

Statement by Mr. Tomoyuki Hanami
Representative of Japan
At the Meeting of the Sixth Committee
On Agenda Item 79: Report of the International Law Commission on the Work of
Its Sixty-fourth Session (Part III – Chapters VI, VII, VIII, IX, X and XI)

(Check Against Delivery)

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

For the topic of “Immunity of State Officials from Foreign Criminal Jurisdiction,” the delegation of Japan would like to congratulate Special Rapporteur, Ms. Escobar-Hernandez for assuming the position as the first female Special Rapporteur in the history of the ILC. We also commend the work of the Special Rapporteur for her preliminary report. While emphasizing the importance of continuity from the work of the former Special Rapporteur Mr. Kolodkin, the delegation of Japan commends the attempts by Ms. Escobar-Hernandez to encourage the Commission to discuss new ideas. Considering the development of international criminal law, it will be interesting to look into the new trends and principles of international law, if there are any, but we would also like to clearly mention that, as a matter of fact, we do rely on established international law and state practice.

Regarding questions posed by the Commission with respect to the aforementioned topic, Japan’s national laws do not stipulate immunity *ratione personae* and immunity *ratione materiae* and practice is insufficient to provide the Commission with concrete information on the criteria of identifying the persons covered by immunity *ratione personae*. The number of cases that we have experienced in applying Japan’s criminal law to foreign state officials is quite limited and when the Ministry of Foreign Affairs receives requests from the National Police Agency to decide on immunity, we usually refer to past ICJ decisions and what is generally accepted by international lawyers and state practice.

If the Commission were to consider, for example, expanding immunity *ratione personae* beyond *troika*, it will need to discuss the criteria to define the scope of the officials.

Provisional Application of Treaties

Mr. Chairman,

For the topic of “Provisional Application of Treaties,” the delegation of Japan would like to commend the work done by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur on the topic that provided preliminary points of discussion. They were useful in fostering dialogues between members in the informal consultations.

The Commission undertook its discussion based on several points raised by the Special Rapporteur – 1) the procedural steps that would need to be considered as preconditions for the provisional application and for its termination; 2) the extent to which article 18 of the VCLT, which establishes the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the VCLT; 3) to what extent the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and 4) the need for obtaining information on the practice of States.

Due to its preliminary nature, Japan is looking forward to further discussions on this topic with a view to deepening the understanding of the topic. Japan expects that the Commission, led by the Special Rapporteur, will bring forth a valuable outcome.

Formation and Evidence of Customary International Law

Mr. Chairman,

The delegation of Japan would like to warmly congratulate Mr. Michael Wood for his appointment to the Special Rapporteur on the topic of “Formation and Evidence of Customary International Law.” The members of the Commission exchanged their ideas based on the introductory notes by the Special Rapporteur, which described

preliminary points of discussion, inter alia, the scope of the topic and use of term, methodology, and points to be covered, and the final outcome, which is to be determined. Many of them commented with great interest, noting that the initial debate has shown the topic's importance and inherent difficulties. The delegation of Japan is going to follow the development of the future work of the Commission on this challenging topic.

The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)

Mr. Chairman,

On the topic of "Obligation to Extradite or Prosecute," the delegation of Japan wishes to appreciate the efforts of the chairman, Mr. Kriangsak Kittichaisaree, and would like to express its gratitude to all the members of the Commission for their discussion on the topic.

The delegation of Japan takes note that in the course of the discussion during the Sixty-fourth session, it was suggested by some members that the Commission terminate its work on the topic. Bearing in mind the topic was given priority at the UN-General Assembly to be dealt with in the Commission, however, we support the conclusion of the Commission that an in-depth analysis of the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite* case of 20 July 2012 would be required to assess fully its implications for the topic as well as to make its decision on the continuation of this topic. The delegation of Japan wishes that the discussion on this topic in the next session be beneficial for the Commission in order to determine the best conclusion.

At the same time, the delegation of Japan perceives that this topic would be useful for providing a basis for the ongoing discussion of "The Scope and Application of the Principle of Universal Jurisdiction" (Agenda item 84) in the Sixth Committee. We, therefore, call on the Commission to continue its deliberation of this topic from this point of view as well.

Treaties over Time

Mr. Chairman,

Now we would like to offer comments on the topic of “Treaties over Time.” First of all, the delegation of Japan would like to extend its appreciation to Mr. Georg Nolte, the chairman of the Study Group on the topic, for his significant contribution with his submission of the third report and energetic chairmanship which stimulated vigorous discussion among members.

In its 64th session, the Study Group continued its deliberation of the second report submitted by the Chairman, and formulated the text of six additional preliminary conclusions, which are 1) subsequent practice as reflecting a position regarding the interpretation of a treaty; 2) specificity of subsequent practice; 3) the degree of active participation in a practice and silence; 4) effects of contradictory subsequent practice; 5) subsequent agreement or practice and formal amendment or interpretation procedures; and 6) subsequent practice and possible modification of a treaty.

The Study Group considered the third report also prepared by the Chairman which covers subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings. We appreciate the difficulty in collecting evidence of state practice on such issue as the “subsequent agreement” and “subsequent practice” in terms of Art. 31, para (a) and (b) of the VCLT, as we have still much to work out regarding the contour of these notions. Caution needs to be taken as to what falls under those two notions as the means to interpret treaties. We take the view that this exercise drew our attention to the need to identify the yardsticks by which to appreciate State practice.

Japan commends the decision taken by the Commission to change the format of the work on this topic and to appoint Mr. Nolte as Special Rapporteur for the topic “Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties.” We expect that the Commission, under the chairmanship of Mr. Nolte, will further discuss and elaborate on this topic in order to provide a useful tool to interpret the legal effect of subsequent agreements and subsequent practice prescribed in the VCLT.

Most-Favoured-Nations Clause

Mr. Chairman,

Now we would like to turn to the topic of "Most-Favoured-Nation Clause."

First, the delegation of Japan expresses appreciation to the distinguished Chairman of the Study Group, Mr. Donald McRae, for leading the discussion on the topic.

In view of the important role of the MFN clauses in bilateral investment treaties and trade agreements, we have regarded the comprehensive study of the ILC on the topic as useful and helpful for every State and followed therefore very closely from the beginning, the deliberations by the Study Group. We welcome that the work is going smoothly under the outstanding chairmanship of Mr. McRae and that the prospect of completion of the work within the next two or three sessions has been extended.

The delegation of Japan is convinced that the final report with guidelines and model clauses for the negotiation of MFN clauses based on state practice could make a huge contribution towards assuring greater certainty and stability in this field. With that in mind, we are going to closely look at the course of discussion in the Sixty-fifth session.

Thank you, Mr. Chairman.