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United States Statement
63rd UN General Assembly Sixth Committee – Agenda Item 75
Report of the International Law Commission on the Work of its 60th Session:
Reservations; Responsibility of International Organizations;
Expulsion of Aliens
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Mr. Chairman, once again, I would like to thank the Chairman of the Commission, Mr. Edmundo Vargas Carreño for his introduction of the Commission's report. I would also like to thank the Special Rapporteurs for their important contributions to the Commission's study of these important topics. As noted in my earlier remarks on the Commission's report, the United States highly appreciates the significant contributions of the International Law Commission to the progressive development and codification of international law and commends the Commission on the quality of the report on its most recent work. I appreciate the opportunity to comment on the topics that are currently before the Committee.

Reservations

On the subject of Reservations to Treaties, I would first like to compliment the Special Rapporteur on the impressive work that has gone into the draft guidelines. We are grateful for the scholarship he has brought to bear on this important topic. We have, however, concerns regarding the Rapporteur's 13th Report dedicated to States' and international organizations' reactions to interpretative declarations, which in our view is not ripe for the work of the Commission and goes beyond the original mandate of the project regarding reservations to treaties.

As the Report notes, there is a "scarcity [and] relative uncertainty of practice" with regard to such reactive declarations. There is not enough State practice from which to derive suitable guidelines at this point. In addition, we do not think the "general regime" put forth in the Report is nuanced enough to address what little practice there is in this area. The proposed categories of reactions are too restrictive and do not take into account, for example, reactions to interpretative declarations that are positive but are not intended to express "agreement" with the interpretative declaration, or negative but do not ultimately "reject" the interpretation at issue or purport to propose a concrete alternative.

Moreover, the terms proposed in the Report for labeling reactions — “approval” for positive statements and “opposition” for negative statements — imply that a State’s reaction to an interpretative declaration has legal consequences for the interpretative statement to which it is reacting. In our view, such a reaction would rarely, if ever, have a legal effect on the other Party’s interpretative declaration. In this sense, the proposed regime draws far too heavily on the regime used for responding to reservations, which **is**, as noted by the Special Rapporteur, fundamentally different.

Similarly, although the Report in several places notes that silence cannot be understood to indicate “approval” of an interpretative declaration as it does in the case of reservations, the proposed guideline 2.9.9 takes this position. The guideline states that “[i]n certain specific circumstances . . . a State . . . may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.” While a State’s conduct may be relevant, it is entirely unclear on what basis a State’s silence would be a consideration, given the extraordinarily rare practice of opposing interpretative declarations.

The proposed guidelines go beyond the progressive development of international law and instead promote a new legal regime where one does not currently exist. Consequently, the guidelines are likely to produce a significant burden on the treaty offices of States that will feel compelled to review all interpretative declarations and respond to them, so as not to suggest that they are agreeing to a particular interpretation of a provision through their lack of response.

In sum, we have a great many concerns regarding the work done on this topic, of which I have only mentioned a few. While there is no one better suited to do this work than the Special Rapporteur, in our view the Commission should put this work aside.

Responsibility of International Organizations

The United States appreciates the Commission’s desire to generate a common set of articles on the responsibility of international organizations. We remain concerned, however, about the methodology that underlies the Commission’s work. As noted in our previous statements on this topic, we have serious reservations regarding a key assumption that appears to guide the Commission’s work in this area: the notion that the Commission’s articles on State Responsibility establish a model template for articles on the responsibility of international organizations. States and international organizations are fundamentally different. The fact that both have international legal personalities does not in and of itself mean they should be subject to the same basic rules under international law. Unlike States, which share a fundamental set of qualities, there is great diversity in the structure, functions, and interests of international organizations both as they relate to States and to each other. In addition, many of the interests of States that underpin the articles of State Responsibility — such as those related to sovereignty, citizenship, and territorial integrity — do not exist in the case of international organizations. These differences make applying the Commission’s articles on State Responsibility to international organizations problematic.

Our comments on the first 45 draft articles highlighted concerns regarding the problems of treating international organizations as if they are States for purposes of holding such organizations responsible for internationally wrongful acts. Several commentators have noted that the treatment of reparations may have different implications when applied to international organizations than would be the case in the traditional context as applied to States. For example, the general obligation to make reparations for an injury, whether material or moral, caused by an internationally wrongful act of an international organization, may have the effect of steering the resources of international organizations away from funding the internationally agreed functions of the organization toward protecting against unquantifiable litigation risks; creating reasons for States to reconsider the extent to which they want to continue to participate in such organizations and undermining the independence of international organizations that must now deal with unquantifiable litigation risks. We believe that the same concerns are implicated by the articles considered and adopted by the Commission this summer pertaining to the admissibility of claims, the invocation of responsibility of international organizations and countermeasures.

We recognize the significant challenges that this topic presents and appreciate the Commission's efforts to transcend those challenges. As the Commission continues its work, however, we would encourage it to pay particular attention to pressing problems that arise in the existing practice of international organizations. States could benefit from the Commission's expanded study of practical examples that illustrate the relevance and application of these draft articles.

Expulsion of Aliens

I would like to restate my government's appreciation to the Commission's Special Rapporteur, Mr. Maurice Kamto, for his thorough and thoughtful work on the topic of Expulsion of Aliens. We are in the process of studying his reports and coordinating their review among appropriate agencies of the United States government. We expect to provide more detailed comments in the near future to the Special Rapporteur and the Drafting Committee as they continue their work in this area.

As the scope of the draft articles is becoming clearer, we continue to be concerned that this topic requires careful examination. "Expulsion of Aliens" is a complex topic that implicates the formulation and enforcement of a State's immigration laws as well as national security. The Commission should bear in mind that each State faces legal and political issues that are delicate and unique. Additionally, the sovereign rights of each State to control admission to its territory should be recognized and respected. For these reasons, as the Special Rapporteur and the Drafting Committee continue their work on the draft Articles, we encourage them to carefully examine the scope of the topic, the definitions employed therein and whether the draft articles reflect well-settled principles of international law and State practice.

As we have noted before, we agree with the Special Rapporteur that certain issues, including non-admission, rendition and other transfers, fall outside the scope of the topic. We also believe that issues that are governed by specialized bodies of international law should be excluded from the topic, such as extraditions and expulsion of aliens in situations of armed conflict. Otherwise, this process may sow confusion with respect to issues that are already well-covered in existing law (e.g., concerning expulsions in the context of military occupation) and could be seen as articulating new or alternative rules that are not well-settled in international law and practice; and that may present an obstacle to broad support for this project.

We will be looking carefully at the draft articles to ensure that they recognize the rights of States to control admission to their borders and to enforce their immigration laws. We note that the distinction between aliens who are lawfully present and those who are not should be clearly observed (and in particular that it should be recognized that aliens not lawfully present can be expelled for that reason alone). For these reasons, we will carefully scrutinize, in particular, the extent to which these draft articles concern the treatment of aliens unlawfully present within a State's territory, where different removal procedures from those regarding aliens lawfully present may apply.

We welcome the opportunity to review future efforts to refine the scope of the Commission's work on this subject and intend to provide further comments to the Special Rapporteur and the Drafting Committee in the future. In the meantime, in addition to our general concerns above, we have some preliminary comments on the text of the draft articles we would like to share in the hopes that they may be of use to the Special Rapporteur and the Drafting Committee as they continue their work, and to other governments as they review the ILC's important work in this area.

We are concerned that draft Article 1, which describes the scope of the draft articles, does not recognize that there are many issues that should be excluded from the scope of the draft articles, including those identified by the Special Rapporteur as falling outside of the topic. For example, we agree with the Special Rapporteur that certain issues, including non-admission and rendition and other transfers, fall outside the scope of the topic. We encourage the ILC to find a way to more clearly exclude such issues (and others that are not properly within the scope of this project) from the application of the draft articles. Along these lines, we also believe that extraditions should be explicitly recognized as falling outside the scope of the topic. Among our reasons are that extradition is not expulsion, but the transfer of an individual for a specific law enforcement purpose; that it is subject to a separate international legal regime, governed by bilateral and multilateral extradition agreements as well as State practice that in some cases has gone back centuries; and that extradition is not limited to aliens, but rather also applies to nationals. Indeed, draft Article 4 would be entirely inconsistent with international law and practice on extradition. Additionally, we continue to believe that matters regulated by the law of armed conflict should be excluded from the topic.

The definitions contained in Article 2 require careful scrutiny as they will be critical to defining the scope of the draft articles. One of our initial concerns relates to

the definition of “territory” contained in draft Article 2. Defining “territory” as “the domain in which the State exercises all the powers deriving from its sovereignty,” is vague and could be interpreted in an over-expansive manner.

Regarding draft Article 4, we understand that at the 60th session the ILC approved the conclusion of a Working Group, established during the session, that the commentary to the draft articles should 1) indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities, and 2) make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. While the U.S. agrees as a general matter with these conclusions, these are complex issues and a careful review of the actual wording to be used in the commentary will be necessary. We note, however, that we do not agree with the view, expressed in the fourth report of the Special Rapporteur and discussed at the 60th session, that States have an obligation not to denationalize a citizen who does not have any other nationality and that nationality cannot effectively be lost unless the person concerned has effectively adopted another nationality.

Regarding draft Article 5 on the non-expulsion of refugees, we agree with others who have expressed the view that the language more consistently track the provisions on non-expulsion of refugees set forth in the 1951 Convention relating to the Status of Refugees. We note that Article 32 of the Refugee Convention concerns refugees lawfully in the territory and provides greater protections to such persons, while Article 33’s narrower protections are not limited to refugees lawfully in the territory. Moreover, as there are various definitions of “refugee” reflected in international instruments, we encourage the ILC to clarify that the term “refugee” shall be defined in accordance with each country’s existing obligations.

Regarding draft Article 6 on the non-expulsion of stateless persons, we are concerned at the inclusion of this language as this concept derives from the Convention Relating to the Status of Stateless Persons, which is not widely ratified by States, including the United States, and thus does not reflect a well-established and widely accepted principle of international law.