
STATEMENT BY YOLANDE DWARIKA, PRINCIPAL STATE LAW ADVISER (INTERNATIONAL LAW) TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS 64th SESSION
PART 2,
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The South African delegation notes with pleasure the progress in developing the topic: Immunity of State Officials from Criminal Jurisdiction. We warmly congratulate the Special Rapporteur, Ms Escobar Hernández on her appointment and we take this opportunity to thank the former Special Rapporteur Mr Kolodkin for his contribution to this topic which no doubt will serve as a good foundation as the current Special Rapporteur charts her own way forward on the topic.

Mr Chairman,

South Africa attaches great importance to this topic and we welcome the approach taken by the Special Rapporteur in her preliminary report. Even though the report is transitional in nature, we consider that the pertinent issues pertaining to this topic have been adequately identified and will be systematically interrogated. South Africa is of the view that while the issue of immunity of state officials from foreign criminal jurisdiction has strong historical and classical foundations in international law, and is essential to the principle of sovereignty of States and for the conducting of international relations between States, it can not be ignored that the context of relations between States is

evolving and dynamic. The establishment of the International Criminal Court, which seeks to bring an end to impunity is evidence of this reality. We are therefore convinced that the ILC must place sufficient emphasis of the progressive development of international law insofar as it relates to this topic and we would welcome a thorough analysis of the emerging trends pertaining to immunity, in light of contemporary international law.

Mr Chairman,

In 2009 South Africa raised important issues which we considered as vital to the development of this topic. We continue to hold the view that the scope of immunities, both immunity rationae materiae and immunity ratione personae would need deeper reflection and we are therefore pleased to see that this discussion is progressing. It is widely accepted that serving Heads of State and Government enjoy personal immunity, furthermore, the Arrest Warrant case has held that Foreign Ministers are also entitled to immunity ratione peronsae. We would benefit from clarification by the ILC on the scope and extent of the applicability of immunity ratione personae for the so called "Troika" and whether there are benefits to restrict its application to other officials.

The ILC has also sought specific information on whether the distinction between immunity ratione personae and immunity ratione materiae result in different legal consequences in domestic cases, further information will be provided to the ILC in this regard.

Mr Chairman,

South Africa's domestic law like many other States, has already sought to balance important international law principles such as the fight against impunity and human rights with rules applicable to immunities through the Implementation of the Rome Statute Act of 2002. We have noted in International Court of Justice decision pertaining to Germany v Italy, that the Court stated that a State is not deprived of the immunity when it is accused of serious violations of international human rights, and that the Court was of the view that jus cogens norms and State immunity are not in conflict, since they have a different nature. However this related to immunity of the State and we would

encourage the ILC to further elaborate whether the commission of serious international crimes which bears individual criminal liability could result in exceptions to immunity. Since the scope of the topic is on individual criminal responsibility, we do encourage deeper reflection on the definition of an official act and whether there could in fact be exceptions to immunity ratione materia should the said act be contrary to *jus cogens* norms.

On the procedural aspects, we do believe that there is merit in dealing with both substantive and procedural elements, as demystifying some procedural aspects could contribute to the overall progress of the topic. In relation to procedure we would benefit from the ILC considering the relationship between the nature of certain serious crimes and the circumstances under which a State could be said to have implicitly waived immunity.

Mr Chairman,

We are pleased with the approach taken by the Special Rapporteur and the time frames for producing draft articles, which we look forward to engaging in. At this stage we wish the Special Rapporteur success and commit to providing our full support for her work.

**Provisional application of Treaties**

Mr Chairman,

I will now turn to the topic, "provisional application of treaties". We welcome the decision of the ILC to undertake a study into the topic of Provisional Application of Treaties and we also congratulate Mr. Juan Manuel Gómez-Robledo on his appointment as the Special Rapporteur for this important topic.

Mr Chairman,

We take note of the 2011 Recommendation of the Working Group on the Long Term Programme of Work of the ILC and the various possible interpretations of a clause in a treaty that provides for provisional application of the treaty. Having regard to the negotiating history of Article 25 of the Vienna Convention on the Law of Treaties, as well

as recent arbitral awards concerning provisional application, South Africa is of the opinion that the prevailing view should be that States who agree to provisionally apply a treaty, are bound to apply the relevant provisions of that treaty in the same way as if the treaty has entered into force, subject to the conditions provided in the particular provisional application clause.

The South African Constitution makes provision for two distinct procedures for the State to become bound to an international agreement. Which procedure to follow will depend on the nature of the international agreement. Agreements of a technical, administrative or executive nature, require Executive approval and bind the Republic of South Africa on signature. All other agreements agreements must be approved by parliament before it becomes binding on the Republic.

The provisional application of treaties and how it relates to domestic law, in particular where parliamentary approval is required before an international agreement would bind a State remains an important and much debated question.The challenge faced by many countries to conciliate provisional application of treaties with Constitutional requirements makes this study by the ILC relevant. The ILC's guidance concerning the legal meaning of provisional application, as well as the legal effect of termination of provisional application would greatly assist in determining the scope of obligations in terms of the treaties which apply provisionally.

**Formation of Customary International Law**

We welcome the appointment of Sir Michael Wood as Special Rapporteur for the topic, "Formation of customary international law", and thank him for the comprehensive note on the topic. South Africa supports the Special Rapporteur‘s proposal to focus on the practical aspects of the topic rather than theory as well as the proposal that the outcome should be a set of conclusions or propositions with commentaries, for judges, government lawyers and practitioners. We also believe that such conclusions will be of practical usefulness especially for those who might not be experts in public international law.

Mr Chairman,

We are mindful of the problems of inconsistency often associated with the formation of customary international law. Nonetheless, we are confident that the foundations of customary international law on the formation and evidence of customary international law remain valid and useful. Moreover, the flexibility associated with customary international law is a strength rather than weakness. We are thus not expecting the Commission's project to rewrite the rules of customary international law or produce a text comparable to a "Vienna Convention on Customary International Law".

Mr Chairman,

The Republic of South Africa welcomes and supports the importance of this topic and agrees with the Special Rapporteur that there is a need to engage governments from the outset on whether there are any significant cases in national, regional or sub-regional courts that could shed light on the formation of customary international law.

The Republic of South Africa's Constitution is very clear that customary international law is automatically part of our own domestic legal system. This is reflected in section 232 of the Constitution which states that "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."* South African courts continue to grapple with the customary international law and all its intricacies and nuances. Important decisions by our Constitutional Court, for example, have relied on customary international law. These include the death penalty case, *S v Makwanyane as well as Kaunda v President of RSA* and several others.

The importance of customary international law in the South African law reinforces the need to produce practical guidelines. South Africa looks forward to Commission's work on this topic and will provide responses in writing to the Commission's question in order to the facilitate the consideration of this topic.

Mr Chairman,

**The obligation to extradite or prosecute**

This delegation wishes to thank the Working Group on the obligation to extradite or prosecute for the work done in connection with the topic. We wish to reiterate our position on the topic, that the obligation to extradite or prosecute is a single and composite obligation in which the obligation to extradite and the obligation to prosecute are inextricably linked.

In so far as the major issues facing the topic are concerned, our delegation is inclined to agree with the members of the Commission that the harmonisation of multilateral treaty regimes would be a less than meaningful exercise because of the complex nature of multilateral treaties dealing with the obligation to extradite or prosecute.We further, agree with the members of the Commission's conclusion that an assessment of the actual interpretation, application and implementation of the obligation to extradite or prosecute clauses in particular situation, such as Belgium v Senegal case before the ICJ would not be useful to the development of the topic.

Mr Chairman,

It has been suggested that the Commission might pursue a systematic survey and analysis of state practice to establish if there existed a customary rule reflecting a general obligation to extradite or prosecute for certain crimes, whether such an obligation was a general principle of law. It was also argued that such an exercise would be futile since the Commission had already completed, in 1996, the Draft Code of Crimes against the peace and security of mankind. Article 9 thereof already contains an obligation to extradite or prosecute for the core crimes.While we still maintain the importance of this topic, in light of the debate within the ILC we question whether the topic should continue to be pursued by the Commission.

Mr Chairman,

<u>Most Favoured Nation Clause</u>

Chairperson,

We thank Mr. Donald M. McRae and Mr. A Rohan Perera for their work as co-chairs of the Study Group on the Most-Favoured-Nation clause. South Africa is pleased with the

decision of the ILC to continue its work on the Most-Favoured-Nation (MFN) clause, and supports the objective of the ILC in this regard, namely to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions in the area of investment, particularly in relation to MFN provisions. South Africa specifically welcomes the proposal of the ILC to make recommendations in the envisaged report on this topic, including possible guidelines and model clauses where appropriate.

Mr Chairman,

South Africa supports the view that, unless it specifically so provides, the MFN clause in a basic treaty cannot incorporate the procedural provisions of a third treaty. While it is unfortunate that a number of investment arbitration awards have held differently, South Africa is concerned about the divergent interpretations of MFN clauses by different arbitral tribunals, and the apparent lack of consistent reasoning amongst these tribunals in interpreting MFN clauses. This lack of consistent reasoning results in legal uncertainty amongst those stakeholders who are responsible for negotiating BITs as to how to formulate MFN clauses to encapsulate no more rights than what the State Parties to a specific Bilateral Investment Treaty are willing to grant to each other, and consequently to each others' investors. It is precisely this lack of coherence, which is also pointed out in the ILC's Report, which has led to our decision to reconsider the issue of MFN clauses in our Bilateral Investment Treaties.

Mr Chairman,

It is our hope that the work of the ILC on this topic will contribute to greater clarity on the subject and ultimately to more predictability in the manner in which MFN clauses are interpreted in dispute resolution forums.

In conclusion, we wish to once again thank the members of the International Law Commission for their report and assure them the of the Republic of South Africa's support in their work and future endeavors.