

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)

Mark Simonoff, Legal Adviser
November 5, 2019

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.

We **protection of the environment in relation to armed conflicts** 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

- ◁ 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

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,
Criminal Jurisdiction.

Immunity of State Officials from Foreign

teur, Concepcion Escobar

Hernandez, has made on this difficult topic. We commend also the thoughtful contributions by other members of the ILC.

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

Moreover, s consequences. For instance, if one State were to notify the State of the official once it concludes that the foreign 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 S 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 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; tance, 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

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

