



As we have indicated in past statements, the United States is in general agreement with

We share the commitment to deterring and punishing these

not acknowledge that immunity is procedural, not substantive, in nature. As emphasized by the International Court of Justice in the *Arrest Warrant* and *Jurisdictional Immunities* cases, immunity is purely procedural in nature, and operates irrespective of whether the alleged conduct is lawful or unlawful. In both cases, the ICJ held that the nature of the allegations does **not** affect whether immunity exists under customary international law. Draft Article 7 ignores this basic proposition.

In addition to serious concerns about the lack of consistent state practice and *opinio juris*  
*ratione*  
*materiae*  
language because of uncertainty about whether to characterize serious international crimes as  
re is an exception to  
immunity without determining whether immunity would ordinarily attach to an act to begin  
with

exhibits none of these features, and risks creating the impression that the Commission is creating new law.

stewardship, these complex issues will be thoroughly discussed and carefully considered in light of the views and that we and other States will provide.

### **Provisional Application of Treaties**

States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, the Drafting Committee, and the working group for their contributions to the Draft Guidelines and commentaries that have been provisionally adopted by the Commission.

the context of treaty law is well-settled  
internati

entry into force for that State (or organization). 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 once the treaty has entered into force. We

Accordingly, while we are in agreement with many of the Draft Guidelines and commentaries as provisionally adopted, we have a number of concerns. We will discuss three of our concerns today.

First, we are concerned that the Draft Guidelines, especially Draft Guidelines 3 and 4 and their commentaries, fail to make clear that provisional application within the meaning of Article 25 of the Vienna Convention on the Law of Treaties requires the agreement of all of the States and international organizations incurring rights or obligations pursuant to the provisional application

agreements for provisional application for example saying that provisional application arises whose agreement is required. While the commentary to Draft Guideline 3 explains why the Draft Guidelines do not refer to the

specify the group of States and international organizations that must instead agree. This problem could be corrected by using the active voice and by indicating whose agreement is required.

We are concerned that the ambiguity in the Draft Guidelines is compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the

ng clear  
that only those States and international organizations that agree will be engaged in the provisional application of the treaty.

Second, we are concerned by the discussion in subsection (b) of Draft Guideline 4 and the accompanying commentary and establishing provisional application through a unilateral declaration by a State that is accepted by the other States and international organizations concerned. We do not believe that the examples cited in the commentary involve provisional application (within the meaning of Article 25 of the

Vienna Convention) having been established through such a mechanism, and we are unaware of any other such practice. For this reason, we believe the discussion of such a hypothetical form of agreement to establish provisional application risks creating confusion, and we would urge that