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Report of the International Law Commission on the work of its sixty-fourth session

Chapter VI: Immunity of State officials from foreign criminal jurisdiction

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CHAPTER VI

Immunity of state officials from foreign criminal jurisdiction

Mr. Chairman,

The Greek delegation would like first of all to warmly thank Mrs. *Concepcion Escobar Hernandez* for her preliminary Report on the topic of immunity of state officials from foreign criminal jurisdiction. We are sure that she will lead the study she has undertaken to fruitful results.

Mr. Chairman,

We had the opportunity, last year in particular, to comment rather extensively on the Reports of the previous Rapporteur, Mr. *Roman Kolodkin.* Our views have therefore been largely expressed, so we will only make a short recapitulation thereof and add some further comments in connection with the preliminary Report now in front of us.

On this basis, we would like to make the following observations:

There is no doubt that the topic under examination is very important not only because of its prominent position in international law, but also because it touches upon ethical questions with a much larger resonance in society. Furthermore, as the Special Rapporteur admits, it is "politically sensitive." From another, more factual perspective, it is to be noted that the questions related to this subject never cease to surface in various forms and in various instances, particularly judicial. As there is, as yet, no

normative text dealing with the matter, there is ample room for clarifying these questions. We are therefore of the view that there is merit in coming up with solutions in the form of draft articles as, we understand, is the aim of the Special Rapporteur.

With this aim in mind, we agree with the differentiation between immunity *ratione personae* and immunity *ratione materiae*. These two types of immunity indicate different spheres in terms of time and acts covered, with different consequences. With regard to immunities *ratione personae,* we concur with those delegations who support the idea that this type of immunity should be accorded, at a maximum, to the Head of State, Head of Government and the Minister of Foreign Affairs.

Furthermore, we see the point of finding an adequate method to delineate the contours of the term "state official" and "official act," the latter being far more difficult to identify. Concerning the former, on the other hand, i.e. state officials, there is no doubt in our mind that the circle of such persons -who are accorded immunities *ratione materiae*- should be limited to those who exercise governmental authority or find themselves in the highest echelons of public service.

On a closely connected issue, the Special Rapporteur is right in identifying a point of convergence -which might also become, we add, a point of friction- between state responsibility and immunities of state officials. There is therefore room for exploration which is the applicable regime on that convergence point, so as to avoid duplication and confusion with undesirable consequences.

A topic which is being hotly debated and certainly will continue to be so, is that of exception to immunity in respect of grave crimes – however they may be described, such as "international crimes," or "crimes which are breaches of *jus cogens* or *erga omnes* obligations." However, their description as crimes under universal jurisdiction is not convincing for a number of reasons, one of them being that universal jurisdiction may also be applicable to crimes not of the same nature at all, such as piracy.

Setting aside the principle of immunity even in the face of grave crimes, is not a novelty, of course. It was done by the post World War Two Tribunals, under the London Charter, the Tokyo Charter and under Control Council Law No. 10. More recently, in the early nineties,

immunity was set aside by the Security Council which drew up the Statute of the *ad hoc* International Tribunals for the former Yugoslavia and for Rwada. Following a parallel path, the Statute of the International Criminal Court expressly provides for the irrelevance of official capacity when the crimes committed, which appear to be attributable to the person holding such an official position, are within the jurisdiction of the Court. Mention was made in the Kolodkin Reports, of article 98 of the ICC Statute. However, it is worth repeating here that Article 98 refers to pre-existing agreements, such as Status of Forces agreements which, it was thought, could not be nullified because of the ICC Statute. This is, I might add, a unique exception. All in all, a trend is being formed in international law to set immunities aside when they protect the perpetrator of grave crimes.

It can of course be argued that the ICC Statute is a Treaty and the Statutes of the *ad hoc* Tribunals are, in effect, Security Council resolutions adopted on the basis of Chapter VII of the UN Charter, while customary international law says a different thing, namely that immunity is unshakable. Mention is made in order to support this view, of the recent judgment of the *ICJ* on jurisdictional immunities. However, it has been correctly pointed out in the *IlC* discussions that that case referred to a different matter, i.e. state immunity from civil jurisdiction.

It is true, nonetheless, that a trend in international law does not automatically translate into customary law. This particular trend, however, is strong enough to be difficult to ignore. It is indeed true that treaty law, when very widely accepted, is very much apt to mark a shift in international customary law. As participation in the ICC Statute slowly but steadily reaches a point of universality, and as its member-states adopt legislation to conform with the requirements of complementarity, the shift in the legal custom will become more and more obvious. It is therefore the appropriate time for the ILC to examine the legal situation and place itself at the head of developments which are already taking place.

Let me add, at this point, that the theory of the procedural bar which leaves the substantive law unaffected is hardly convincing because what is meant in reality is that the act remains an egregious crime but the perpetrator can go unpunished or may be punished later, if ever. This is

not the response that the culture of accountability would find suitable for the suppression of such crimes.

Finally, Mr. Chairman, I come to the two questions asked by the Special Rapporteur. To the first question -whether our national legislation provides such a distinction between jurisdiction *ratione personae* and jurisdiction *ratione materiae*- the answer is in the negative-it doesn't. It also does not expressly refer to persons enjoying immunity other than foreign Heads of State. However, it does not exclude the possibility for other persons enjoying immunity, by referring, for that purpose, to international agreements and customary international law.

Thank you, Mr. Chairman