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Statement by the United States of America
United States Delegation
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Report of the International Law Commission
on the Work of its 66th Session
Extradite or Prosecute, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Protection of the Atmosphere, and Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman, once again, I would like to thank the chairman of the Commission for his introduction of the Commission's report.

The Obligation to Extradite or Prosecute

Mr. Chairman, with respect to the topic entitled "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)," we would like to thank the Commission for its final Report. The report ably recounts the extensive and useful work by the Commission, which included a survey of the diverse array of treaty instruments containing such an obligation, a typology of the extradite or prosecute provisions contained in multilateral instruments, the implementation of these provisions, an analysis of gaps in the existing treaty regime and of the relationship of the obligation to extradite or prosecute with other obligations, and a discussion of important developments such as the International Court's 2012 judgment on *Questions relating to the Obligation to Prosecute or Extradite.*

As we have explained before, while we consider extradite or prosecute provisions to be an integral and vital aspect of our collective efforts to deny offenders, including terrorists, a safe haven, and to fight impunity for such crimes as genocide, war crimes and torture, there is no obligation under customary international law to extradite or prosecute individuals for offenses not covered by treaties containing such an obligation. Rather, as the Commission notes in its Report, efforts in this area should focus on specific gaps in the existing treaty regimes. Accordingly, we commend the Commission for its report, which provides an appropriate conclusion for this project.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Mr. Chairman, turning to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", we would like to thank Special Rapporteur Georg Nolte and the Commission for their extensive and valuable work on this topic.

In reviewing the Special Rapporteur's second report as well as the draft conclusions and commentary provisionally adopted by the Commission, the United States welcomes the situating of the topic in the framework of the rules on treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as well as the recognition of the need to distinguish between the interpretation of a treaty and the rules on amendment of a treaty as reflected under Article 39. While we believe that more work may need to be done on that distinction, we are pleased to see the attention given to the issue.

Mr. Chairman, while the United States welcomes much of the language in the Commission's draft conclusions, we continue to have some concerns. We will touch on some of those issues now, beginning with one general point. In studying the conclusions and commentary, it appears that in a number of cases the conclusions rely too heavily on the commentary to flesh out the meaning of the black letter rule set forth in the draft conclusions. We are concerned that this results in undesirable ambiguity in the meaning of the conclusions, which is only clarified in the commentary. Since these conclusions may well be read by practitioners and perhaps even reproduced without the commentary, we believe the better practice is to ensure that important limitations and explanations are included in the conclusions themselves. In addition, the Commission might consider including in an introductory commentary a statement that the commentary is integral for understanding the meaning of the conclusions.

Draft Conclusion 9 as adopted by the Commission illustrates this point. Paragraph 2 of that conclusion provides that the number of parties that must engage in a subsequent practice to establish an agreement as to the interpretation of a treaty may vary and that silence by a party may constitute acceptance of the practice. However, the draft Conclusion fails to make clear that in one way or another – be it by engaging in the consistent practice or by acceptance of the practice of others – all the parties to the treaty must manifest their agreement with the interpretation at issue. For that important clarification, one must study the accompanying commentary. Similarly, a reader must look to the commentary to find the important caution that a State's acceptance of a practice by way of silence or inaction "is not easily established." The United States would have preferred to see both of these points made clearly in the conclusions themselves.

Mr. Chairman, with respect to the Commission's draft Conclusion 10 on decisions adopted within the framework of a Conference of States Parties (COP), we are concerned that the draft conclusion and commentary may suggest that the work of such Conferences generally involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. Subject to the terms of the treaty at issue, it is possible that a COP may produce a decision that constitutes a subsequent agreement of the parties or may engage in actions giving rise to subsequent practice, where such a decision or action reflects the agreement of all the

treaty's parties (and not just those present at the COP). However, these results are by far the exception, not the rule, with regard to the activities of COPs. We believe that it is important that the fairly general language of draft Conclusion 10 be modified to indicate that these results are neither widespread nor easily demonstrated.

Mr. Chairman, before concluding, the United States would like to make a related comment about the Special Rapporteur's pending requests to States regarding whether the practice of an international organization may contribute to the interpretation of a treaty and whether pronouncements or other action by a treaty body give rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty. The United States looks forward to providing information to the Special Rapporteur on both of these issues. For now, we note that this project is concerned with subsequent agreements and subsequent practice as they relate to the rules set forth in the 1969 Vienna Convention and not the 1986 Vienna Convention. As such, for this project it is only the States parties to a treaty that can enter into a subsequent agreement or engage in relevant subsequent practice. While it is possible for those parties to act through other bodies, like a plenary organ of the international organization or a COP as discussed a moment ago, it is the agreement of all the States parties to the treaty at issue that must be demonstrated.

In conclusion, we again thank the Special Rapporteur and Commission for their valuable work on this important topic.

Protection of the Atmosphere

Mr. Chairman, on the topic of "Protection of the Atmosphere," we have previously expressed concerns about the suitability of the topic. We fear that those concerns have been borne out in the first report of the Special Rapporteur, issued earlier this year.

Our original concerns—which were shared by a number of other countries—ran along two main lines.

First, we did not believe that the topic was a useful one for the Commission to address, since various long-standing instruments already provide not only general guidance to States in their development, refinement, and implementation of treaty regimes, but in many instances very specific guidance tailored to discrete problems relating to atmospheric protection. As such, we were concerned that any exercise to extract broad legal rules from environmental agreements concluded in particularized areas would be infeasible and unwarranted, and potentially quite harmful if doing so undermined carefully-negotiated differentiation among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate future negotiations and thus to inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission's agenda. Our concerns were somewhat alleviated when the Commission issued an understanding in 2013 that framed the topic narrowly. This understanding was apparently designed to limit the scope of work to

areas where there might be some utility and to prevent the work from straying into areas where it might do harm.
Unfortunately, as is clear from the first report by the Special Rapporteur, and from the Commission's debate during its Sixty-Sixth Session, the Special Rapporteur did not adhere to the 2013 understanding. Indeed, the report evinced a desire to recharacterize the understanding altogether, and generally took an expansive view of the topic.

While we welcome the fact that the draft guidelines proposed in the first report were not sent to the drafting committee, we remain seriously concerned about the direction this topic appears to be taking.

We urge the Special Rapporteur, in his next report, to adhere to the letter and the spirit of the understanding that forms the basis for this work. A strict adherence to that understanding can help ensure that the Commission's work on this topic may provide some value to States, while minimizing the risk that it will complicate and inhibit important ongoing and future negotiations on issues of global concern. We look forward to seeing revisions along those lines.

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 Special Rapporteur Concepción Escobar Hernández for the progress she has made on this important and difficult topic. We commend also the thoughtful contributions by the members of the ILC.

To date, the ILC has produced draft articles and commentary addressing the scope of the topic, addressing immunity *ratione personae*, and addressing some aspects of immunity *ratione materiae*.

As I pointed out last year, 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 officials sometimes collectively referred to as the "troika." The federal government of the United States has never brought a criminal case against a member of the troika. Nor do we believe that any state government within the United States has brought such a case.

The draft articles on immunity *ratione personae* provide for broad immunity for the troika. Indeed, the draft articles provide for absolute immunity for the troika during the term of office for all acts in a private or official capacity, regardless of whether they occurred during or before the term in office. Immunity for a sitting head of state for acts prior to taking office is consistent with state practice in the United States in *civil* cases against heads of state. For example, in a case brought in the United States, the Executive Branch submitted a suggestion of immunity on behalf President Kagame of Rwanda with respect to allegations against him that predated his presidency, and the courts agreed.[1] We note that the Special Rapporteur has not yet turned to exceptions, and we suggest that waiver may be the only exception for immunity *ratione personae*.

[1] *Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012).

With respect to immunity *ratione materiae*, the ILC has drafted an article stating that State officials acting as such enjoy immunity from the exercise of foreign criminal jurisdiction. In doing so, the ILC has posited that immunity *ratione materiae* exists and is enjoyed by individuals who – according to the definition of "State official" – either represent the State or exercise State functions. This definition, as well as the phrase "acting as such," can be understood to mean that the acts for which immunity *ratione materiae* is available are those in which a State official either represents the State or – far more broadly – exercises State functions. Comment 11 to Article 2(e) says that "State functions" are to be understood to mean all the activities carried out by the State. This would appear to express a broad view of immunity *ratione materiae* – subject, of course, to exceptions and procedural requirements. Yet Comment 15 disclaims that the definition of "State official" has any bearing on the type of acts covered by immunity, and the acts covered by immunity are to be taken up at a later date. It will be important to resolve this ambiguity.

The other major areas yet to be addressed are exceptions to immunity and procedural aspects of immunity. Very broad immunity can be limited by exceptions or by strict procedural requirements. Accordingly, it is apparent that despite the impressive progress made by the Commission to date, a great deal of difficult ground remains to be covered.

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

Thank you, Mr. Chairman.