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**Statement by the United States of America
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Report of the International Law Commission
on the Work of its 66th Session**

**Expulsion of Aliens, Protection of Persons in the Event of Disasters, and Other Decisions
and Conclusions of the Commission (Crimes Against Humanity and *Jus Cogens*)**

Mr. Chairman, I would like to thank the chairman of the Commission, Mr. Kirill Gevorgian, for his introduction of the Commission's report. I would also like to congratulate the Commission for a productive 66th session and for its extensive work, which has again provided this committee with valuable information and analysis on important topics of international law.

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 "Expulsion of Aliens" and "Protection of Persons in the Event of Disasters," as well as provide a few comments on chapter 14 of the Commission's report regarding other decisions and conclusions.

Expulsion of Aliens

With respect to the topic of "Expulsion of Aliens," the United States congratulates the International Law Commission and, in particular, Special Rapporteur Maurice Kamto, for completing its work on the topic through the adoption on second reading of a set of 31 draft articles, together with commentaries.

Earlier this year, the United States submitted extensive comments on the draft articles as adopted on first reading, as did many other Governments. In many respects, the Commission appears to have given serious consideration to concerns expressed by Governments, and in particular we are pleased to see that the final draft articles reflect several of our suggestions.

We also appreciate that the Commission expressly acknowledges at several points throughout the commentary that much of this project reflects progressive development. Indeed, the opening paragraph to the general commentary correctly indicates that "the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature."

Even with this characterization, however, we continue to have significant concerns about several of the draft articles in their final form, and maintain our view that the draft articles, even as an aspirational document, do not overall strike the proper balance between the important goal of protecting aliens and the State's sovereign prerogative, responsibility and ability to control admission to its territory and to enforce immigration laws.

I would refer colleagues to our full written comments available on the ILC website, as many of them are still applicable, but will highlight a few of our most significant concerns. We still do not agree with the discussion of disguised expulsion contained in Articles 2 and 10 as drafted. For example, we do not believe "tolerance" of the actions of non-state actors generally gives rise to state responsibility. Article 12 on circumvention of extradition is overly vague and fails to account for a State's prerogative to use a variety of legal mechanisms to effect transfers of criminals wanted by a foreign country. In addition, Articles 23 and 24 are still problematic to the extent they extend *non-refoulement* protections to situations beyond what reflects established international law and beyond what the United States views as desirable law.

In some instances where the Commission did make laudable changes, they did not go far enough. For instance, while the text of Article 14 on nondiscrimination has improved, the Commentary still suggests an overbroad limitation on States' ability to treat groups differently with respect to expulsion where there is a rational basis for doing so. Additionally, although the Commission decided to limit Article 23's non-refoulement obligation to threats to life rather than also threats to freedom, the list of grounds on which such threats could be based still goes far beyond those contained in the Refugee Convention and its Protocol, without any clear justification in law or practice.

We also note that the Commission has addressed concerns with numerous articles that appeared to conflict with widely-adopted conventions by converting them to "without prejudice" provisions. While this solution largely resolves these legal concerns, it also highlights the extent to which existing treaties already cover many of the subjects addressed by these draft articles, reducing the imperative for an additional instrument in this field.

At the same time, many of the proposals for progressive development are clearly controversial and would need to be subjected to thorough governmental discussion and negotiation before any such proposed rule could be recognized as a rule of international law. Article 27, on the suspensive effect of an appeal, and Article 29, which would create an unprecedented right of admission, are just two examples of proposals that would require significant additional consideration by States.

Given this range of concerns, and in light of previous comments by the U.S. and other governments, we would have strongly preferred that the Commission issue these in a different form, such as guidelines or principles. We do not believe that the draft articles should be considered as the basis for negotiation of a new convention in this field, as no such instrument is needed given the several multilateral treaties that already exist in this field. Rather, we believe these draft articles should be brought to the attention of states for their further consideration.

Protection of Persons in the Event of Disasters

Mr. Chairman, on the topic of “Protection of Persons in the Event of Disasters,” the United States appreciates the work of the Commission and in particular the efforts of the special rapporteur, Mr. Eduardo Valencia-Ospina, on the 21 draft articles and commentaries adopted on first reading this summer.

We look forward to providing written comments and observations on the draft articles and commentary by 2016 in response to the Commission’s request. In the meantime, we remain concerned that several of the draft articles appear to be attempts to progressively develop the law without being clearly identified as such. For example, we do not accept the assertion in Draft Article 11, entitled “Duty to reduce the risk of disasters,” that each state has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. While the United States appreciates the efforts the Commission has made to document laudable individual and multilateral measures taken by states to reduce the risk of disasters, we do not believe that these efforts establish widespread state practice undertaken out of a sense of legal obligation.

Other Decisions and Conclusions of the Commission

Mr. Chairman, with respect to other decisions and conclusions of the Commission, let me make brief remarks about two additional topics.

First, with respect to the topic of “Crimes Against Humanity,” the United States looks forward to a thorough discussion of the topic now that the Commission has added it to its active agenda. We support and very much welcome the appointment of Sean Murphy as Special Rapporteur and the considerable expertise that Professor Murphy will bring to bear in thinking critically about the difficult questions that this topic implicates.

As the description of this topic noted, 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, including by promoting the repression of such offenses and creating a basis for accountability. Because crimes against humanity have been perpetrated in various places around the world, 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, and we look forward to following the ILC’s work on this subject now that it is on its active agenda.

This topic's importance is matched by the difficulty of many of the legal issues that it implicates, and we urge that all of these issues be thoroughly discussed and carefully considered in light of States' views as this process moves forward.

Second, Mr. Chairman, we note the addition of the topic of *jus cogens* to the Commission’s long-term work programme. We thank Professor Tladi for his work to identify a number of very important issues in his clear and concise syllabus describing the topic, and we thank him also for his informative description of the procedural history of the Commission’s consideration of this topic. As he notes, the Commission considered addressing this topic in 1993, but decided not to do so. The chair of the working group that considered the proposal, Derek Bowett, expressed doubt that addressing the topic would serve a useful purpose at that stage, in light of the

insufficient practice that existed on the topic. We believe the time is still not yet ripe for the Commission to address this topic.

The Commission is currently working on two topics that address key sources of international law – subsequent agreements and subsequent practice in relation to the interpretation of treaties, and the identification of customary international law. These sources implicate many issues that would also be relevant to consideration of *jus cogens*. For example, the Commission is currently considering whether and how silence by a treaty party may constitute practice for purposes of establishing acceptance of an interpretation of a treaty. Likewise, the Commission is currently considering what actions constitute practice for the purposes of customary international law, how to describe the rule that such practice must be “general,” whether any particular duration of practice is required to form a customary rule, and the relationship between practice and *opinio juris*. Such issues are closely enough related to *jus cogens* that the original proposal for the Commission’s topic of customary international law left open whether it would include *jus cogens*, and only after launching the project has the Commission decided not to include it. Indeed, the first report of the special rapporteur on customary international law indicated that “one’s view as to the relationship between *jus cogens* and customary international law depends, essentially, on the conception that one has of the latter”.

While the international law rules regarding formation of *jus cogens* norms may differ from these other sources, many concepts that the Commission is already considering are of relevance to a study of *jus cogens*. We are concerned that having three overlapping ILC projects addressing sources, all proceeding in parallel, risks confusion and inconsistency, and at a minimum would be inefficient.

In addition, it is not clear that practice on this topic has developed sufficiently since 1993 to justify a conclusion different than the one reached at that time. The syllabus for the topic presents a helpful discussion of some important issues, including an overview of the International Court of Justice’s treatment of *jus cogens* in certain cases. But the syllabus references few examples of State practice since 1993 that would support the conclusion that the situation has changed and that this topic is now ripe for consideration.

Accordingly, we do not believe it would be productive for the Commission to add this topic to its active agenda at the present time.

Thank you, Mr. Chairman.