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**Statement of the United States of America
70th General Assembly Sixth Committee
Agenda Item 83**

**Report of the International Law Commission
on the Work of its 67th Session
Statement by ~~Stephen Townley~~, Counselor
November 10, 2015**

**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, concerning the topic “Protection of the environment in relation to armed conflict,” we greatly appreciate the diligent and thoughtful work of Special Rapporteur Jacobsson, the drafting committee, and the rest of the Commission. We noted with interest the draft introductory provisions and principles that have been completed by the drafting committee. Nevertheless, we have substantial concern with the content and phrasing of a number of the draft principles, as well as the direction in which they appear to be orienting this project.

We have a general concern that most of the draft principles are phrased in mandatory terms, purporting to provide what “shall” be done, despite the fact that the principles go beyond existing legal requirements of general applicability.

Relatedly, we are troubled by the presence among the principles of rules extracted from certain treaties that we do not believe reflect customary law. For example, draft principle II-4 repeats a prohibition in Additional Protocol I (AP I) on attacks against the natural environment by way of reprisals that we do not believe exists as a matter of customary international law. To the extent the rule is offered to encourage normative development, we remain in disagreement with it, consistent with the objections we have stated on other occasions.

We are also concerned that the draft principles appear to suggest that the Commission will address questions about the concurrent application, in situations of armed conflict, of bodies of international law other than international humanitarian law. For example, draft principle II-1 refers to “applicable international law *and, in particular, the law of armed conflict.*” Our

consistent view has been that the Commission should avoid such questions, and it would appear appropriate to do so in that all of the draft principles are drawn from the law of armed conflict.

Other draft principles could benefit from further refinement or adjustment.

For example, concerning draft principle I-(x) we have concerns about the inclusion of the phrase “or otherwise” insofar as it may be taken to suggest that a designation to which one side has not consented may nevertheless have legal effects. For example, even though a State may remove its military objectives from an area in order to reduce the likelihood that an opposing State, during armed conflict, would conduct attacks in the area or view such an area as a military objective, a unilateral designation would not create obligations for an opposing State to refrain from capturing the area or placing military objectives inside it during armed conflict.

We also recommend omitting “cultural importance” as a basis for designating an area, as that reference is beyond the scope of these principles as specified in the introduction. Further, in connection with draft principle II-5, we suggest clarifying that States that are not Party to an agreement would not be bound by its provisions, especially if a non-Party is the State in whose territory the area is located. Similarly, in connection with principle II-5, we suggest clarifying that if a designated area contains a military objective, the entire “area” would not necessarily forfeit protection from being made the object of attack.

With respect to principle II-2, we do not believe it is useful or correct to state that all of the law of armed conflict “shall be applied” to the natural environment. Whether a particular rule of the law of armed conflict is applicable with respect to the natural environment may depend on the context, including the contemplated military action. To the extent principle II-2 is intended merely to confirm the applicability of existing law, the principle seems too vague and ambiguous to accomplish that purpose. We hope the principle is *not* intended to modify the applicability of existing law.

We also recommend that principle II-3 be eliminated or revised – perhaps with the addition of a caveat such as “where appropriate – in that environmental considerations will not in all cases be relevant in applying “the principle of proportionality and the rules on military necessity” in the context of *jus in bello*. More fundamentally, it is unclear to us exactly what is meant by the phrase “environmental considerations” and the requirement that such considerations be “taken into account.”

Lastly, we recommend using the term “natural environment” rather than “environment” for clarity.

In conclusion, we thank the ILC Members, the Drafting Committee, and especially the Special Rapporteur for their impressive work on this issue, we look forward to the Special Rapporteur’s third report, and we welcome further discussion and 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.

We note that the new draft article 6, paragraph 1, limits immunity *ratione materiae* to acts performed in an official capacity. This provision is sensible in light of the draft articles provisionally adopted by the Commission last year, in particular draft article 5, which provides that State officials acting as such enjoy immunity from the exercise of foreign criminal jurisdiction, and draft article 2(e), which defines “State official” as an individual who either represents the State or exercises State functions. In its comments last year, the United States noted that draft articles 2(e) and 5 appeared to express a broad view of immunity *ratione materiae*, subject to exceptions and procedural requirements

By contrast, the new draft article 6, as narrowed by the new definition in draft article 2(f), limits the reach of immunity *ratione materiae*. In particular, draft article 2(f) defines the phrase “an act performed in an official capacity” to mean “any act performed by a State official in the exercise of State authority.” This definition results in a narrower scope of immunity than would exist if the definition turned solely on whether the official's conduct could be attributed to a State, a factor analyzed in the Special Rapporteur's report. Both the definition in draft article 2(f) and exceptions to immunity are important and difficult issues that merit ongoing and careful consideration, and we look forward to the work of the Special Rapporteur and the Commission on them as this topic moves forward.

Draft article 6, paragraphs 2 and 3, provide that immunity *ratione materiae* subsists even after the individuals concerned have ceased to be State officials, and that individuals who formerly enjoyed immunity *ratione personae* continue to enjoy immunity as to their official acts. Both articles are consistent with the treaty-based immunities of diplomats, consular officers, and UN officials, who continue to enjoy residual immunity for their official acts even after they have left their respective offices.

The other major areas yet to be addressed are exceptions to immunity and procedural aspects of immunity. The Special Rapporteur proposes to address in her next report the issue of limits and exceptions to immunity, which she accurately noted is the most politically sensitive issue to be addressed in this project. 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, with respect to the topic of “Provisional application of treaties,” the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his third report, including the extensive work and consideration of States’ views that it reflects. We also thank the Drafting Committee for its contributions in the three Draft Guidelines it provisionally adopted in July.

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 to 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 hope to see this clearly stated in the Draft Guidelines as they progress.

We also believe it is important that the Draft Guidelines make clear that a State's legal obligations under provisional application can only arise through the actual agreement of that State and the other States that undertake to apply the treaty provisionally. We are concerned that the Special Rapporteur's Draft Guideline 2 and the language of his report may suggest that such obligations may be incurred through some method other than agreement, contrary to Article 25 of the Vienna Convention on the Law of Treaties.

Mr. Chairman, the United States is impressed by the extensive research reflected in the Special Rapporteur's third report, which contains references to a wide variety of situations. We caution, however, that not every situation in which States apply a treaty prior to its entry into force involves "provisional application" of the treaty within the meaning of the Vienna Convention. We do not believe, for example, that the application by an international organization of its constituent instrument is "provisional application" in the sense of the Vienna Convention, as the international organization is not a prospective party to the treaty. Similarly, a non-legally binding commitment to begin applying a treaty prior to entry into force is not "provisional application" in our view.

With regard to future work of the Special Rapporteur and the ILC on this topic, we 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 to negotiators and how best to capture those options in their drafts. However, we are not convinced of the merits of studying the legal effects of the termination of provisional application with respect to treaties granting individual rights, as we do not believe that the rules regarding provisional application of treaties differ for such instruments.

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

Thank you, Mr. Chairman.