UNITED STATES MISSION TO THE UNITED NATIONS

799 United Nations Plaza
New York, N.Y. 10017

Statement by the United States of America
72nd General Assembly Sixth Committee
Agenda Item 81 – Report of the International Law Commission on the Work of its 69th Session
Richard Visek
Acting Legal Adviser
US Department of State
October 25, 2017

Immunity of State Officials from Foreign Criminal Jurisdiction, Crimes Against Humanity, Provisional Application of Treaties, New Topics on General Principles of Law and Evidence before International Courts and Tribunals

Mr. Chairman, I would like to thank the chairman of the Commission, Mr. Georg Nolte, for his introduction of the Commission's report. I would also like to congratulate the Commission for a productive 69th Session and for its extensive and valuable work and I look forward to our debate on these on these important topics of international law over the next two weeks.

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address the topics of "Crimes Against Humanity" and "Provisional Application of Treaties" as well as the new topics of "General Principles of Law" and "Evidence before International Courts and Tribunals." I hope that delegations will indulge me in commenting on the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction" at the outset.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman, the United States has followed with great interest the Commission's work on the important topic of the immunity of state officials from foreign criminal jurisdiction. We appreciate the effort that Special Rapporteur Escobar Hernandez has put into addressing this complex and, at times, controversial issue.

As we have indicated in past statements, the United States is in general agreement with the Commission's work on immunity *ratione personae*, the status-based immunity that protects incumbent heads of state, heads of government, and foreign ministers. Despite some residual disagreement on precisely which officials enjoy status-based immunity, the Commission's draft articles on this topic can be seen to rest on customary international law.

The same cannot be said for the Commission's work on immunity *ratione materiae*. As the combined work of two Special Rapporteurs has shown, there are basic methodological disagreements about how to identify customary international law, if any, in this area. In evaluating state practice, does one begin with a baseline of immunity, and then look for examples of exceptions? Or does one begin with a baseline of no immunity, and then look for examples of immunity? And how does one account for prosecutions that are not brought to begin with, where the exercise of prosecutorial discretion could conceivably rest on considerations of immunity, but could also rest on completely different grounds, such as the lack of available evidence, or the absence of probable cause?

The categorical propositions on immunity set forth in draft Articles 5 and 6 on immunity *ratione materiae* do not reflect the full extent of State practice: there have, in fact, been prosecutions of foreign officials, including by the United States, for a range of conduct including corruption, violent crimes, and cyber crimes. Premature generalizations such as those contained in draft Articles 5 and 6 risk being inaccurate and potentially misleading.

In part because of the difficulty of identifying and evaluating state practice and *opinio juris* in the form of prosecutions, or lack thereof, there is a tendency to focus on caselaw. However, the decisions of national courts on *ratione materiae* immunity remain sparse. As the Special Rapporteur observed in her Fifth Report, "there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes" that Draft Article 7 identifies as exceptions to immunity. Moreover, these few decisions may be based on treaties, as in the *Pinochet* case, or on other considerations. Attempting prematurely to draw broad conclusions from a few decisions is both unwarranted as a legal matter and, in our view, unwise.

The Commission's work on this topic reached a critical phase last year, when the Special Rapporteur issued her Fifth Report, which includes Draft Article 7. The Fifth Report claims that there is a "clear trend" based on treaties, case law, legislation, and other state practice toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. However, the Fifth Report, and state practice in this area, do not actually provide evidence of a "trend" in any particular direction. Perhaps surprisingly, the Commission, by majority vote at its 69th Session, ratified the idea of an asserted trend toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. The Commission reached this conclusion despite the Special Rapporteur's findingthat there are very few cases on point. In the view of the United States, there is insufficient state practice to illustrate a "clear trend," let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal.

The other rationale offered by the majority of Commissioners for adopting Draft Article 7 was that it declines to recognize immunity for the "most serious crimes of concern to the

international community . . . ." We share the commitment to deterring and punishing these crimes, which we agree are very serious. However, the majority's approach in this instance does not acknowledge that immunity is procedural, not substantive, in nature. As emphasized by the International Court of Justice in the *Arrest Warrant* and *Jurisdictional Immunities* cases, immunity is purely procedural in nature, and operates irrespective of whether the alleged conduct is lawful or unlawful. In both cases, the ICJ held that the nature of the allegations does **not** affect whether immunity exists under customary international law. Draft Article 7 ignores this basic proposition.

In addition to serious concerns about the lack of consistent state practice and *opinio juris* supporting Draft Article 7, we are troubled by the article's statement that immunity *ratione materiae* "shall not apply" to specified crimes. We understand that the Commission chose this language because of uncertainty about whether to characterize serious international crimes as involving "official acts" to begin with. But one cannot assess whether there is an exception to immunity without determining whether immunity would ordinarily attach to an act to begin with—the very question Draft Article 7 explicitly begs.

We are also concerned by the cursory explanation in the Commentary about why Draft Article 7 does not include an exception for crimes by foreign officials in the territory of the forum state. This fundamental issue of territorial conduct and its effect on criminal jurisdiction warrants much more serious attention and analysis. The Commission's limited discussion of this important and complicated issue makes its approach even more difficult to comprehend, and will create confusion rather than clarification. Likewise, the Commentary's brief treatment of corruption further confuses, rather than clarifies, the basis for the Commission's decision to exclude corruption from Draft Article 7.

The Committee's debate on Draft Article 7, which began last summer and continued into this summer, itself demonstrates that no consensus yet exists regarding the contours of immunity *ratione materiae*. The unusual split vote that led to the Committee's provisional adoption of the Draft Article further demonstrates that this topic does not command a true consensus of the Commission, and that the resulting language cannot be said to represent customary international law or even the progressive development of existing law.

This is not to say that all states have adopted an absolutist position regarding *ratione materiae* immunity; to the contrary, as noted above, there have indeed been prosecutions of foreign officials in some circumstances. Nor is it to say that there should not be any exceptions, even if immunity would ordinarily attach. However, in our view, the inconsistent nature of state practice means that premature attempts at codification can do more harm than good in this area.

We are deeply concerned that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to Draft Article 7 as THE definitive and comprehensive expression of international law. With all due respect to the Commission, the development of law in this area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7

exhibits none of these features, and risks creating the impression that the Commission is creating new law.

The United States looks forward to the Special Rapporteur's next and final report on procedural provisions and safeguards, which the Commission is expected to take up next summer. The Special Rapporteur has recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States is very interested in this final report and supports a full discussion of its proposals. The United States feels strong that after the debate on procedural safeguards takes place, Draft Article 7 should be suspended until a consensus of the Commission can endorse all of the draft articles as sound and principled. After discussion of the final report, we believe it would be prudent for the Commission to put this project on hold without further action by the Commission, until additional State practice provides a sufficient basis for meaningful generalizations to be drawn, and for the Commission's work to re-establish itself on a firmer footing.

Sometimes a group of talented legal scholars and practitioners can develop a well-supported set of guidelines to address a difficult international legal issue. But sometimes the best answer, at least to part of the question, is: we don't know – the law is unsettled, State practice is sparse and uneven, and the issue is not capable of being properly resolved at this time. In that situation, we lawyers should follow a principle of our medical friends and resolve to do no harm. I suggest that the Commission revisit Draft Article 7, and the timeline for this project, with that important principle in mind.

Crimes against Humanity

Mr. Chairman, the United States continues to follow with great interest the commission's work on the topic of crimes against humanity. Special Rapporteur Sean Murphy brings tremendous value to bear in the commission's work on this topic, including the challenging questions that this topic raises.

The development of the concept of "crimes against humanity" has played a critical role in the pursuit of accountability for some of the most horrific episodes of the last hundred years. Further, the widespread adoption of certain multilateral treaties regarding serious international crimes – such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, including by non-state actors, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable.

As we have previously noted, this topic's importance is matched by the complicated legal issues that it implicates. We are continuing to review the ILC's completed draft articles and commentary on this topic carefully, as they present a number of complex issues on which we are still developing our views. We are deeply grateful to Professor Murphy and to the other members of the commission for their work on a topic of such importance, and we eagerly look forward to providing our views to the commission. We expect that, under Special Rapporteur Murphy's

stewardship, these complex issues will be thoroughly discussed and carefully considered in light of the views and that we and other States will provide.

Provisional Application of Treaties

Mr. Chairman, turning to the topic of "Provisional application of treaties," the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, the Drafting Committee, and the working group for their contributions to the Draft Guidelines and commentaries that have been provisionally adopted by the Commission.

As the United States has stated, we believe the meaning of "provisional application" in the context of treaty law is well-settled – "provisional application" means that a State (or international organization) agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State (or organization). Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself once the treaty has entered into force. We approach all of the ILC's work on this topic from that perspective.

Accordingly, while we are in agreement with many of the Draft Guidelines and commentaries as provisionally adopted, we have a number of concerns. We will discuss three of our concerns today.

First, we are concerned that the Draft Guidelines, especially Draft Guidelines 3 and 4 and their commentaries, fail to make clear that provisional application within the meaning of Article 25 of the Vienna Convention on the Law Treaties requires the agreement of all of the States and international organizations incurring rights or obligations pursuant to the provisional application of the treaty. The lack of clarity arises from the draft's use of the passive voice in describing agreements for provisional application – for example saying that provisional application arises when "it has been so agreed" without indicating whose agreement is required. While the commentary to Draft Guideline 3 explains why the Draft Guidelines do not refer to the agreement of the "negotiating States" as in Article 25 of the Vienna Convention, it does not specify the group of States and international organizations that must instead agree. This problem could be corrected by using the active voice and by indicating whose agreement is required.

We are concerned that the ambiguity in the Draft Guidelines is compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the commentary to Draft Guideline 3 makes reference to the agreement of "only some negotiating States" and "one or more negotiating States or international organizations" without making clear that only those States and international organizations that agree will be engaged in the provisional application of the treaty.

Second, we are concerned by the discussion in subsection (b) of Draft Guideline 4 and the accompanying commentary addressing what is described as a "quite exceptional" practice of establishing provisional application through a unilateral declaration by a State that is accepted by the other States and international organizations concerned. We do not believe that the examples cited in the commentary involve provisional application (within the meaning of Article 25 of the

Vienna Convention) having been established through such a mechanism, and we are unaware of any other such practice. For this reason, we believe the discussion of such a hypothetical form of agreement to establish provisional application risks creating confusion, and we would urge that discussion of it be eliminated both from subsection (b) of Draft Guideline 4 and from paragraph (5) of the commentary.

The third concern deals with Draft Guideline 6, which provides that the provisional application of a treaty or part of a treaty "produces the same legal effects as if the treaty were in force" unless otherwise agreed. We are concerned that this may not be true in all respects. For example, as we have noted, provisional application can be more easily terminated than a treaty that is in force for that State. Moreover, we are studying whether – as suggested in the Special Rapporteur's last report and by some members of the Commission – Draft Guideline 6 means that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. To avoid suggesting too close a parallel between provisional application and entry into force of a treaty, we believe that Draft Guideline 6 should be revised to read: "An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

Mr. Chairman, again, we thank the Commission for its work on this important topic and look forward to following future work on these issues.

New Topics on General Principles of Law and Evidence before International Courts and Tribunals

Finally, we would like to respond to the Commission's decision to include two new topics in its long-term programme of work. The first topic is on "general principles of law," which is referred to in Article 38(1)(c) of the International Court of Justice's statute as one of the sources of international law the court is to apply. We appreciate the syllabus that Commission member Marcelo Vazquez-Bermudez developed for this topic. Yet, while we agree that the nature, scope, function and manner of identification of "general principles of international law" could benefit from clarification, we are concerned that there may not be enough material in terms of State practice for the Commission to reach any helpful conclusions on this topic.
With respect to the second topic, "evidence before international courts and tribunals," we share the sentiments expressed by Commission member Aniruddha Rajput that international adjudication is an important method of peacefully resolving international disputes, and that evidence is an integral part of the adjudicative process. However, we question both the need for and the practicability of discerning general rules of evidence from the heterogeneous practice of international courts and tribunals that has developed over time in light of each forum's particular circumstances and experience.