I T A L Y

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Statement by
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Mr. Chairman,

Allow me to congratulate Professor Caflisch on his election as Chairman of the International Law Commission and thank him for the clear presentations of the work of the Commission.

Our comments relate to three topics: Immunity of state officials; *aut dedere aut judicare;* formation and evidence of customary international law.

(1) As far as the issue of *Immunity of state officials from foreign criminal jurisdiction* is concerned, we would like to thank the previous Special Rapporteur Ambassador Roman Kolodkin for the work done over the last few years. We are very pleased to welcome Professor Conception Escobar Hernandez in the role of Special Rapporteur on this topical issue and we are glad to ensure her of our support.

As the Report highlights there still is a variety of approaches to this issue. However, we believe there are a few fundamental principles that ought to be upheld and on which there cannot be so many divergences of views.
Among these few fundamental principles one may recall that all state officials must be immune from foreign jurisdiction for actions carried out in their official capacity, apart from cases in which crimes under international law are concerned.

In all other instances (what we can label as 'ordinary' cases), however, those who act in the name of the State, for example members of the armed forces, or police, or members of government and so on, are to be held immune for their official acts which are to be attributed to the State to which they belong. Ordinary rules on State responsibility would then apply as appropriate and the response is to be found in the framework of inter-state relations. This should not mean that there will not be responsibility for unlawful acts.

At the same time, acts performed by state officials in their private sphere or capacity, acts not involving the insignia of state sovereignty must remain under the scope ordinary rules on jurisdiction, unless special categories of personal immunities apply (e.g. in the case of diplomatic personnel or special missions, or the so called 'troika'). These well established principles of international law.

The divergences of views, on the other hand, seem essentially to revolve around a few categories of specific crimes under international law which are listed e.g. in the Statutes of the UN Ad hoc Tribunals or in the ICC Rome Statute. Admittedly, this is an area where difficulties are present and need for more work is necessary as rightly pointed out by the Special Rapporteur. According to the ICJ when referring to international crimes, immunity must not entail impunity, and for this principle to be implemented there might be the need to identify or to use (when available) appropriate rules or mechanisms allowing redress.

There seems also to be agreement on the fact that international crimes are offences of an exceptional nature which necessitate adequate legal responses. On one level national courts must exercise their primary responsibilities, on the other international mechanisms may be available to prosecute these crimes.

However, rules and principles in this area need not be construed as exceptions to the rule of immunity of state officials. These could be specific norms strictly linked to the provisions establishing the individual criminal responsibility of the officials who commit certain classes of crimes. In particular, war crimes, crimes against humanity and genocide may entail the responsibility of both the individual as well as the State to whom these crimes are attributable, and hence the immunity paradigm may not be necessarily the most appropriate in these circumstances.

In this direction we would support the efforts of the Special Rapporteur to deepen the analysis and look forward to contribute to it. The whole relationship between jurisdiction and immunities may profit from being conceptually reworked in this direction. And we look forward to any element of further reflection in the future work of the Special Rapporteur.

As far as the distinction between *ratione materiae* and *ratione personae* immunities is concerned we believe that this distinction continues to be important and even if, in particular for international crimes, there may still be instances where the *ratione personae* dimension temporally bars prosecution before foreign courts, what is important to determine is that no *ratione materiae* immunity justifies such crimes.

(2) On the topic of *aut dedere aut judicare* we would like to encourage the Commission to give further energy to the work in this area.

The obligation to extradite or prosecute is an important tool (specifically provided for in certain treaties) for the purpose of avoiding impunity. It is a principle that involves States which have a specific relationship in cooperating with each other in the fight against crimes. It offers a clear choice to the State that captures an alleged offender: either to contribute directly by adjudicating or indirectly by transferring the person to another jurisdiction able and willing.

A principle of cooperation underlies the bilateral relationship that can be instituted on the basis of the principle; this principle is particularly important in the area of prosecution of crimes of concern for the international community as a whole, such as e.g. the Rome Statute crimes or crimes of terrorism. It is a useful principle to avoid that States may become safe havens for alleged perpetrators of serious crimes.

There are provisions on *aut dedere aut judicare* contained in specific conventional rules and domestic legislation which allow for elaborating such a notion. However there may be doubts as to the possibility to identify numerous principles of customary law in this area and de-link them from the conventional context.

A thorough reflection on the existence of principles dealing with jurisdictional gaps in general or in specific areas may be worth exploring and a study of these elements could be appropriate.

(3) Formation and evidence of customary International law

Finally, Mr Chairman, let me turn to the last topic we wish to address. The issue of *Formation and Evidence of customary international law*.

We see with great curiosity this theme in the programme of the ILC and are confident that the Special Rapporteur will be able to gather ample information on this topic and provide useful research.

It is hard to deny that it is an issue that is both important and appealing; however, in light of its complexity caution should be exercized in formulating any reasoning that may restrict the action of judges at the international and domestic level, as well as other interpreters. One of the distinctive traits of customary law is that it emerges in a nearly spontaneous manner, through the 'interaction' of a variety of actors and taking into account a variety of factors. The temptation to build predetermined drawers or procedures may result too artificial to be useful.
The very nature of international law requires the possibility to identify the rule in every relevant legal act or fact.

The idea to make a study in this area can still be useful to analyze a list of elements that concur to the formation and evidence of international customary law, but we hardly see this as an exhaustive process.

While it may be both feasible and useful to develop a compilation of practice in a determined field of international law, with the purpose of codifying customary law, such as e.g. the monumental work of the ICRC on International Customary Law in the area of IHL; the attempt to develop a sort of meta-language on the formation and evidence of international customary law in general may be too broad and may turn out to be unduly constraining. It would run contrary to the essence of general international law as spontaneous law (which is the necessary *toile de fond* of international relations and cannot be circumscribed by a codification exercise); in particular such strict determination with regard to rules of customary law in *statu nascendi* may run contrary to necessary developments of international law.

Even though developing principles on how to gather evidence on customary international rules might be less controversial, it should be kept in mind that a great degree of flexibility should be left to the interpreter in this area. It is the reasoning and the materials identified that attest to the credibility of the statement and not any procedural device that may end up obfuscating the strength of realities.

The problem is not so much to determine that there is a set of sources or predetermined elements that assist in identifying the formation or evidence of customary law but it is more whether doing so implies that other elements can be excluded. Some of these elements or their balance may change over time, and may depend on the advances in technologies and on the context in which principles and rules emerge, or the values embodied in certain rules, or the frequency of certain events. In some areas *opinio iuris* may be stronger (and more relevant) than actual practice, in other cases there may be practice which lacks clear expressions of *opinio*. A thorough mapping exercise is not easy, and the results may be less satisfactory than expected. Nonetheless, we stand ready to contribute to the efforts of the Special Rapporteur in this area and will make available our reflections to this end.

Thank you