

Statement of the United States of America

Sixth Committee Debate

Agenda Item 79: Report of the International Law Commission on the Work of its 71st Session
(A/74/10)

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Cluster II

*Protection of the Environment in Relation to Armed Conflicts, Immunity of State Officials from Foreign Criminal Jurisdiction,
Sea-Level Rise in Relation to International Law*

Thank you, Madam Chair.

With respect to the topic “**protection of the environment in relation to armed conflicts**,” we recognize the efforts of this Commission and in particular, the Special Rapporteur, Ms. Marja Lehto, and note the completion of the first reading of draft principles and commentaries. We look forward to providing our full comments by December 2020. In the meantime, we offer some initial comments.

As noted in our statement for cluster 1 of this debate, the United States would appreciate greater clarity from the ILC on the intended legal status of draft principles, as distinguished from draft articles and guidelines. Most of the draft principles for this topic are clearly recommendations, phrased in terms of what States “should” do with respect to environmental protection before, during, and after armed conflict.

We are concerned, however, that several of the other draft principles are phrased in mandatory terms, purporting to dictate what States “shall” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. There is little doubt that several of these draft principles go well beyond existing legal requirements, making binding terms inappropriate. I would like to mention three specific examples:

- First, draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.

- Second, draft principle 27 purports to expand the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include “toxic or hazardous” remnants of war, despite the previous commentary on this draft principle recognizing that the term “toxic remnants of war” does not have a definition under international law.
- And third, the draft principles applicable in situations of occupation similarly go beyond what is required by the law of occupation.

Separately, we note that the draft principles include two recommendations on corporate due diligence and liability. It is unclear to us why the ILC has singled out corporations for special attention. The draft principles do not address any other non-State actors such as insurgencies, militias, criminal organizations, and individuals. This has the effect of suggesting that corporations are the only potential bad actors when it comes to non-State activity in the context of protection of the environment.

Madam Chair, I turn now to the topic “**Immunity of State Officials from Foreign Criminal Jurisdiction.**” We appreciate the effort that Special Rapporteur, Concepcion Escobar Hernandez, has made on this difficult topic. We commend also the thoughtful contributions by other members of the ILC.

The United States refers to and reiterates its serious concerns detailed in prior years’ statements, including, in particular, that we do not agree that draft Article 7 is supported by consistent State practice and *opinio juris* and, as a result, it does not reflect customary international law. We also underscore our desire for the Commission to work by consensus on this difficult topic, as that would be the approach most likely to produce draft articles that accurately reflect existing law or that reflect sound progressive development addressing all the relevant concerns.

The most recent report on procedural aspects of immunity reflects some of the same methodological challenges that also affected prior reports – there is generally very little visibility on prosecutions not brought (either due to immunity or for other reasons), and case law in this area is exceedingly sparse. Against this backdrop, the most recent report expounds on what the Special Rapporteur believes would be appropriate procedures without the benefit of significant State practice. Most provisions are best viewed as suggestions, not law, and the drafting of the articles should reflect this. For example, it would be more appropriate to use the word “should” rather than “shall.”

Moreover, some of the Special Rapporteur's suggestions overlook practical consequences. For instance, if one State were to notify the State of the official once it concludes that the foreign official "could be subject to its criminal jurisdiction," in the absence of assurances that the official would not be notified, this could jeopardize a criminal investigation. Such a step could permit the official to destroy evidence, warn partners in crime, or flee from the forum State's reach. As a result, this provision could very likely have a severe detrimental effect on the investigation and prosecution of crimes that cross international borders. Moreover, the draft articles disregard the fundamental principle and practice observed in the United States that foreign official immunity is not considered a bar to criminal investigation, and U.S. prosecutors may investigate crimes involving foreign officials without notifying the foreign official's state of the investigation or of potential immunity issues.

In addition, paragraph 3 of draft Article 16 should be deleted. It misstates the applicable customary international law on consular notification reflected in the Vienna Convention on Consular Relations. When applicable, consular notification is only required if requested by the detained individual; there is no "entitlement" to assistance, and we disagree with the notion that fair and impartial treatment cannot be provided in the absence of consular notification.

Whereas other, more developed areas of immunity law, such as diplomatic immunity, deal with procedural issues in a handful of paragraphs, the report suggests nine articles on procedure with a total of 35 subparts. Even so, the Special Rapporteur leaves unaddressed difficult questions raised by many countries in our debate last year, such as how to address the issue of politically motivated or abusive prosecutions. The draft articles seem to rely on cooperation and consultation between friendly States, but this problem can also arise when countries are in a state of animosity, for example, in the case of accusations of "war crimes" by military officials on the other side of a regional armed conflict. How can procedural safeguards prevent abuses and resolve conflicts in such a context? Other important questions remain unanswered, such as: Do the procedures apply even to potential prosecution of an official or former official if it is clear that the act in question was not taken in an official capacity? Although paragraph 21 of the draft report states that "any proceeding by the forum state concerning this type of immunity involved the presence of the [State official]," would these procedures apply even when the foreign official is not in the forum State at the time of indictment? In States where criminal prosecutions can be instituted by a person who claims to be a victim, do the rules secure a role for appropriate government ministries to express substantive views, or under draft Article 9, is there a role only if national laws so provide? Article 8 states that competent authorities shall "consider" immunity, but is a court required to make a determination of immunity with input from competent authorities, at the initiation of any legal proceeding?

Further consideration should also be given to the relationship between the procedural provisions and safeguards in Part Four and the provisions in Parts One through Three of the draft

articles. For example, the draft articles do not clearly address the legal effect of an invocation of immunity by a foreign State. We would also note in passing that Draft Article 9, paragraph 2, refers to the immunity of the foreign *State* rather than the immunity of the foreign State officials, and the reason for this is not clear. In addition, we believe that paragraph 4 of Article 11 merits further consideration. The concept of a waiver being “deduced” seems inconsistent with the concept of an express waiver.

Finally, we wish to express concern with the suggestion that the Special Rapporteur would address the immunities of State representatives before international criminal tribunals, such as the International Criminal Court (ICC). We believe this goes beyond the mandate of the ILC’s project on immunities of State officials before *foreign* criminal jurisdictions. We also take this opportunity to note that we had many concerns with the ICC Appeals Chamber’s decision on Head of State immunity in the case involving Jordan. As but one example, we disagreed with the Appeals Chamber’s far-reaching conclusions that no Head of State immunity exists under customary international law before an “international court” established by “two or more” States. In any event, such issues would not be appropriate for inclusion in the current ILC project on immunities.

Madam Chair, with respect to the topic of “**sea-level rise in relation to international law**”, the United States continues to have concerns that the topic as proposed to the ILC did not meet two of the Commission’s criteria for selection of a new topic. In particular, we continue to have questions regarding whether the issues of Statehood and protection of persons as specifically related to sea level rise are at a sufficiently advanced stage of State practice.

As the Commission decided to move the topic to its active agenda, we think it was appropriate that the Commission chose to do so via a Study Group, and that it has decided to focus its work during the 2020 session on issues related to the law of the sea. We also think it is appropriate that the Study Group will be open to all members of the Commission, and that the issue papers developed in connection with this topic will be made available to UN Member States.

With respect to issues related to the law of the sea, the United States recognizes that sea level rise may lead to increases in coastal erosion and inundation, which, in some areas, could lead to a reduction or loss of maritime spaces and the natural resources therein. In this connection, the United States supports efforts to identify measures that could protect states’ maritime entitlements under the international law of the sea in a manner that is consistent with the rights and obligations of third states. Such efforts could include, for example, physical measures for coastal reinforcement, such as the construction of seawalls or other measures for artificial protection; coastal protection and restoration; and the negotiation and conclusion of

maritime boundary agreements. We are also supportive of efforts by states to delineate and publish the limits of their maritime zones in accordance with international law as reflected in the Law of the Sea Convention.

We appreciate the Commission's attention to these issues, and we welcome further discussions on steps that can be taken to protect states' interests, in accordance with international law, in the context of sea level rise.

Thank you, Madam Chair.