



UNITED STATES MISSION TO THE UNITED NATIONS

799 UNITED NATIONS PLAZA
NEW YORK, N.Y. 10017-3505

Statement by the United States of America
68th General Assembly Sixth Committee
Agenda Item 81: Report of the International Law Commission
on the Work of its 63rd and 65th Sessions
Part I: Treaties over Time / Immunity of State Officials from Foreign Criminal
Jurisdiction / Other Decisions

Mr. Chairman,

I would like to thank the Chairman of the Commission, Professor Bernd Niehaus, for his introduction of the Commission's report and congratulate him for his Chairmanship of the Commission this year. I would also like to congratulate the Commission for a productive 65th session and its extensive work, which has again provided this Committee with valuable information and analysis on important topics of international law.

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the Committee and will in these remarks address the issues of Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties and Immunity of State Officials from Foreign Criminal Jurisdiction, as well as provide a few comments on chapter 12 of the Commission's report regarding Other Decisions and Conclusions.

Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties

On the subject of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties," we would like to thank the Special Rapporteur, Professor Georg Nolte, for his extensive and valuable work in producing his first report as Special Rapporteur for this topic, and to commend the Commission for its rapid consideration of draft conclusions in the drafting committee during its session earlier this year. 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 Special Rapporteur's report and the draft conclusions adopted by the Commission, the United States welcomes in particular the emphasis on preserving and highlighting established methods of treaty interpretation under Article 31 of the Vienna Convention, and situating subsequent agreements and subsequent practice in that framework.

We also welcome the increasing acknowledgment in the draft conclusions and commentary of the limits of subsequent agreement and subsequent practice as interpretive tools vis-à-vis the

reasonable scope of the treaty terms being interpreted. For example, subsequent agreements and subsequent practice should not substitute for amending an agreement when appropriate.

In draft conclusion number 3, we note some concern at the term “presumed intent.” While discerning the intent of the parties is the broad purpose in treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in Articles 31-32. In other words, intent is discerned by applying the approach set out in Articles 31-32, not through an independent inquiry into intent and certainly not into presumed intent. The text of conclusion 3 does not seem to capture this important distinction.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman, turning to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we commend Concepción Escobar Hernández of Spain, the ILC’s Special Rapporteur, for the progress she has made on this important and difficult topic. We appreciate the efforts that Professor Escobar Hernández has made to build on the work that Roman Kolodkin, the former Special Rapporteur, had done, and her foresight in planning out the work that remains to be done. We commend also the thoughtful contributions by the members of the ILC.

Under the stewardship of Professor Escobar Hernández, the ILC has produced three draft articles addressing the scope of the topic and immunity *ratione personae*, as well as commentary on those articles. Accordingly, we are pleased that there is now visible progress that has been built on the extensive effort that went into laying a foundation.

One of the challenges of this topic as it relates to immunity *ratione personae* has to do with the small number of criminal cases brought against foreign officials, and particularly against heads of State, heads of government, and foreign ministers. The federal government of the United States has never brought a criminal case against a sitting foreign head of State, head of government, or foreign minister. Nor are we aware of a state government within the U.S. having brought such a case.

The bulk of U.S. practice on foreign official immunity centers on civil suits. For our purposes, perhaps the most critical difference between civil and criminal jurisdiction in the United States is that civil suits are generally brought by private parties, without any involvement by the executive branch; criminal cases are always brought by the executive branch. We realize that procedures differ in other countries, including those in which criminal investigations are conducted by members of the judicial branch and/or initiated by private party complaints. Of course it is the sovereign that is concerned with reciprocity, whereas the private parties who bring civil suits are not. When the issue of immunity does arise in the criminal context, and decisions regarding prosecution are made within the executive branch, the application of immunity or of related policy concerns about bringing a prosecution of a sitting head of State may not be publicly apparent because they are considered and resolved within the executive branch as part of the initial decision whether to proceed. Thus, the deferral of prosecution of sitting heads of State may not be a matter of public record, which may make it more difficult to elicit the governing rules.

The United States believes that scope of the topic and immunity *ratione personae* were prudent issues with which to begin, and that the draft articles and commentary may help produce momentum to deal with issues of greater controversy such as immunity *ratione materiae* and exceptions to immunity, as may be appropriate.

With respect to scope, because the rules that govern immunity in civil cases differ from those in criminal cases, we suggest that the commentary clarify that the draft articles have no bearing on any immunity that may exist with respect to civil jurisdiction.

The precise definition of the concept of “exercise of criminal jurisdiction” has been left to further commentary. The existing commentary, to Article 1, paragraph 5, explains that the exercise of criminal jurisdiction should be understood to mean “the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context.” It is unclear why the exercise of criminal jurisdiction should be limited to those that are linked to judicial processes. In the US, there are limited instances in which the Executive Branch can apply the police powers without the prior involvement of the judicial branch, for example, arrest and limited periods of detention that can be lawfully undertaken by police authorities with respect to crimes committed in their presence or when necessitated by public safety. We view such application of the police powers as constituting the exercise of criminal jurisdiction, and believe that the commentary to Article 1 should make this clear. Any immunity that exists from the exercise of criminal jurisdiction should not depend on the branch of government that applies the coercion, or the stage of the process at which that coercion is applied. As stated by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, “the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority.”¹ It follows that the types of exercise of criminal jurisdiction as to which a head of State, or other member of the troika, may enjoy immunity are those that are coercive, regardless of the branch of government applying the coercion.

Another issue with respect to immunity *ratione personae* that would benefit from clarification in Draft Article 4 is whether members of the troika can be compelled to testify in a criminal case in which they are not the defendants. The citation to *Djibouti v. France* in paragraph 3 of the Commentary to Draft Article 3 would imply that the answer is no, as the I.C.J. ruled in that case that because France had issued a mere request to the President of Djibouti to testify, it did not violate his immunity.² The implication of that ruling is that an order compelling the head of State’s testimony would have violated his immunity. The commentary should make it clear that the immunity of the troika from compelled testimony does not arise only in cases in which a member of the troika is a defendant or the target of an investigation.

We look forward to working with Professor Escobar Hernández and with the Commission on this important and complex topic.

¹ I.C.J. Reports 2008 ¶ 170.

² *Id.*

Other decisions and conclusions

Mr. Chairman, with respect to other decisions and conclusions of the Commission, let me make brief remarks about two additional topics. First, Mr. Chairman, I wish to express my disappointment that the topic of "Protection of the Atmosphere" has been moved onto the Commission's active agenda, in light of the concerns we expressed about this topic last year. The Commission's understandings limiting the scope of this topic are very welcome, but even with them, the U.S. continues to believe that this is not a worthwhile topic for the Commission to address, as various long-standing instruments already provide sufficient general guidance to States in their development, refinement, and implementation of treaty regimes. We do not see value in the Commission pursuing this matter, and we will pay close attention to developments on this topic.

Second, Mr. Chairman, the United States welcomes the Commission's addition of the topic "crimes against humanity" to its long-term work program. As the description of this topic noted, the codification of other serious international crimes in widely adopted multilateral treaties – such as the codification of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable. This topic's importance is matched by the difficulty of some of the legal issues that it implicates, and we expect these issues will be thoroughly discussed and carefully considered in light of States' views as this process moves forward.

Thank you, Mr. Chairman.