THE NEW STATE IMMUNITY CONVENTION: COMMERCIAL TRANSACTIONS; HUMAN RIGHTS

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 20th January 2005; participants included lawyers, academics and representatives of NGOs and of UK and foreign Government Departments.

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The United Nations Convention on Jurisdictional Immunities of States and their Property was adopted by the UN General Assembly on 9 November 2004.

The Group discussed two subjects. The first was the scope of the commercial transaction exception as set out in the Convention. In this connection, the question of whether or not ratification by the UK would necessitate any amendments to UK law and practice was briefly discussed. The second subject was the extent to which the new Convention would serve the interests of those seeking civil redress in the courts of a State Party for serious violations by a State of their human rights. In both cases, the question of whether or not the Convention would allow the gradual evolution of the law along the lines of current developments in the case law of many States or would risk freezing or, as some put it, ossifying the law on these aspects was discussed.

Background

One speaker summarised the recent preparatory work leading to the adoption of the new Convention, pointing out that the International Law Commission (ILC) had submitted a final set of draft Articles in 1991. At that time, States had shown little inclination to reach agreement on a new Convention. There had been disagreement over several points of substance and, more generally, as to whether a legally binding convention was the best way to take matters forward. In 2001, an Ad Hoc Committee was set up under the chairmanship of Professor Gerhard Hafner with the specific task of resolving all the outstanding issues. The passage of time proved to have had a significant impact on many States’ attitudes to the draft Articles, and in 2003, agreement was reached on a new draft Convention. It was noted that any interpretation of the Convention provisions would need to take into account the “understandings” set out in the Annex to the Convention. In addition, the General Assembly Resolution adopting the Convention, the statement of the Chairman of the Ad Hoc Committee and the ILC’s Commentary on the 1991 draft Articles would constitute important travaux préparatoires to be used in interpreting the Convention. The UK Government welcomed the adoption of the Convention and were currently inviting comments from all interested parties in a consultation exercise as to whether the UK should become a party.

Restrictive Theory of State Immunity

The speaker commented that the new Convention is largely based on current State practice and reflects the so called “restrictive theory” of State immunity. This approach was now widely accepted and had developed in response to increasing
commercial activity by States. It was based upon two principles – the need to ensure justice for individuals engaged in commercial transactions with foreign States and the fact that subjecting such disputes to the adjudicative jurisdiction of national courts would not constitute a challenge to the sovereign authority of the foreign State concerned. It necessarily rests upon the classic distinction in international law between acts *iure imperii* and acts *iure gestionis*. The restrictive theory of immunity is reflected in the UK State Immunity Act 1978 and, to some extent, in the provisions of the European Convention on State Immunity to which the former gives effect. The latter was a regional treaty but had, even within that context, failed to attract widespread support. Several speakers welcomed the adoption of the new Convention and expressed particular satisfaction that it reflected this restrictive theory. One speaker commented that this was clearly the way forward for commercial interests and could be of great importance for those engaged in commercial trading with Russia and other former communist States if such States could be persuaded to become parties. One speaker recalled that there had been considerable opposition to the restrictive theory amongst some developing countries during negotiations on the Convention in 1995. What had happened since to change their attitude? Was there a risk that their acceptance had been prompted by a recognition that the theory had become entrenched anyway and that adoption of a Convention could be helpful in freezing any further development of the law? This was countered by a comment that there had been no evidence to suggest such a motive and that acceptance seemed more likely to have been prompted by a growing recognition of commercial realities amongst such States.

**Commercial Transaction**

There was some criticism of the drafting of the provisions which established the commercial exception. Article 10.1 provides that a State which engages “in a commercial transaction with a foreign natural or juridical person……….where differences relating to the commercial transaction fall within the jurisdiction of a court of another State,….. cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.” This does not apply to commercial transactions between States or where the parties to the transaction have expressly agreed otherwise. “Commercial transaction” is defined in Article 2.1.c. It was noted that that the term “transaction” was broader than “contract” and was used in the Convention to cover a much wider range of activities. However, it was pointed out that, in practice, it was likely to be the “commercial” character of the transaction that was likely to be in dispute and that it was in this area that it had proved impossible to draw up precise limits.

**Nature v Purpose**

In determining whether or not a particular transaction was commercial, for the purposes of the Convention, there was much debate as to whether the defining criteria should relate to the nature or purpose of the transaction concerned. Differences on this issue proved to be a major obstacle to agreement on the text. The UK Government had preferred a text based upon the nature of the transaction alone but this had not found favour with some other States. The 1991 draft Articles had contained a provision which also allowed the purpose of the transaction to be taken into account if the purpose was relevant in determining the non-commercial character of the transaction in the practice of the State Party. Eventually, a compromise was reached and Article 2.2 of the Convention now provides that reference should be made primarily to the nature of the transaction but that its purpose should also be taken into account if, in the practice of the forum State, that purpose is relevant in determining the non-commercial character of the transaction. It was noted that such
an approach was broadly in line with the approach of the UK courts when such a question fell to be decided under common law. In this connection, reference was made to *Holland v Lampen Wolfe*, a case concerned with visiting forces. Here the court adopted a broad contextual approach in determining that the supervision of general educational services to a State's armed forces and their families was an act carried out in the exercise of sovereign authority. One speaker questioned why the Convention had failed to make provision for a situation where the purpose of a transaction changed during the life of that transaction. Others took the view that it would not have been possible for the Convention to cover all such eventualities. In practice, the courts would need to reach a decision based on all the facts. In this context, one speaker referred to the *Iraqi Airways* case where the court had to look at a whole range of connected commercial and non-commercial activities. Another speaker pointed out that the UK courts had much experience in this area based upon their interpretation of similar provisions in the 1978 State Immunity Act. The important question to be addressed was whether there was anything in the Convention which would hinder or prevent the courts from pursuing their current very helpful line on commercial transactions especially with regard to defence work contracted “out” by Government.

**State Enterprises**

One speaker pointed out that the meaning of Article 10.3 was far from clear. On one interpretation, it was redundant and, therefore, merely confusing but, on another view, it might be seen as an attempt to regulate a separate substantive matter concerning a State’s liability for its enterprises. The UK and other States had failed to secure agreement on its removal and it remained potentially problematic. However, another speaker doubted whether Article 10.3 would cause any difficulty in practice and suggested that it had been included merely to draw a line between “states” and “state enterprises”.

**Measures of Constraint**

It was noted that the Convention reflected the distinction between adjudicative and enforcement jurisdiction made in the 1978 Act. Again, however some speakers complained of a lack of clarity and precision in the provisions covering these matters. It was not entirely clear what the scope of the remedies available was and, in particular, whether the Convention would, in some circumstances, permit forms of injunctive relief. One speaker asked whether the immunity preserved by Article 21 with regard to property of a “military character” would apply only to enforcement jurisdiction or whether it could be extended to cover other forms of jurisdiction. Other speakers pointed out that the statement of the Chairman of the Ad Hoc Committee which refers to an understanding that the Convention is not intended to cover military activities is clearly important in this regard. But as regards the question whether military activities were generally excluded from the Convention altogether, it was noted that in spite of the Chairman’s statement, the matter was not free from doubt.

**Compatibility with UK law**

In discussion, no firm conclusion was reached as to the compatibility of the Convention with UK law, although the preliminary view of one speaker was that the provisions on commercial transactions could be read as broadly compatible with the 1978 Act. Another suggested that, if there was doubt, it might be best dealt with by appropriate reservation rather than amendment to UK legislation. Alternatively, where
the problem was merely ambiguity or lack of precision, an interpretative declaration might be sufficient.

**Interpretation and Scope of Application**

One speaker raised a number of specific concerns about the interpretation and scope of the Convention. It was noted that the operative provisions of the Convention provide little guidance on this. Article 1 states simply that it applies to the “the immunity of a State and its property from the jurisdiction of the courts of another State.” Article 5 provides that a State will enjoy this immunity “subject to the provisions of the present Convention.” But in addition there are general statements contained in the preamble, the annex to the Convention, the General Assembly Resolution adopting it and the statement by the Chairman of the Ad Hoc Committee. However, it is by no means clear whether or not these rank as “provisions of the present Convention” within the terms of Article 5. In any event, the precise meaning of these statements and the weight which should be given to them is, in itself, obscure. The preamble affirms that the “rules of customary international law continue to govern matters not regulated by the provisions of the present Convention.” In the Chairman’s statement, this is referred to as an example of the general approach of the Convention which does not apply where there is a special immunity regime. Elsewhere in the preamble, reference is made to the fact that the jurisdictional immunities of States and their property are “generally accepted as a principle of customary international law” and that developments in State practice with regard to such immunities have been taken into account. The speaker questioned the accuracy and practical utility of such preambular statements given the diversity of State practice in certain areas and the rapid development of the law in some States in recent years. In particular, reference is made, in the preamble, to the general understanding reached in the Ad Hoc Committee that the Convention “does not cover criminal proceedings.” In many States with a civil law tradition, it is possible for victims to lodge claims in a criminal prosecution as a “partie civile” for damages resulting from the crime alleged. Would the Convention prevent recovery of damages or even injunctive relief in such a “partie civile” suit? The speaker also referred to a further general understanding contained in the Chairman’s statement to the effect that the Convention does not cover “military activities” which, in turn refers to a statement by the International Law Commission, commenting on Article 12 that the provision does not apply to “situations involving armed conflict.” The precise meaning of such statements was ambiguous but they could mean that the Convention would apply to international crimes committed by government forces but not where such crimes were part of an “armed conflict eg Rwanda. It was not clear whether the Convention could apply to peacekeeping operations.

**Human Rights**

One speaker opened the discussion on this topic by conceding that the Convention might well represent a diplomatic triumph but questioning whether it could be said to be a triumph for justice. To what extent, if at all, might it help or hinder individuals seeking redress for serious breaches of their human rights committed by States. Making civil claims in such cases can be as important for victims as the possibility of criminal prosecution and it is often only States that have the means with which to compensate victims. A comment submitted after the meeting, expanded on this point by noting that civil proceedings can sometimes provide a better opportunity for the victim to participate and achieve official acknowledgement of the crimes committed against them and that this can be a valuable aid in the healing process. The first speaker explained, however, that the issue of human rights had been raised only
three times during the lengthy period of negotiation of the Convention and it seemed clear that very few concerned with its drafting and preparation had really put their minds to this aspect of its application. Another speaker suggested that this was because the Convention was not intended to have anything to do with international crimes committed by States. In this context it was also important to note the distinction between civil jurisdiction and immunity. The latter operates as no more than an exception, or bar, to jurisdiction; questions of immunity are only relevant if the State concerned would otherwise have jurisdiction. The wording of the Convention makes this clear for example the references in Articles 11, 12, 13 etc to “a court of another State which is otherwise competent.” Other speakers acknowledged the importance in practice of the question of jurisdiction but noted the recent decision of the Court of Appeal in *Jones and Mitchell v. Saudi Arabia, Prince Naif & Others* which indicates that torture committed abroad has, in some circumstances, become justiciable in a civil action for damages in the UK courts. The decision upheld the immunity of the foreign State concerned but rejected the notion that such immunity would extend to State officials when they are sued as individuals. In these circumstances, it would be prudent to look very carefully at the provisions of the Convention to see whether they were compatible with such a development.

**Representatives of the State Acting in that Capacity**

In that connection there was discussion of the definition of “State” contained in Article 2(b) which includes the term “representatives of the State acting in that capacity.” The question arose as to whether the term “representatives” is, in this context, capable of covering a wide range of persons from a head of State or government or foreign minister down to a minor official or even a soldier; in other words, would all such people be covered by the immunity enjoyed by the State itself? One speaker expressed the view that it should be interpreted in its normal narrow sense to include only heads of State, diplomats etc and would not extend to officials. The phrase “acting in that capacity” sheds little light on the precise nature of the type of acts contemplated. Others pointed to Article 6.2 (b). It is arguable that any civil litigation against a government official in that capacity could be characterized as seeking to “affect the property, rights, interests or activities of that other State.” In such a case these people would also enjoy immunity, and the Convention would be incompatible with the law as given in *Jones and Mitchell*. Was there not a risk that this provision would benefit States who wished to avoid development of the law along the lines of *Jones and Mitchell*? One speaker suggested the law would best be served by allowing customary international law to develop in this area.

**Personal Injuries and Damage to property**

In discussion of the human rights aspects, Article 12 of the Convention caused concern. The Article provides that “Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to precuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.” The point was made that the provision presumably applies only to civil proceedings but again no thought seems to have been given as to whether it would apply to *partie civile* actions in the course of a criminal prosecution. The words “death or
injury to the person, or damage to or loss of tangible property” would not necessarily include mental pain and suffering, a frequent consequence of torture and other serious human rights violations. In addition, the term “pecuniary compensation” appears to exclude other forms of redress. Even more significant is the fact that the provision appears to take no account of the possibility of recovering damages for acts eg torture committed entirely outside the forum State even where the victim suffers the effects of that torture in the forum State. In this connection, one speaker referred to the statement of the Legal Counsellor of the US Permanent Mission to the UN who commented that “Article 12 leaves open questions with respect to the further evolution of public international law in those specific circumstances where the conduct complained of contravenes other widely accepted international conventions …….. for example the UN Conventions Against Torture or Hostage-Taking.” However the reference in the same statement to the effect that Article 12 should be interpreted generally to apply only to commercial acts, not those of a governmental character, was criticised as counter to plain language, drafting history, the relevant commentary and State practice.

Compatibility with Existing Law and State Practice

Some speakers expressed doubts as to whether codification had been the right approach given the rapid pace of developments in this area. It was argued that some States would have difficulty in ratifying the Convention, given their legislation and case-law. In this connection, particular mention was made of the United States with its Alien Tort Claims Act, Torture Victim Protection Act and the Sosa v Alvarez-Machain case. Reference was also made to US special legislation aimed at “terrorist” offences committed abroad by designated “terrorist” states which is problematic not only on substance but also because it permits fairly wide execution against the property of “terrorist” States. Even in the UK, recent developments in Jones and Mitchell might pose difficulty. Could such problems be addressed by appropriate reservation? One speaker expressed doubt as to whether such reservations would be regarded as compatible with the object and purpose of the Convention. Another speaker commented that more thought was needed on some of these new tendencies in international law. State sovereignty and international human rights standards were increasingly in conflict.

Concluding Remarks

The discussion concluded with a question as to how widely accepted the new Convention was likely to be. Would it suffer the same fate as the European Convention On State Immunity which has been ratified by only 8 States.? It was noted, however, that many States are currently conducting wide ranging consultation exercises on the Convention and are contemplating legislation.

While there were a variety of views on the question of ratification by the UK, with or without reservation, some speakers gave a very strong welcome to the adoption of the Convention and recommended its early ratification.