one country into the international system, and then "downloaded" elsewhere into another country's laws or even a private actor's internal rules.[13]

United States Comments on International Law Commission's Current Projects

In a November 2012 statement to the UN General Assembly's Sixth (Legal) Committee, Department of State Assistant Legal Adviser for UN Affairs Todd Buchwald expressed appreciation for the work of the International Law Commission's special rapporteurs and summarized U.S. views on the Commission's current projects.[1] Excerpts follow:

Immunity of State Officials from foreign criminal jurisdiction

. . . .

. . . The United States . . . 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*?"

. . . .

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

[13] U.S. Dep't of State Press Release, Legal Adviser Harold Hongju Koh, Remarks at Georgetown University Law Center on Twenty-First Century International Lawmaking (Oct. 17, 2012), *at* http://www.state.gov/s/l/releases/remarks/199319.htm.

[1] *See* Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AJIL 164 (2013).

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*. . . .

Provisional application of treaties

. . . 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

. . . [T]here are still many unsettled questions in this area that could benefit from the attention of States and the Commission. Some 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. . . . [A]s work on this topic proceeds, it is critically important that the results of the Commission's work not be overly prescriptive. . . .

Obligation to Extradite or Prosecute

. . . .

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. . . .

Treaties over time

. . . .

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 . . . 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*
>
> . . . .
>
> 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. . . .[2]

STATE DIPLOMATIC AND CONSULAR RELATIONS

Nevada Supreme Court Directs Hearing to Assess Possible Prejudice to Foreign National from Failure of Consular Notification in Capital Case

In September 2012, the Nevada Supreme Court in *Gutierrez v. State*[1] became the second state court[2] to order review and reconsideration of a Mexican national's capital sentence for failure of consular notification as directed by the International Court of Justice in *Avena*.[3] Gutierrez is one of the fifty-one Mexican nationals with death sentences at issue in *Avena*.

Gutierrez entered a no-contest plea to first-degree murder in the death of his three-year-old stepdaughter in 1994. He was sentenced to death. In the recent proceedings, the Nevada Supreme Court ruled that he should have a postconviction evidentiary hearing to assess, inter alia, whether he suffered prejudice because he did not receive the consular notification required by Article 36(1)(b) of the Vienna Convention on Consular Relations. Excerpts from the court's unpublished order follow:

> *Avena* does not obligate the states to subordinate their post-conviction review procedures to the ICJ ruling. Thus, the Supreme Court has rejected post-conviction claims similar to Gutierrez's by two other *Avena* defendants, Humberto Leal Garcia and Jose Ernesto Medellin, holding that "neither the *Avena* decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law," *Leal Garcia v. Texas*, 564 U.S. ___, ___, 131 S.Ct. 2866, 2867 (2011) (5-4 decision), to which state procedural default rules must yield. *Medellin I*, 552 U.S. at 498–99. Nonetheless, in declining to stay Leal Garcia's and Medellin's executions, the Supreme Court noted that neither had shown actual prejudice to a constitutional right due to lack of timely consular

[2] U.S. Mission to the United Nations Press Release No. 2012/248, Statement by Todd Buchwald, Assistant Legal Adviser for UN Affairs, Office of the Legal Adviser, on Agenda Item 79—Report of the International Law Commission on the Work of Its 64th Session at 67th GA Sixth Committee (Nov. 5, 2012), *at* http://usun.state.gov/briefing/statements/200301.htm.

[1] Gutierrez v. State, No. 53506, 2012 Nev. Unpub. LEXIS 1317 (Sept. 19, 2012) (order of reversal and remand).

[2] In 2004, the Oklahoma Court of Criminal Appeals concluded in *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2004), that Torres was prejudiced by a Vienna Convention violation. The governor of Oklahoma had previously commuted his death sentence to life imprisonment. *Id.* at 1186; *see* John R. Crook, Contemporary Practice of the United States, 99 AJIL 691, 695 (2005).

[3] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 31).