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Statement at the 79th General Assembly Sixth Committee
Agenda Item 79: Report of the International Law Commission on the work of its seventy-fifth session (Cluster One)
United States Statement
October 23, 2024

Thank you, Mr. Chairman. Before turning to our observations on the work of the Commission, the United States would first like to take a moment to acknowledge the departure of Mr. Miguel de Serpa Soares and Mr. Huw Lewellyn after many years of service, and to appreciate their outstanding work as Under-Secretary General for Legal Affairs and Director of OLA's Codification Division, respectively.

We extend our gratitude to Mr. Marcelo Vázquez-Bermúdez for chairing the International Law Commission and to all members of the Commission for their productive work during the ILC's 75th session. The United States also recognizes the Office of Legal Affairs, particularly the Codification Division, for its critical support of the Commission.

The United States continues to strongly support the ILC's work, which has resulted in a multitude of products that have proved valuable to the international community in promoting international law. Many of its products have resulted in multilateral treaties.

In this vein, we wish to once again thank the Commission and Special Rapporteur Sean Murphy, for their valuable contributions to the Draft Articles on the Prevention and Punishment of Crimes Against Humanity. As we discussed earlier in this session, the United States joined with many Member States in co-sponsoring a draft resolution deciding to convene a UN Conference to elaborate and conclude a convention on this important topic. Such a convention would fill a gap in the international legal framework – a gap that is critical to address now more than ever.

I will now turn to address the topics in cluster 1: immunity of State officials from foreign criminal jurisdiction, sea-level rise in relation to international law, and other decisions and conclusions of the Commission.

Immunity of State Officials from Foreign Criminal Jurisdiction

Turning first to the topic "immunity of State officials from foreign criminal jurisdiction," I join others in thanking ILC Special Rapporteur Claudio Grossman Guiloff for his first report addressing the comments received by States on the draft articles. The United States submitted

detailed written comments at the invitation of the Commission last December, as did more than three dozen other States.

We appreciate the extent to which the Commission has taken States' views into account in considering modifications to draft articles 1 through 6. Revisions improved the clarity of the draft articles, including the new approach to consolidate draft articles 5 and 6. We also welcome the decision to allow more time to consider the text of draft article 2 in light of comments from States and the Commission's upcoming review of draft article 7.

The United States urges the Commission to continue to engage in a deliberative, thorough review of the remaining draft articles and their commentaries and to take the time necessary to account for the views of States and work through disagreements toward consensus. In this respect, we welcome the Commission's invitation for further views from Member States on draft articles 7 through 18.

As the Commission turns at this time to the second reading of the remaining draft articles, the United States reiterates its concern that disagreement among ILC members and among States regarding whether the draft articles represent codification of customary international law or even desirable progressive development of the law risks uneven acceptance of the draft articles and reduces their utility to States. The Commission knows well the U.S. position that draft article 7 is not supported by widespread and consistent State practice and *opinio juris* and therefore does not reflect customary international law. Given the vital importance of this topic to States and the importance that international courts, tribunals and practitioners place on work products of the Commission, it will be critical for the Commission to distinguish clearly in the commentaries where the draft articles reflect efforts to codify international law or reflect recommendations for its progressive development.

For example, although the commentaries to draft article 7 explains why some members felt the Commission should not portray its work as possibly codifying customary international law, we believe the commentaries should expressly confirm that draft article 7 is a recommendation for the progressive development of the law. This might be done by simply deleting the words "and codification" from the first sentence of paragraph 11. Otherwise, judges, prosecutors, private parties initiating criminal cases, and scholars could mistake draft article 7 as reflective of existing international law, which it in fact is not.

Moreover, draft article 7 requires additional review with respect to the legal basis for any exceptions to functional immunity. Without a clear and broadly supported rationale, the draft article lacks a persuasive explanation and justification for the inclusion and exclusion of crimes in the exception. We urge the Commission not to rush the second reading of draft article 7 but to take the time necessary to engage with and address the difficult questions that States have raised and the persistent lack of consensus. We also encourage the Commission to consider a different approach to draft article 7 that would enumerate factors that States should consider in assessing whether functional immunity would apply to a particular defendant in light of the particular circumstances of a case. Such factors could include ones related to the position of the official and the scope of their authority as well as the nature of the offense, and whether the sending state asserted that the challenged conduct constituted an official act. The practice in the United States

has been to consider the application of functional immunity on a case-by-case, fact-specific basis.

With respect to the procedural provisions proposed in Part Four, the United States observed that, as reflected in the commentaries to the draft articles, these eleven draft articles represent neither a codification of customary international law nor a progressive development of the law. They are recommendations for new rules that unnecessarily broaden the scope of the draft articles beyond the criminal immunity of foreign officials. The draft articles would do better to avoid drawing conclusions concerning domestic procedural obligations that do not yet reflect a consistent pattern of State practice. We have therefore suggested that the Commission move Part Four to a separate annex that could serve as a resource for States without broadening the scope of the draft articles. Doing so would also avoid the implication that the procedural safeguards set forth represent the totality of safeguards to protect the rights of the accused. In fact, setting forth a clear and comprehensive list of such safeguards that are based in state practice and international law could easily constitute an entirely separate project for the ILC. We refer the Commission to our written comments for further views on the specific draft articles.

The United States appreciates the opportunity to share our views, and thanks the Commission for its time and attention to this important and complex topic. We look forward to continued engagement with the Commission to help address the remaining significant issues before the Draft Articles and Commentaries are adopted.

Sea-Level Rise in Relation to International Law

I turn now to the topic of "sea-level rise in relation to international law." The United States appreciates the Commission's continuing efforts with respect to issues related to the law of the sea. The United States is thankful to the Co-Chairs of the Study Group, Ms. Galvão Teles and Mr. Ruda Santolaria, who briefed the Committee on the additional paper to the second issues paper as the focus of the Study Group's discussions this year.

On the sub-topic of statehood, it is the United States' policy that sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations. The United States is committed to working with Pacific Island States and others on issues relating to human-induced sea-level rise and statehood to advance those objectives. We note and underscore the observation of some Study Group members regarding the need to carefully consider the views expressed by States on this subject and avoid reading into those views positions the States have not expressly stated.

On the sub-topic of the protection of persons affected by sea-level rise, the United States agrees that States must protect the human rights of persons on their territory affected by sea-level rise and supports further discussion on this important issue. While we appreciate the Commission's effort to identify possible elements of legal protection for persons affected by sea-level rise in its recent paper, we believe the elements require further consideration and development. We note that, sea level rise does not necessarily implicate states' non-refoulement obligations under existing international law. Furthermore, States' obligations under international human rights law and international refugee law generally do not apply extraterritorially, including

with respect to persons affected by sea-level rise. The United States supports States in choosing to develop complementary protection pathways for persons displaced by the effects of climate change. We agree that non-binding frameworks, such as the Global Compact on Migration, can be valuable tools for coordinating national approaches on climate mobility and engage constructively on efforts to further elaborate those frameworks.

The United States appreciates that the Commission has again invited States to submit information in relation to the law of the sea, statehood, and protection of persons affected by sea-level rise. We look forward to the Study Group's preparation of a joint final report on the topic as a whole for the Commission's next session. We would caution against using the label "conclusions," however, with respect to the final report. We think the outcome of the Study Group's work should be clearly differentiated from the more formal work products used by the Commission.

Other Decisions and Conclusions of the Commission

Turning to the final topic of this cluster, "other decisions and conclusions of the Commission," the United States appreciates the efforts of the Working Group on methods of work and procedures to advance the preparation of a handbook. We think that the handbook could enhance transparency and States' and other stakeholders' understanding of the Commission's internal working methods and procedures. We laud the Working Group's ambition to address issues of nomenclature and forms of output, and we urge the Working Group to allocate sufficient time in the upcoming session to advance this important work.

The United States also notes the Commission's decision to include two new topics in its long-term program of work – namely, on "compensation for the damage caused by internationally wrongful acts" and "due diligence in international law." We have read the annexed papers on these topics, and I offer a few preliminary thoughts. On the topic of compensation, we would caution against overreliance on decisions of courts or tribunals that are not well-reasoned or grounded in State practice and *opinio juris*.

On "due diligence in international law," the United States believes the Commission's consideration of this topic on its active program of work would be premature. Although "due diligence" is the standard of conduct applicable to certain primary obligations under international law, the United States does not believe there is sufficient State practice and *opinio juris* to support a claim that there is a general obligation of "due diligence" under customary international law that applies to a State's conduct outside of those specific primary obligations. Other States have expressed similar views. Additionally, we believe States have sufficient clarity with respect to how due diligence applies as a standard of compliance for those specific primary obligations to which it is applicable. We therefore question whether this topic would be a useful one to pursue at this time.

Before concluding my remarks, I would like to briefly address one additional issue, with respect to the topic "non-legally binding international agreements." Although we will address this point in more detail in Cluster 3, I would like to stress at the outset our strong view that the title of this topic should not reference "agreements," as that term in the practice of the United States and

other states refers to instruments that are legally binding. Use of the phrase "non-legally binding international agreements" in the ILC's work would undermine states' abilities to distinguish legally binding agreements from non-binding instruments and create the very kind of legal uncertainty the ILC's work should be aimed at reducing. We believe many States share these concerns. The Council of Europe's Committee of Legal Advisers on Public International Law has used the term "non-legally binding instruments" in a project it has undertaken on this same topic. That term, or a similar alternative, would avoid the problems associated with the use of "agreement" in this context.

Chair, in closing my remarks, the United States reaffirms our support for the work of the International Law Commission and extends our congratulations to its members on a very productive session. We look forward to engaging with the Commission, the Sixth Committee, and fellow UN Member States on the Commission's work.

Thank you.