UN CONVENTION ON STATE IMMUNITY: FORM AND FUNCTION

The eventual product of the International Law Commission's (ILC) work on state immunity has been in the form of a Convention. This prompts the question whether widespread ratification (or accession etc) will be necessary for clear rules of international law on state immunity to become firmly established or whether a substantial codifying effect could be achieved even if the Convention does not attract a great number of parties. The latter has sometimes been said of much of the Vienna Convention on the Law of Treaties. As the law on state immunity has undergone much of its substantial development by practice of national courts (albeit that the piecemeal adoption and implementation of treaties has played some part), could this process not simply continue with the Convention providing guidance or a model? If the trend from absolute to restrictive immunity could occur by development of customary law, are there not still adequate means of consolidating customary law without the need for states actually to become parties to the treaty?

It is suggested in this note that such thoughts should be firmly and rapidly dismissed. The immediate and practical response to the allusion to practice as a means of development is that the move to the restrictive doctrine has been halting and uneven. Reliance on a continuation of the process in such fashion, even with the provisions of the Convention as a model, hardly inspires confidence that the law will stabilize adequately. Nor is the Vienna Convention on the Law of Treaties a particularly satisfactory example for how a treaty with a slow uptake can codify the law. Unlike the law on state immunity whose application hitherto has been almost exclusively within national legal systems, the Vienna Convention's law is essentially in the realm of relations between states, albeit that a fair chunk of its content (such as the rules on treaty interpretation) do manifest themselves in the work of domestic courts. Hence in the case of the Vienna Convention there has been a fair amount of practice in international courts and tribunals whose pronouncements more readily achieve international attention and recognition than miscellaneous decisions of national courts.

One instance in which the form of the outcome of the ILC's work has been considered in the context of its potential codifying effect has been in its work on state responsibility. The jury is still out on this; but the deliberations over the form of the eventual instrument uncovered a number of considerations worth examining in relation to state immunity, even though form is no longer an open issue. In the Fourth report on State Responsibility Professor Crawford, the Special Rapporteur of the ILC, recorded doubts expressed by some governments and commentators over use of a treaty:

> They note the need for flexibility and for a continued process of legal development, as well as the rather tentative and controversial character of aspects of the text. They doubt that States would see it in their interests to ratify an eventual treaty, rather than relying on particular aspects of it as the occasion arises. They note the destabilising and even 'decodifying' effect that an unsuccessful convention may have. In their view it is more realistic, and is likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the text. These will have more influence on international law in the form of a declaration or other approved statement than they would have if included in an unratified and possible controversial treaty . . . [1]

[1] UN Doc A/CN.4/517 (31 March 2000) para 23.

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Taking each of the matters raised here, the first is the possible need for flexibility and scope for a continued development. These factors definitely do not militate against ratification of the treaty on state immunity. The need is for greater stability and consistency within the law of all states. Further, flexibility has already been built in to the Convention's text: see, for example, Article 2(2) providing for account to be taken of the practice of the state of the forum if purpose is considered relevant there to determining the non-commercial character of a contract or transaction. If the need for development arises to cope with unforeseen activities, this is not something that the treaty will inhibit any more than established customary rules. The idea that if states become parties to a codifying treaty on state immunity this in some way sets the law in stone in effect denies that the law on state immunity is founded on rules of customary law. For that idea demands that one allocates to each state the constant possibility of changes in the rules being made by individual states rather than directing any significant proposals to a review conference. Of course, it goes without needing to be said that the interpretative function of courts will continue when applying the Convention to particular facts and, in all probability, unforeseen situations.

The second doubt noted in the quotation above was based on 'the rather tentative and controversial character of aspects of the text'. In the case of the state immunity provisions, even if aspects of the text were controversial (as demonstrated by the difficulty in reaching agreement), that the controversial aspects were the subject of such prolonged attention yet were eventually negotiated to successful agreement suggests that the outcome should not be viewed as tentative but as final (at least for a few decades).

The third suggestion was that there may be doubts whether states would see it in their interests to ratify an eventual treaty rather than relying on particular aspects of it as the occasion arises. This seems most unlikely in the case of provisions to be made effective for use by national courts. Granted that there could be situations where particular states may perceive particular interests to be adversely affected by ratification, the equation is unlikely to balance these doubts against the possibility of reliance on particular aspects of the Convention as and when cases arise. Domestic law needs to be in place before any case comes before the courts as state immunity needs to work as an integrated set of rules rather than an à la carte menu. It is one thing to suggest that a particular issue in the area of state responsibility might be argued in the international arena on the basis of the work of the ILC and the outcome of that work, and a rather different situation to envisage national courts having to decide the extent to which a provision of a treaty to which the forum state is not a party should be recognized as a reflection of customary law and suited to the state's interest in its acceptance.

More generally, the interest of states in ratifying should become greater as more states become parties to the treaty. The premise of the Convention in its preamble is that it 'would enhance the rule of law and legal certainty'; and there are some indications that those states which have passed domestic legislation in the later part of the twentieth century have found the legislation helpful in the context of legal transactions between private parties and states. States which do not ratify the treaty could find themselves at growing disadvantage if parties to domestic transactions involving states have any choice in governing law and in where disputes are to be resolved.

The fourth doubt (the destabilising and even 'decodifying' effect that an unsuccessful convention could have) is unproven. But even if there seems limited likelihood of any rolling back of the law on state immunity if there were not widespread partici-

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pation in the new Convention, continuation of the present lack of stability and uniformity in international law on this topic gives sufficient ground to urge encouragement of states to embrace the treaty's regime.

The final suggestion (that it is more realistic, and likely to be more effective, to rely on state practice and doctrine to adopt and apply the rules in the text of the Convention) is quite inappropriate in the context of state immunity. The rationale for the Convention directly opposes the suggestion. The aim of treaty provisions on state immunity is to provide the firm international foundation (presently lacking) for the law within national legal systems. For those whose constitutional arrangements so provide, becoming a party to the UN Convention will bring its rules into their domestic law, while legislation will be triggered in other cases where this is a necessary process in becoming a party to the treaty.

Hence there seems no good argument for suggesting that the Convention could be equally effective if unratified. This is a Convention which does demand ratification if its aim is to be achieved.

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