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**Statement by the United States
71st General Assembly Sixth Committee
Cluster III - Report of the International Law Commission
on the Work of its 68th Session
Stephen Townley, Counsellor**

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**Protection of the Environment in Relation to Armed Conflicts, Immunity of State Officials
from Foreign Criminal Jurisdiction, Provisional Application of Treaties**

Protection of the Environment in Relation to Armed Conflicts

Mr. Chairman, with respect to the topic “Protection of the Environment in Relation to Armed Conflicts,” the United States first expresses its thanks for the efforts of the Special Rapporteur, Ms. Marie G. Jacobsson, in drafting reports that recognize the complexity and controversial character of many of these issues.

We are in the process of reviewing the Special Rapporteur’s proposed draft principles that emerged from the ILC’s Drafting Committee in August. Although our review is not complete, we note two areas of concern.

First, with regard to the general scope of the project, we remain concerned by the attention paid to addressing the application of bodies of law other than international humanitarian law (or IHL) during armed conflict. We are also concerned that this is not the appropriate forum to consider whether certain provisions of IHL treaties reflect customary international law.

Second, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States “shall” or “must” do. Such an approach, however, is not appropriate for a project that is purporting to assert “principles” and, in any event, several of these so-called “principles” go well beyond existing legal requirements of general applicability. For example, draft principle 8 introduces entirely new substantive legal obligations in respect of peace operations that cannot be found in existing treaties, practice, or case law, and draft principle 16 expands 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.

Even so, Mr. Chairman, we thank Ms. Marie Jacobsson and the Commission for their work on this topic.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman, turning to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we appreciate the efforts that the Special Rapporteur, Concepción Escobar Hernández, has made on this important and difficult topic. We commend also the thoughtful contributions by the other members of the ILC.

This summer, the Special Rapporteur issued her fifth report, this time addressing limitations and exceptions to immunity falling within the scope of this topic. We note that the topic does not address immunity of State officials covered by “special rules of international law,” such as diplomatic, consular, or international organization officials, or officials on special mission.

For officials falling within the scope of this topic, Draft Article 7 provides that there are no exceptions to their immunity *ratione personae*, but that their immunity *ratione materiae* immunity will not apply with respect to alleged acts falling within three groups:

- First, genocide, crimes against humanity, war crimes, torture, and enforced disappearances;
- Second, corruption-related crimes; or
- Third, crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

Because the ILC had insufficient time to consider the proposed articles before debating them, its debate commenced but has been held over until next summer.

There are a number of concerns raised by the Special Rapporteur’s approach in formulating draft Article 7. First, in stating that immunity will not apply to certain crimes, Article 7 does not specify why immunity does not apply. It is arguable that corruption-related crimes, which are presumably motivated by the defendants’ self-interest, would not be considered official acts in the first place. But other crimes, for example, war crimes would often include acts taken in an official capacity. Article 7 presumably makes immunity unavailable for those crimes based on their status as serious international crimes. It would have been helpful to have a better idea what is the conceptual basis for making immunity not available for certain crimes, otherwise it is difficult to assess whether these exceptions are grounded in existing law.

Second, with respect to the territorial exclusion for immunity, it is not clear why a civil law tort standard was adopted for use in the context of criminal law, nor whether the exception applies to all crimes involving any level of injury to person or property, or only to crimes involving serious harm. We also do not understand the basis for requiring that the defendant be in the forum state’s jurisdiction at the time of the act for the forum state to exercise jurisdiction. For example, we wonder why it would make a difference if anthrax that causes death or injury in the forum state was mailed from some other state, such as the official’s state or a neighboring state.

Finally, the accompanying report, while thorough, did not adequately support the exceptions to immunity that appear in draft Article 7 through reference to widespread State practice with *opinio juris*, treaty law or case law.

Next year, the Special Rapporteur may produce a further report addressing procedural matters, and that issue may provide needed clarity with respect to how any limitations and exceptions to such immunity are expected to operate.

We appreciate the time and attention that Professor Escobar Hernández and the Commission have devoted to this important and complex topic, and we look forward to their continuing work.

Provisional Application of Treaties

Mr. Chairman, turning to the topic of “Provisional application of treaties,” the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his fourth report. We also thank the Drafting Committee for its contributions in the Draft Guidelines it has provisionally adopted.

As the United States has stated, we believe the meaning of “provisional application” in the context of treaty law is well-settled – “provisional application” means that a State agrees to apply a treaty, or certain provisions of it, prior to the treaty’s entry into force for that State. Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself may be once it has entered into force. We approach all of the ILC’s work on this topic from that perspective.

With that in mind, we are generally in agreement with the text of most of the Draft Guidelines as provisionally adopted by the Drafting Committee.

One exception is Draft Guideline 4, entitled “Form.” As we have noted previously, we are concerned that Draft Guideline 4 as provisionally adopted may suggest that a State’s legal obligations under provisional application may be incurred through some method other than the consent of all the States concerned, contrary to Article 25 of the Vienna Convention on the Law of Treaties. We believe that it is important that that Guideline be reworked to avoid that interpretation, perhaps rephrasing subparagraph (b) to read: “any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, that reflect the consent of all the States concerned.”

We also hope to see Draft Guideline 3 as provisionally adopted and Draft Guideline 10 as proposed by the Special Rapporteur clarified to make clear that a State may provisionally apply a treaty pending its entry into force *for that State*, even if it has entered into force for other States, and that a State may agree to provisionally apply a treaty only to the extent it is consistent with its national law.

In addition, we are continuing to consider Draft Guideline 7, which provides that the provisional application of a treaty or part of a treaty “produces the same legal effects as if the treaty were in force” unless otherwise agreed. While we believe that is largely correct, one way in which this is not precisely true is that, as we have noted, provisional application can be more easily terminated. Moreover, we are studying whether – as suggested in the Special Rapporteur’s report and by some members of the Commission – Draft Guideline 7 means that that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. This is a fascinating and complicated issue to which we will be giving additional thought as the Commission’s work on this topic progresses.

With regard to future work of the Special Rapporteur and the ILC on this topic, we continue to support the suggestion that the ILC develop model clauses as a part of this exercise, as those clauses may assist practitioners in considering the many options that are available. However, we are not convinced of the merits of specifically studying the provisional application of treaties that address the rights of individuals, as we do not believe that the rules regarding provisional application of treaties differ based on the subject matter of the instrument.

Mr. Chairman, again, we thank the Special Rapporteur and the Drafting Committee for their contributions to this important topic and look forward to following future work on these issues.

Thank you, Mr. Chairman.