United Kingdom of Great Britain

and Northern Ireland

Sixth Committee

Statement on

The Report of the ILC: Part Three

by

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UNGA SIXTH COMMITTEE: AGENDA ITEM 79

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY THIRD AND SIXTY FOURTH SESSIONS: PART 3

CHAPTERS VI (IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION), VII (PROVISIONAL APPLICATION OF TREATIES), VIII (FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW), IX (THE OBLIGATION TO EXTRADITE OR PROSECUTE), X (TREATIES OVER TIME) & XI (MOST-FAVOURED-NATION CLAUSE)

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Mr Chairman/Madam Chair

Turning to **Immunity of state officials from foreign criminal jurisdiction**, the UK welcomes the appointment of Madam Escobar Hernandez as Special Rapporteur on this important topic, and we extend to her our very best wishes for her work. She is perhaps fortunate to have the excellent foundation of the reports of the previous Special Rapporteur, Ambassador Kolodkin, as well as the Secretariat's study of State practice, on which to base the further work of the Commission. In our view this existing work is firmly based in State practice, and provides an excellent, practical orientation for further work.

We are still considering how most appropriately to answer the specific questions on this topic asked by the Commission in Chapter 3 of its Report, and we shall provide further details of our law and practice in due course. We offer for now the following answers on a provisional basis, pending the opportunity for further examination.

The first question asks whether the distinction between immunity *ratione personae* and immunity *ratione materiae* results in different legal consequences, and if so, how they are treated differently.

Where relevant immunities have been codified at the international level and the UK is a party to the relevant treaty, then the relevant treaty obligations will usually be incorporated into national law by a UK statute. Thus for example in the case of immunities under the Vienna Conventions on Diplomatic Relations and on Consular Relations, the relevant provisions of the Conventions have been reproduced in and given effect by respectively the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968. There are also statutory provisions dealing with the immunities of foreign heads of State. However in respect of other immunities from criminal jurisdiction reference to customary international law, which for these purposes may form part of the common law, is

permissible. Thus for example the immunities (*ratione personae*) of high ranking State officials (such as for example Heads of Government, Foreign Ministers and others) and of members of special missions are given effect to by the courts in line with the obligations of the UK in customary international law. Further, immunities of other State officials for their official acts (*ratione materiae*) from criminal jurisdiction may similarly be given effect by the courts applying principles of customary international law.

The questions faced by the court in deciding on questions of immunity *ratione personae* and immunity *ratione materiae* are clearly distinct. In relation to immunities *ratione personae* the question is essentially whether the individual in question currently holds a position which attracts immunity *ratione personae*. In this respect it is accepted in our law and practice that there may be relevant factual evidence within the special knowledge of the UK Government, which the Government can certify with conclusive effect. Such matters include for example whether or not an individual has been notified and received as a diplomatic or consular agent, whether or not an individual is a head of State, or whether or not the Government has given its consent to a visit as a special mission.

There have been relatively few cases in the UK where an individual has asserted immunity *ratione materiae* to oppose criminal proceedings, but that possibility has been recognised in principle. However in the two most recent cases where immunity *ratione materiae* has been claimed in the context of criminal proceedings (*Pinochet* and *Khurts Bat*), the court found that immunity was not available in the particular circumstances. The plea of immunity *ratione materiae* in criminal cases is a plea by the State that the act of its official is an act of the State itself, and therefore cannot be the subject of adjudication by the court of another State. The State that asserts such immunity, acknowledges the act of its official as its own and thereby its responsibility on the international plane may be engaged, and it is at the level of international law that any claim or remedy may lie. It is our view that this remains the general position.

However the two cases mentioned above both suggested some qualification to that general rule. First of all the well-known decision of the House of Lords in the *Pinochet* case, which found that, for those States which had ratified it, the UN Convention against Torture constituted a *lex specialis* or exception to the usual rule on immunity *ratione materiae* of a former head of State in respect of crimes of torture. The *Khurts Bat* case, in which the Court found the work of Ambassador Kolodkin for the ILC of considerable assistance, suggests that a plea of immunity *ratione materiae* would not operate in respect of criminal proceedings for acts of a State official committed on the territory of the forum State.

In relation to the Commission's second question as to the criteria applied to identify the persons covered by immunity *ratione personae*, the UK courts have drawn considerable assistance from the decision of the International Court of Justice in the *Arrest Warrant* case. We shall provide the

Commission with the details of our practice in due course, but briefly speaking the key questions have centred on the seniority of the individual and their functional need to travel for the purposes of promoting international relations and cooperation. In practice this has included not only Heads of State, Heads of Government and Foreign Ministers, but also Ministers of Defence and a Minister of International Trade.

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Mr Chairman/Madam Chair

Turning now to the topic **Provisional application of treaties**. The UK welcomes the inclusion of this topic in the programme of work and congratulates Mr Juan Manuel Gomez-Robledo on his appointment as Special Rapporteur.

The UK believes that a study of this topic would usefully build on the body of work on treaties undertaken by the ILC. That includes those topics recently completed such as the Guide to Reservations to Treaties and the Effect of Armed Conflict on Treaties, as well as the ongoing topic of Treaties over Time, and of course the Vienna Conventions on the Law of Treaties themselves.

We think that this topic has the potential to be of genuine practical importance to States, though we note that in practice questions of provisional application can have important dimensions of national and constitutional law for States. Provisional application is being increasingly utilised in our own treaty practice. The UK acknowledges the initial view of the Commission that it is still premature to take a decision on what should be the outcome of this study. We think this is a sensible approach, and, given the nature of the topic, it may, at least in the first instance, lend itself better to a study of how Article 25 of the Vienna Convention is applied in practice, perhaps leaving general propositions or commentaries, if any, to be drawn out subsequently.

The UK notes the intention of the Special Rapporteur to submit his first substantive report at the sixty-fifth session and the UK looks forward to studying that.

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Mr Chairman/Madam Chair

Turning now to the topic **Formation and evidence of customary international** law. The UK welcomes the inclusion of this topic in the programme of work.

Again, we see this topic as having real practical value. Whilst the distinguished members of the Sixth Committee will be very familiar with formation and evidence of customary international law, it is our impression that these issues now increasingly arise in new contexts, where the relevant decision-makers or legal advisers do not necessarily have the same familiarity with the sources and methods of international law as a Legal Adviser to a Foreign Ministry.

For example, in recent years we have seen that in the domestic courts in the UK, parties to litigation have increasingly sought to make arguments based on points of customary international law in a wide variety of contexts. Where the issue in question is one set out in an international convention then the question of establishing the current position in international law may be relatively simple. But where the proposition is that there is or, conversely, is not a customary rule of international law, there is currently no authoritative point of reference to which, for example the judge of a domestic court can turn for guidance as to how to determine that issue.

In this respect we note that the role of the national judge in identifying relevant rules of customary international law has a particularly interesting aspect, which underlines the benefit of the Commission providing such guidance. In relation, for example, to the customary international law of State immunity, in its landmark decision in the case of *Germany v Italy* earlier this year, the International Court of Justice noted that the judgments of national courts constituted "State practice of particular significance". Thus the national judge may find himself or herself in the interesting position of simultaneously both identifying relevant State practice, and also creating State practice. This dual aspect of the role of the national judge in such circumstances has been noted in our domestic courts. In a case in 2006 before the UK's then highest domestic court, the House of Lords, one of the law lords explained that it was not for the UK's domestic judges to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other States[1]. Rather, it is their role to establish the current position in international law and apply that to the facts of the case at hand.

We think that a clear and straightforward set of propositions or conclusions with commentaries relating to this topic could very well become an important reference tool for those judges and for practitioners, who may not necessarily be experienced in international law, but who nevertheless find themselves confronted by questions of customary international law. We welcome the indication that the Commission feels it would not be appropriate to be unduly prescriptive in setting out its conclusions since a central characteristic of customary international law is that it is formed through a flexible process.

In terms of timing, the UK welcomes the intention of concluding this work within this quinquennium. The UK believes this to be an ambitious but achievable timeframe and looks forward to the first report on this topic with interest.

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Mr Chairman/Madam Chair

Turning now to the topic of **Obligation to extradite or prosecute**, the UK thanks the Commission for their work on this topic, although it notes that there has been little substantial progress.

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[1] Per Lord Hoffman in *Jones and Mitchell v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and Others* [2006] UKHL 26 at paragraph 63

As stated on previous occasions, the UK's position continues to be that the obligation to extradite or prosecute arises as a result of a treaty obligation. We do not consider that State practice and opinio juris have reached the point at which such an obligation can be regarded as a rule or principle of customary international law.

In view of the UK's position that any obligation to extradite or prosecute arises under the terms of international agreements, we consider that it is the terms of those agreements that govern both the substantive crimes in respect of which the obligation arises and the question of whether the custodial State has discretion as to whether to extradite or prosecute. The excellent Secretariat Study from 2010 (A/CN.4/630) dealt with these matters rather fully.

The UK notes that the judgment of the International Court of Justice in the case of *Belgium v Senegal* was handed down during the sixty-fourth session of the International Law Commission. It welcomes the indication that the International Law Commission will carry out an in-depth analysis of that judgment to assess fully its implications for this topic. The UK awaits with interest the result of that analysis but for the time being, the UK is not convinced that it would be a good use of the Commission's time to continue with this topic.

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Mr Chairman/Madam Chair

Turning to the topic of **Treaties over time,** the UK has previously indicated its view that there should be a narrower approach to this topic, focusing on subsequent practice in implementing the treaty and any agreements among the parties as to its operation or interpretation, rather than attempting a broader view which takes into account all the possible factors that might affect the operation of a treaty over the span of its existence.

Accordingly, the UK welcomes the decision of the Commission to narrow the focus of the topic and to rename it "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". We also congratulate Mr Georg Nolte on his appointment as Special Rapporteur for this topic. We look forward to his first report as Special Rapporteur.

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Mr Chairman/Madam Chair

I turn to the work of the Study Group on **Most favoured nation clause.**

As the UK has previously indicated, we agree with the Study Group's affirmation of its intention not to prepare any new draft articles or revise the 1978 draft articles on the Most Favoured Nation Clause. We also agree with the Study Group's intention to instead work towards producing a draft report providing the general background, analysing and contextualising the case law, drawing

attention to the issues that have arisen and trends in the practice and where appropriate making recommendations, including model clauses.

The UK notes that the Study Group considered that the relationship between investment agreements and human rights may be of contemporary interest. However, we also note that the Study Group is mindful of not broadening the scope of its work, and its caution about exploring aspects that may divert attention from other aspects of this topic. The UK welcomes and agrees with this analysis and believes that the relationship between investment agreements and human rights should not be considered.

The UK welcomes the broad outline of future work for the Study Group as summarised in the report of the Sixty-forth session. In particular the UK believes it would be useful to continue to consider the various factors that have been taken into account by the tribunals in interpretation as part of its consideration of this topic. The UK also supports and welcomes the Study Group's emphasis that the interpretation of the most-favoured nation clause is a matter of treaty interpretation, which will be based on the precise wording and negotiating history of the clause at issue.

The UK thanks the Study Group for both its work to date and its proposals for further study, and looks forward to following its future work with interest.

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Mr Chairman/Madam Chair

That concludes this statement on behalf of the UK.