue to be included in the commentaries to the draft article, the Committee contemplated several ways to reflect this need in the text of draft article 7. It eventually agreed to do so in a footnote.

Members of the Drafting Committee preferred the insertion of a footnote over other suggestions, such as the inclusion of a placeholder or safeguard clause in the text of the chapeau of draft article 7. It was noted that none of the draft articles adopted so far contained a placeholder or safeguard clause. The Drafting Committee also decided against explicit reference to particular procedural mechanisms, such as waiver of immunity, in draft article 7. Members were of the opinion that this would mix substantive and procedural aspects of limitations and exceptions to immunity, which they preferred to deal with in separate draft articles.

The footnote reads as follows: "The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session". The reference to "provisions and safeguards" indicates that the procedural aspects of immunity are not restricted to the question of limitations and exceptions to immunity, but affect the draft articles as a whole. To underline this, the Drafting Committee attached the footnote to the headings of Part Two, on immunity *ratione personae*, and Part Three, on immunity *ratione materiae*, rather than to the title of draft article 7.

Finally, the title of draft article 7 is "Crimes under international law in respect of which immunity *ratione materiae* shall not apply". After this lengthy and detailed statement, I hope that none of the elements of the title comes as a surprise to the members of the Commission. As I mentioned earlier, draft article 7 will be placed within Part Three on immunity *ratione materiae*.

Mr Chairperson, before concluding I need to point out that some members of the Drafting Committee were opposed to transmitting draft article 7 back to plenary at the present stage, for a number of reasons. They were firmly of the view that it did not reflect existing law, and wanted this to be clearly acknowledged; they considered that the provision should only be forwarded together with procedural safeguards, given the serious risk of abuse; and they did not support the proposal even as one for new law.

Mr. Chairperson,

This concludes my introduction of the fifth report of the Drafting Committee for the sixty-ninth session devoted to the topic, Immunity of State officials from foreign criminal jurisdiction. This report is being submitted for the consideration of the Commission with a view to taking action on draft article 7, together with the annex, as presented.

I thank you for your kind attention.
