UNITED STATES MISSION TO THE UNITED NATIONS

799 United Nations Plaza
New York, N.Y. 10017

Statement by the United States of America
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Report of the International Law Commission
on the Work of its 64th Session

Immunity of State Officials from foreign criminal jurisdiction/ Provisional application of treaties/ Formation and evidence of customary international law/ Obligation to Extradite or Prosecute/ Treaties over time Most-Favored-Nation clause

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Mr. Chairman, once again, I would like to thank the Chairman of the Commission, Professor Lucius Caflisch, for his introduction of the Commission's report. I appreciate the opportunity to comment on the topics that are currently before the Committee.

Immunity of State Officials from foreign criminal jurisdiction

Mr. Chairman, turning first to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we warmly welcome Concepción Escobar Hernández of Spain as the ILC's new Special Rapporteur for this difficult topic and, indeed, the first female Special Rapporteur in the Commission.

We also wish to thank Professor Escobar Hernández for her efforts thus far to build on the comprehensive reports produced by Roman Kolodkin over the past several years. We have no doubt that she will be an able steward of this very important project. We greatly appreciate the care she has taken to survey the work that has been done to date, to identify a list of issues that remain open, and to propose a plan of work to address them going forward.

The reports prepared so far engage questions of considerable importance. The United States stands ready to engage on this topic and remains committed to striking the right balance between immunity and accountability. We must keep in mind these twin goals in order that state officials performing their official duties overseas are adequately protected and those guilty of gross crimes do not go unpunished.

The Commission's report poses two questions to states regarding their national law and practice with respect to this topic: "(a) Does the distinction between immunity *ratione materiae* and immunity *ratione personae* result in different legal consequences and, if so, how are they treated differently? (b) What criteria are used in identifying the persons covered by immunity *ratione personae*?" We understand the Commission not to be seeking information on the provision of immunities to diplomats, consular officials, officials of international organizations, or persons on special missions, and our answers are limited to foreign officials who do not fall into any of these categories.

As a general matter, the bulk of U.S. practice centers on civil suits and the issue arises rarely in the criminal context. To the extent U.S. practice in civil cases could be relevant to our handling of criminal cases, we offer the following.

The United States government analyzes cases that raise questions of immunity *ratione materiae* and those that raise questions of immunity *ratione personae* differently. Immunity *ratione materiae* is a conduct-based immunity such that an individual who has immunity *ratione materiae* enjoys immunity only for acts taken in an official capacity. For this reason, in cases that necessitate determining whether an official enjoys immunity *ratione materiae*, the United States analyzes whether the acts at issue were taken in his official capacity.

This can be contrasted with cases that raise questions of immunity *ratione personae*, a status-based immunity. Under United States practice, a foreign official who enjoys immunity *ratione personae* must occupy a particular governmental office. An individual's status as the current occupant of that office generally results in broad immunity but only while in office. Thus, cases that raise questions of immunity *ratione personae* do not necessitate an analysis of whether the acts at issue were taken in an official capacity and were official acts. Instead, the analysis required is only whether the official currently occupies an office to which immunity *ratione personae* generally attaches. If the official enjoys immunity *ratione personae*, the official is usually immune for all acts while he occupies the relevant office, *i.e.*, in general, he is immune for acts taken both before he took office as well as those taken while in office, and he is immune for acts taken in both his official and his private capacities and official and private acts.

In the United States, our practice has been that only the troika – heads of state, heads of government and foreign ministers – are covered by what is often referred to as "head of state immunity" and thus generally enjoy immunity *ratione personae*. The United States would be happy to provide examples of U.S. domestic courts recognizing such immunity in the civil

context. However, the United States has never experienced a criminal case directed against a foreign head of state, head of government or foreign minister.

Provisional application of treaties

Turning to the topic, "Provisional Application of Treaties," the United States compliments Mr. Juan Manuel Gómez-Robledo on his appointment as Special Rapporteur for this topic. We also thank Professor Gaja for his earlier work on this topic. In our view, provisional application means that states agree to apply a treaty, or certain provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty – or provisions – in the period of provisional application can be more easily terminated than is the case after entry into force. We hope that the result of this work includes a clear statement to this effect. With regard to the issue of whether States should give notice prior to terminating provisional application, the United States urges caution in putting forward any proposed rule that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties, which has no such restriction regarding a State's ability to terminate provisional application of a treaty. Finally, we think a decision on the final form that this project should take is best left to a later date.

Formation and evidence of customary international law

With respect to the topic "Formation and Evidence of Customary International Law," the United States welcomes the Commission's decision to add this topic to its program of work. We extend our compliments to Sir Michael Wood for his excellent work on the topic and on his selection as Special Rapporteur. Mr. Wood's initial Note on this topic set forth an excellent road map for how the Commission might tackle this issue and highlights that there are still many unsettled questions in this area that could benefit from the attention of States and the Commission. Sóme of these are the sorts of acts that count as state practice, the relationship between state practice and *opinio juris*, and the role that treaties play in the formation of customary law. We echo the paper's conclusion that, as work on this topic proceeds, it is critically important that the results of the Commission's work not be overly prescriptive. In response to the Commission's request for input from States, we are reviewing United States practice with respect to the formation and development of customary international law with a view to providing materials that may be useful to the Commission.

Obligation to Extradite or Prosecute

Mister Chairman, with respect to the topic Obligation to Extradite or Prosecute, we look forward to the working paper to be prepared, by the Chairman of the Working Group, Kriangsak Kittichaisaree, for the sixty-fifth session "reviewing the various perspectives in relation to the topic in light of the judgment" of the International Court on July 20, 2012 in *Questions Relating to the Obligation to Prosecute or Extradite.*

The United States is a party to a number of international conventions that contain an obligation to extradite or submit a matter for prosecution. We consider such provisions to be an integral and vital aspect of our collective efforts of denying terrorists a safe haven and fighting impunity for such crimes as genocide, war crimes and torture. The United States continues to believe, however, that its practice, as well as the practice of other States, reinforces the view that there is no norm of customary international law obliging a State to extradite or prosecute. States only undertake such obligations by joining binding international legal instruments that contain detailed provisions that identify a specific offense and then apply a specific form of the extradite or prosecute obligation in that particular context. The obligation to extradite or prosecute is not uniform across these treaty regimes, as is clear from the Commission's own work on this topic to date. Further, while many of these treaty regimes are widely-adhered to, they are not universally adhered to, and they contain various important exceptions specific to the regime. The State practice reported to date in the Commission's reports is largely confined to State implementation of treaty-based obligations, which has been recognized by the Special Rapporteur as varying widely in scope, content, and formulation. As such, it is not possible to extract a customary norm from the existing treaty regimes or associated practice.

Treaties over time

On the subject of treaties over time, we would like to thank the Chairman of the Study Group, Professor Georg Nolte, and other members of the group for the commitment and scholarship that they have brought to bear on this important topic. Moreover, we extend our compliments to Professor Nolte on his selection as Special Rapporteur for the topic, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties." The United States continues to believe that there is a great deal of useful work to be done on this subject, and thus welcomes the more specific focus that this topic has taken on.

In reviewing the most recent report submitted to the Study Group, the United States welcomes in particular its emphasis that subsequent agreements or subsequent practice must, for purposes of Article 31 of the Vienna Convention, reflect agreement among, or practice by, parties to a given treaty in their application of that treaty. One important consideration as the work on this topic is carried forward involves the importance of striking the right balance when deriving general conclusions from particular treaties; in particular, we feel that caution is important when extrapolating such conclusions from limited precedent.

Finally, we are also curious to learn more about how other States address the domestic legal questions raised by shifting interpretations of international agreements on the basis of subsequent practice after ratification, if the legislative branch is involved in approving such agreements prior to ratification.

Most-Favored-Nation clause

As regards the Most-Favored-Nation Clause topic, we appreciate the extensive research and analysis undertaken by the Study Group, and wish to recognize Mr. Donald McRae in particular for his stewardship of this project as Chair of the Study Group, as well as the other members of the Commission who have made important contributions to helping to illuminate the underlying issues.

We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions are a product of specific treaty formation and tend to differ considerably in their structure, scope and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of MFN provisions, we agree with the Study Group that interpretive tools or revised draft articles are not appropriate outcomes. We continue to encourage the Study Group in its endeavors to study and describe current jurisprudence on questions related to the scope of MFN clauses in the context of dispute resolution. This research can serve as a useful resource for governments and practitioners who have an interest in this area, and we are interested to learn more about what areas beyond trade and investment the Study Group intends to explore.

Thank you, Mr. Chairman.