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Agenda Item 79: 'Report of the International Law Commission on the work of its sixty-fourth session'

Chapter VI: Immunity of state officials from foreign criminal jurisdiction, Chapter VIII: Formation and evidence of customary international law, Chapter IX: The obligation to extradite or prosecute (*aut dedere aut judicare*)

Mr Chairman,

allow me now to address Chapter VI: Immunity of state officials from foreign criminal jurisdiction, which contains comments that are of particular interest to the Commission (Chapter III of the Report). Recognising the complexities of this significant topic, we wish to commend the excellent work of the former Special Rapporteur, Mr Roman Anatolevich Kolodkin, and extend our congratulations to the Special Rapporteur, Ms Concepción Escobar Hernández, on her appointment. My delegation welcomes the proposed systemic approach in the preliminary report of the Special Rapporteur, as well as the contentious issues requiring particular attention that have been identified. We remain confident that the suggested roadmap, and in particular the Special Rapporteur's intention to submit the first set of draft articles in her next report, will streamline and enhance our debate which is intended to identify the positions that we share.

We believe an examination of this topic offers an important opportunity to examine and identify potential new trends in contemporary international law on the immunity of state officials from foreign criminal prosecution. However, given the sensitivity of the issue, which is based on the principle of sovereign equality of states and stability in international relations, we believe particular efforts should be devoted to addressing the occurrence of the progressive development of international law through a detailed examination of State practice, jurisprudence and the doctrine, as well as the principles of contemporary international law.

As to the major points of debate identified by the Special Rapporteur, we believe that it is essential to maintain the distinction between immunity *ratione personae* and *ratione materiae*. In addition to the solidly rooted substantive differences between the two types of

immunity, such as the expiry and scope of immunity, other differences might also be identified, such as those in the context of procedural aspects. Furthermore, regarding immunity *ratione personae*, Slovenia agrees that immunity accrues to what is often termed as a *troika* comprising the Head of State, the Head of Government and the Minister of Foreign Affairs. However, we suggest taking a cautious approach to any additional extension of immunity *ratione personae* to other officials. While recognising that it is common today for other high-ranking officials to participate in international relations, the *troika* still maintains a distinctive level of representative functions.

If immunity *ratione personae* is based on status, immunity *ratione materiae* is limited to acts performed in an official capacity. It is precisely this distinction that emphasises the importance of clearly defining the term 'official act', including whether it extends to such acts which are unlawful or *ultra vires*. Therefore, we agree that efforts should be focused on this aspect in particular, where a clarification of the relationship between official acts in the context of immunity and the rules on the attribution of state responsibility would also be beneficial.

We recognise that the question of possible exceptions to immunity, immunity *ratione materiae* in particular, for the gravest international crimes clearly merits most careful attention. While the immunity of state officials from foreign criminal jurisdiction is grounded on the principles of state sovereignty, non-intervention and the interest of states in maintaining friendly relations, it should also be addressed against the background of the growing prominence of legal humanism and the fight against impunity, in particular through the prism of the progressive development of international law and developments in international criminal law. Here, too, state practice, doctrine and jurisprudence should be thoroughly consulted, including the latest judgment of the International Court of Justice on the *Jurisdictional Immunities of the State (Germany vs. Italy: Greece intervening)*.

Mr Chairman,

turning to Chapter VIII: Formation and evidence of customary international law, we would like to begin by commending the approach taken by the Special Rapporteur, Mr Michael Wood. We agree that the outcome should be practical guidance for judges and lawyers as a set of conclusions, with commentaries which would help identify the rules of customary

international law, particularly for domestic courts. A clarification of relevant terms in a brief glossary would certainly be beneficial for a unified understanding of the matter. We agree that the study should cover both the method for identifying and the existence of a rule of customary international law. It should be noted that the scope of this study is extremely wide, as clearly reflected in paragraph 190 of the report, which includes a list of points that deserve particular attention. A great many scholars have studied this issue, and it has been addressed by both international and national courts. Paragraph 77 of the ICJ judgment in the *North Sea Continental Shelf* case is most frequently cited as the criteria for identifying a rule of customary international law. This shows that the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*. However, in practice, we note that additional substantive guidance in this field is needed. We look forward to the next report of the Special Rapporteur, Mr Michael Wood, and we are convinced that, given his wide expertise, it will be based on a detailed and thorough study. The Secretariat's memorandum on the previous relevant work of the Commission on this topic will also be very helpful, and we thank the Secretariat for its useful work. Finally, on this topic, let me suggest that the guidance should also include some practical examples of the identification and existence of a rule of customary international law, since in our view this would also facilitate comprehension of this issue for non-international lawyers.

Mr Chairman,

let me now turn to Chapter IX: The obligation to extradite or prosecute (*aut dedere aut judicare*). We congratulate Mr Kriangsak Kittichaisaree on his appointment as chair of the Working Group. We also thank the previous chair, Mr Alain Pellet, and the Special Rapporteur, Mr Zdizslaw Galicki, for their work on this topic. We agree that a clearer picture of the issues relating to this topic is necessary, particularly the outcome of the study. In our view, the essence of the obligation to extradite or prosecute is to end impunity for core international crimes: crimes of genocide, crimes against humanity and war crimes, in particular. It is paramount to clarify whether the obligation has attained customary legal status. We note that in its last judgment in the *Questions Relating to the Obligation to Prosecute or Extradite* case, the ICJ has not answered this question. We agree, however, that an in-depth analysis of the judgment is required to assess fully its implications for this issue.

We note that the research on this issue is closely linked to other issues addressed by the Commission. Discovering the existence of a rule of customary international law is obviously closely linked to the previous item "Formation and evidence of customary international law". However, extradition is closely linked to the question of immunities and, therefore, the item "Immunity of state officials from foreign criminal jurisdiction." We would suggest close cooperation between the Special Rapporteurs on these topics. International cooperation in criminal matters is an important element of this topic and, in this respect, it should be noted that according to UNGA Resolution 3074 of 1973 on the *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, states unanimously agreed to cooperate and assist each other in this field.

In regard to the relationship between the topic and universal jurisdiction we would like to stress that although it can be recognised that both principles*, aut dedere aut judicare* and universal jurisdiction, have the same goal of ending impunity, it must be clearly noted that these are different instruments which are not directly linked.

Mr Chairman,

we note that it is the fight against impunity before domestic courts which is addressed by several items on the Commission's agenda and the Sixth Committee: the obligation to extradite or prosecute, the immunity of state officials from foreign criminal jurisdiction and the scope and application of the principle of universal jurisdiction. In this context, we suggest that the Commission deliberate on a comprehensive approach to these matters and take into consideration the possibility of including in the Commission's agenda an item incorporating the above issues, namely "State responsibility to end impunity for international crimes".

To conclude, my delegation highly values the endeavours of the Commission and its Special Rapporteurs, particularly their thorough work on the current topics. The Commission will have Slovenia's full support in the future, and we will continue to contribute to its efficient work by providing the commentaries and observations requested.

Thank you, Mr Chairman, for your attention.