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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON MATTERS RELATED TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-SECOND SESSION

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REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-SECOND SESSION (26 April - 4 June and 5 July - 6 August 2021)

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I. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-SECOND SESSION

A. Background

1. AALCO is statutorily mandated to examine subject matters that are under consideration of the United Nations International Law Commission (ILC or Commission) and forward its views to Member States, and thereafter make recommendations to the ILC based on viewpoints and inputs of the Member States on such agenda items. In its quest to fulfil this statutory mandate over the years, AALCO has forged and nurtured a close relationship with the ILC. It has also become customary for AALCO and the ILC to be represented during each other's sessions. AALCO has, therefore, facilitated and continues to facilitate many of the Asian and African States represented in the ILC to make a valuable contribution to the work of the ILC, and has proven the worth of Asian-African views in ILC's work, so that the ILC may be able to fulfil its stature as a globally representative organization.

2. The Asian-African States continue to play an important role in the work of the Sixth Committee of the UN General Assembly, which is central to ILC's work. The countries in the two regions are playing an active role in ensuring that the development of international law reflects their major concerns and legitimate interests. AALCO Secretariat's report on ILC for a given Annual Session reports on the work of the ILC on the substantive topics that are placed on its agenda at the corresponding session of the ILC, deliberations on the topic at the previous Annual Session of AALCO, summary of the views expressed by the AALCO Member States at the Sixth Committee of the UN General Assembly, and the comments and observations of the AALCO Secretariat taking into consideration views of AALCO's Member States.

3. During the Fifty-Eighth Annual Session of AALCO held in 2019, the substantive topics that were placed on the agenda of the Seventy-First Session of the ILC were discussed. The members of the ILC also deliberated on other pertinent issues pertaining to the work of the ILC and the Sixth Committee. Owing to the ongoing COVID-19 pandemic, the UN General Assembly decided on 12 August 2020 to postpone the Seventy-Second Session of the ILC to 2021. Subsequently, the General Assembly, in resolution 75/135 of 15 December 2020, decided that the Commission would hold its Seventy-Second session at the United Nations Office at Geneva in 2021.

4. Accordingly, the Seventy-Second Session (2021) of the Commission was held from 26 April to 4 June and from 5 July to 6 August 2021, and the corresponding final report[1] to the UN General Assembly was made available on 10 September 2021 on the official website of the Commission. With a view to updating the Member States on the most recent work of the Commission, and to facilitate deliberations thereupon, the Secretariat considered it appropriate to place the same before the Member States at the Fifty-Ninth Annual Session (2021) of AALCO.

5. The document AALCO/59/HONG KONG/2021/SD/S1 reports on the work of the Commission on the following substantive topics that were placed on the agenda of its

[1] ILC, Report of the International Law Commission on the Work of its Seventy-Second Session, UN Doc. A/76/10, <https://legal.un.org/ilc/reports/2021/>

Seventy-Second Session (2021): (1) Protection of the atmosphere; (2) Provisional application of treaties; (3) Immunity of State Officials from Foreign Criminal Jurisdiction; (4) Succession of States in respect of State responsibility; (5) General principles of law; and (6) Sea-level rise in relation to international law.

B. Deliberations at the Fifty-Eighth Annual Session of AALCO (Dar es Salaam, the United Republic of Tanzania, 2019)

6. The **Secretary-General of AALCO, Prof Dr. Kennedy Gastorn,** gave a brief account of the topics that had been deliberated at the Seventy-First Session of the Commission in 2019: (1) Peremptory Norms of General International Law (*jus cogens*); (2) Succession of States in respect of State Responsibility; (3) Crimes against Humanity; (4) Immunity of State Officials from Foreign Criminal Jurisdiction; (5) Protection of the Environment in relation to Armed Conflicts; and (6) General Principles of Law. He welcomed the Members of the ILC, namely Ambassador Hussein Hassouna, Prof. Georg Nolte, Dr. Aniruddha Rajput and Prof. Chris Mena Peter, who had accepted the invitation of the Organization and came to speak at the session. He urged the Member States to consider developing collective positions based on consensus on topics wherever possible. This, in his opinion, would enable AALCO to forward its position as an organization to the Commission.

7. **Ambassador Hussein Hassouna, Member of the ILC**, explained in detail the Commission's relationship with the Sixth Committee of the General Assembly. He stated that the fifteen ILC members belonging to Asia and Africa are playing an active role in ensuring that the development of international law reflects their major concerns and legitimate interests. In that connection, he expressed his appreciation to the governments and academic institutions which in collaboration with AALCO have established training and research program in international law. The Commission always seeks the opinion of States through their written comments or oral views expressed during the Sixth Committee debates. In this regard, he highlighted that the African and Asian perspectives are particularly underrepresented. In his view, this may be explained by the lack of human and financial resources on the part of their governments and missions in New York. He remarked that the solution lies in encouraging their participation through regional United Nations regional procedures, as well as regional organizations. An organization like AALCO can play an important role in coordinating the position of its members towards the work of the Commission and induce them to submit their views on the various topics on its agenda.

8. **Prof. George Nolte, Member of the ILC,** made a few remarks on the three topics which the Commission had concluded on first or second reading in 2019, as well as a remark on the question of new topics. He stated that the Draft Articles on crimes against humanity have been adopted with the goal that they be acceptable to every State that shares the basic commitment to prevent and punish core international crimes, including those States that have not ratified the Rome Statute of the International Criminal Court.

9. As regards the topic "Peremptory norms of general international law (*jus cogens*)", he highlighted the methodological nature of the topic which explains why the Commission does not envisage to propose the elaboration of a convention and why the Commission has only adopted an illustrative list of those norms of *jus cogens* which the Commission itself had previously recognized. Further, in his opinion, it is important that the principles on the "Protection of the environment in relation to armed conflict" distinguish as clearly as possible

between what is already existing law, *lex lata*, and which rules the Commission considers to be desirable, *lex ferenda*. This distinction is particularly important for courts as they can only apply existing law and cannot simply make up law. Finally, he informed the meeting that the Commission is interested in the views of States regarding the choice of new topics.

10. **Dr. Aniruddha Rajput, Member of the ILC,** made brief comments on four topics deliberated in the 71st session of the Commission. Referring to Draft Conclusion 3 of the peremptory norms of general international law (*jus cogens*), he stated that it would be helpful for the Commission to see how the States from Asia and Africa perceive the choice of fundamental values to be the characteristic feature of peremptory norms of general international law. Also, it would be helpful to see how states perceive the distinction between characteristics and criteria that the Commission tries to make in Draft Conclusions 3 and 4 respectively. Secondly, in relation to the third report and some part of the Commentary that the Rapporteur presented in 2019 on the topic "succession of States in respect of State responsibility", it would be helpful to see what the views of the Member States of AALCO are in relation to the report as well as the commentary at this juncture.

11. As regards the topic "immunity of state officials from foreign criminal jurisdiction", an important concern that the Commission is grappling with is the role of diverse laws which are applied in different countries in relation to immunity either its invocation or its exception in national jurisdiction. National laws, national state practices in Asian and African countries in relation to treatment of immunity situations would be of great assistance to the Commission to proceed further. On the topic "general principles of law", he requested suggestions for the appropriate nomenclature to replace the controversial term "civilized nations" in the Commission's work.

12. **Dr. Chris M. Peter, Member of the ILC,** highlighted that half of the ILC membership is from Afro-Asian countries and urged the Member States of AALCO to use this opportunity to convey their comments on the work of the ILC. He joined others in thanking the Government of the United Republic of Tanzania and AALCO for the successful organization of the annual session.

13. **The delegate of the Republic of Korea** spoke on three topics. As regards "*jus cogens*" , it was suggested that the Commission should provide a more comprehensive and practical list of examples for the States. Referring to Draft Article 7 on the topic "Immunity of State officials from foreign criminal jurisdiction", the delegate pointed out that the nature and gravity of the crimes in question do not determine whether immunity applies because immunity is a procedural matter not a substantive one. Further, it was stated that the limitations and exceptions of the immunity of State officials is not just a legal issue but also a sensitive political issue, and the Republic of Korea hopes that the ILC will examine this issue with caution and prudence by taking into account the larger political implications.

14. Finally, on the topic "crimes against humanity", the delegation was also of the position that the Draft Articles should be in line with the Rome Statute of the ICC as much as possible for the coherence and stability of the international criminal legal order. And much more consideration should be given to the relationship between the future treaty on crimes against humanity and other relevant international instruments – including the initiative to adopt a new Convention on Mutual Legal Assistance for Crimes Against Humanity, Genocide, and

War Crimes and the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", which is currently being discussed by the ILC.

15. **The Delegate of Japan** spoke on the topic "crimes against humanity". It was stated that a distinction should be made between the codification of existing norms and the creation of new norms. If the ILC opts to create norms, the Draft Articles should strike a delicate balance so that they will be accepted by States when a diplomatic conference is convened. At this moment, Japan envisages substantial discussions to be raised in the process of drafting a treaty. On "*jus cogens*", the delegate stressed on the importance of contributions from States as the draft principles and Draft Conclusions, unlike draft articles of a treaty, would not be negotiated in a diplomatic conference, as they would not become a treaty.

16. **The delegate of the Islamic Republic of Iran** spoke on "*jus cogens*", "Immunity of State officials from foreign criminal jurisdiction" and "crimes against humanity". Firstly on "*jus cogens*", referring to Draft Conclusion 23 on non-exhaustive list, he reiterated that developing a list of *jus cogens* norms needs further consideration. On Draft Conclusion 16 [17(1)], his delegation was of the view that non-derogability of rules of *jus cogens* would be equally applicable to the resolutions, decisions and other acts of UN Security Council. On the topic "Immunity of State officials from foreign criminal jurisdiction", the delegation expressed its disappointment with the manner in which Draft Article 7 has been provisionally drafted and the impact that it would have on the working methods of the Commission. First of all, this shows that there has been a fundamental division of opinions on certain issues among members, raising difficulty to conclude whether Draft Article 7 reflects *lexlata*. Moreover, it indicates that this Draft Article is not supported by a customary foundation. In this regard, the delegation appreciated the proposal made on Article 7 by Prof. Nolte at the ILC.

17. Finally, the delegation made some comments on the final form of the Draft Articles on "crimes against humanity". He stated that the Islamic Republic of Iran is not convinced about the desirability and the necessity of elaborating a new convention on crimes against humanity. Instances of crimes against humanity have been elaborated in numerous international instruments including the Statute of the International Criminal Court. Thus, his delegation doubts whether the final outcome of the Commission in this regard could contribute to the existing literature on the topic; this rationale is further bolstered by the fact that numerous national legislations provide for the definition and instances of crimes against humanity. Overall, the principle of *aut dedere aut judicare* and bilateral judicial assistance agreements provide for sufficient legal basis for the prevention and punishment of crimes against humanity.

18. **The delegate of the People's Republic of China**, speaking on the topic "crimes against humanity", stated that the Draft Articles are not based on empirical analysis of international practice, but are made by analogy or deduction from the provisions of other international conventions and partial practice of some international criminal courts which have not acquired a universal character. It is hard to say that the Draft Articles represents general consensus. China believes that the time to launch the negotiation of a new convention is not yet ripe.

19. As regards the topic "Immunity of State officials from foreign criminal jurisdiction", China believes that adequate procedural safeguards are necessary for respecting State

officials' immunity, preventing political abuse of litigation and stabilizing international relations, such as abiding by the obligation of the forum State to communicate with the nationality State at the earliest time. It should also be emphasized that the defect of Draft Article 7 is substantive and could not be fixed by any procedural safeguards. The delegate recommends the Commission to revisit the Draft Articles and correct the conclusion based on extensive State practice and *opinio juris*.

20. As to the topic "peremptory norms of general international law (*jus cogens*)", China notices that the Commission adopted 23 Draft Conclusions and their commentaries on the first reading this year. China thinks that the Commission should be extremely prudent since *jus cogens* holds the highest hierarchy in international law. In particular, the standard of identifying *jus cogens* must be clear and rigorous, and parties should apply such standards without compromise in the future practices. Finally, as regards the topic "general principles of law", China holds that the identification of general principles of law must be carried out through rigorous analysis and it is inappropriate to regard national legal principles recognized only by a minority of States, regional States or certain legal systems as general principles of law in the sense of a source of international law without a careful review.

21. **The delegate of the Republic of India,** speaking on the fourth report of the Special Rapporteur on Peremptory Norms of General International Law (*jus cogens*), commented on two aspects addressed in the report. First, it is the issue of existence of regional peremptory norms. This has been a subject of much debate among international law scholars about its existence and definition. In India's considered view, while peremptory norms could be influenced by regional practice of States, the very idea of peremptory norms is that they are universal in nature and application. Secondly, on Draft Conclusions, India was of the view that some of the identified peremptory norms are not well-defined in international law. Different interpretations as to applicability of these norms exist among member states. Hence, there is a need to have more intense discussion on the list of peremptory norms as provided by the Special Rapporteur. On the topic "crimes against humanity", India reiterated its position that, considering the international mechanisms that are already dealing with the matter, including the International Criminal Court, necessity of having a Convention exclusively addressing crimes against humanity need to be examined. It was of the view that the Rome Statute provides sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity. In addition, any work on this topic could lead to duplicating the efforts already undertaken in existing regimes.

22. As regards Draft Article 14 on the "immunity of State officials from foreign criminal jurisdiction" about transfer of criminal proceedings, India was of the view that the Draft Article should expressly provide for request for transfer of proceedings by the State of the official. India would like to reiterate that there is a need to achieve a balance between the interests of the forum State and those of the State of the official, in line with the principle of reciprocity. Further, India responded to the question posed by the Special Rapporteur whether a mechanism for settlement of disputes between the forum State and the State of the official should also be proposed in the Draft Articles. India was of the view that a dispute settlement mechanism is not necessary as the consultations provided in Draft Article 15 should be sufficient. Any differences or disputes between the Forum State and the State of the official can also be settled through diplomatic channels.

23. As regards the newly introduced topic "sea-level rise and its implications", the delegate suggested that the Commission should also address the issue of livelihood and displacement which will affect millions of people in the coastal areas. Finally, referring to the draft principles on protection of the environment in relation to armed conflicts, it was stated that they should not be in conflict with the obligations arising from existing Conventions. Any work on this topic should not duplicate the efforts already undertaken in the existing regimes.

24. **The delegate of the Socialist Republic of Viet Nam**, commenting on the topic "immunity of state officials from foreign jurisdiction", stated Viet Nam's view that the fundamental principles of international law stipulated under the UN Charter, namely sovereign equality and non-interference in states' internal affairs, shall be of utmost importance. While speaking on the topic "sea-level rise and its implications", the delegate applauded the ILC's attempts to gather scientific proof and state practices before studying the effects of sea level rise on international law.

25. **The delegate of the Arab Republic of Egypt**, while speaking on **"**succession of States in State responsibility", stressed the importance of addressing the experiences of African States and developing States in general in this regard and stated that the ILC should not limit itself to the examples and experiences of Western and developed countries.

26. **The delegate of the United Republic of Tanzania** stated that his country has played a major role in the development of international law and more specifically in the international justice system including hosting the International Criminal Tribunal for Rwanda and currently the United Nations Residual Mechanism which replaced the ICTR and the African Court on Human's and People's Rights hosted in Arusha.

27. **The delegate of the Republic of Belarus (observer)**,while referring to the sixth and seventh reports on "immunity of State officials from foreign criminal jurisdiction", expressed his delegation's concern that the balance of the Draft Articles has shifted strongly in favour of the State that exercises jurisdiction. He also stated that his delegation was not able to find support in practice for the assumption that immunity issues should be decided through court/MLA intercourse, and not through diplomatic channels, which is the case in real-life scenarios.

28. **The delegate of the Russian Federation (observer)** criticized that some of the conclusions of the Commission and the reports of the Special Rapporteur do not reflect the State practice or *opinion juris*. So, texts of the Commission should be considered with due regard to the States' opinions that can be found for example in the statements in the Sixth Committee. On the topic "crimes against humanity", the delegate stated that a detailed set of provisions on extradition and mutual legal assistance in the investigation and prosecution of crimes against humanity might have an adverse effect on accession to a potential instrument.

29. Referring to the inclusion of a non-binding, non-exhaustive list as annex to the Draft Conclusions on *jus cogens*, the delegate stated that such a non-exhaustive list may falsely imply that the ultimate purpose of the Commission's work is precisely the development of the list whether it was included in the draft itself or in an annex. Furthermore, the delegate stated that he was disappointed that the Special Rapporteur did not examine the importance of the principles laid down in the Charter of the UN and further developed for instance in the declaration of international law concerning friendly relations and cooperation among States

in accordance with the Charter. The consideration by the Commission of an illustrative list without providing an analysis of the Charter and its purposes and principles in his view was inappropriate. In this regard, Russia welcomed the short reference to the UN Charter in commentary, however, opined that it was not sufficient.

C. AALCO Secretariat's Suggestions on the Topics to be Deliberated at the Fifty-Ninth Annual Session

30. The Seventy-Second Session of the ILC considered the following topics:

(1) Immunity of State officials from foreign criminal jurisdiction
(2) Provisional application of treaties
(3) Protection of the atmosphere
(4) Succession of States in respect of State responsibility
(5) General principles of law, and
(6) Sea-level rise in relation to international law.

31. The Secretariat suggests that the Member States may make statements on the work of the Commission in the aforementioned topics in the Fifty-Ninth Annual Session of AALCO.

II. PROTECTION OF THE ATMOSPHERE

A. Introduction

32. At the Sixty-Third Session of the Commission (2011), the Commission endorsed the inclusion of the topic "Protection of the atmosphere" in its long-term programme of work. The topic was decided to be included at the Sixty-Fifth Session of the Commission in 2013. Mr. Shinya Murase was appointed as the Special Rapporteur for this topic. This topic was included in its programme on the understanding that it shall not interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. It was the understanding that the topic shall not deal with, but was also without prejudice to, questions such as, liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. Certain specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States, shall be excluded from the study. It was also agreed that this project should not attempt to "fill" gaps in the existing treaty regimes.

33. At its Sixty-Eighth Session in 2016, the Commission had before it the Third Report[2] submitted by the Special Rapporteur, Mr. Shinya Murase, which, building upon the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, 5 Draft Guidelines were proposed. The Commission decided to send all the Draft Guidelines and a preambular paragraph proposed by the Special Rapporteur to the Drafting Committee. These Draft Guidelines, along with the preambular paragraph, as well as the commentaries to the guidelines, as formulated by the Drafting Committee were provisionally adopted by the Commission at its Sixty-Eighth Session.

34. At its Sixty-Ninth Session, the Commission had before it the Fourth Report submitted by the Special Rapporteur, Mr. Shinya Murase[3], in which building on the previous three Reports, the Special Rapporteur analysed the interrelationship between international law on the protection of the atmosphere and other fields of international law, namely, international trade and investment law, the law of the sea, and international human rights law. The Commission subsequently decided to refer Draft Guidelines 9 to 12, as proposed by the Special Rapporteur, to the Drafting Committee. The Commission finally considered the report and provisionally adopted draft preambular paragraphs 3bis, 4bis and 6 and Draft Guideline 9, together with commentaries thereto.

35. At its Seventieth Session in 2018, the Commission adopted, on first reading, a complete set of Draft Guidelines on the protection of the atmosphere, comprised of a draft preamble and 12 Draft Guidelines, with commentaries thereto. The Commission decided to transmit the Draft Guidelines through the UN Secretary-General to States and international organizations

[2] A/CN.4/692.
[3] A/CN.4/705.

for comments and observations, with the request that they be submitted to the Secretary-General by 15 December 2019.

36. At its Seventy-Second Session in 2021, the Commission had before it the Sixth Report of the Special Rapporteur, Mr. Shinya Murase[4], as well as comments and observations received from Governments and international organizations.[5] The report examined the comments and observations received from Governments and international organizations on the draft preamble and guidelines, as adopted on first reading, and made recommendations for each Draft Guideline, as well as a proposal for a recommendation to the General Assembly.

B. The Sixth Report of the Special Rapporteur

37. The purpose of the present report is primarily to review the comments and observations made by States and international organizations since the adoption, on first reading in 2018, of the draft preamble and guidelines on the protection of the atmosphere. Attention is also paid to comments and observations received prior to the adoption on first reading, where such comments appear to remain pertinent to the current text.

Draft Preamble

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,
Aware of the special situation and needs of developing countries,

Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that the present Draft Guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein.

38. There is broad support for the preamble among States. Upon receiving suggestions from many States, the Special Rapporteur recommended to insert in the first preambular paragraph the words "a limited natural resource" between the words "is" and "essential". The Special

[4] A/CN.4/736
[5] A/CN.4/735

Rapporteur considers it essential to refer to this notion at the very beginning of the Draft Guidelines. Regarding the second preambular paragraph, the Special Rapporteur proposes that it be deleted, and moved back to Draft Guideline 1, paragraph (a), where it belongs.

39. In the fourth preambular paragraph the Special Rapporteur recommends replacing the phrase "pressing concern of the international community as a whole" with "common concern of humankind".[6]

Draft Guideline 1. Use of Terms

For the purposes of the present Draft Guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

40. As proposed by the Special Rapporteur above, the second preambular paragraph should be moved back to Draft Guideline 1, paragraph (a), where it belongs, so as to read: "'Atmosphere' means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur." The Special Rapporteur further recommends adding the words "or energy", after the word "substances", to Draft Guideline 1, paragraph (b), on the definition of "atmospheric pollution", as suggested by a number of States.[7]

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[6]The Special Rapporteur proposed the following text for the draft preamble:
Preamble
Acknowledging that the atmosphere is a limited natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,
Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a common concern of humankind,
Aware of the special situation and needs of developing countries,
Noting the close interaction between the atmosphere and the oceans,
Noting also, in particular, the special situation of low-lying coastal areas and small island developing States due to sea-level rise,
Recognizing, that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

[7]The Special Rapporteur proposed the following text for Draft Guideline 1:
Use of Terms
For the purposes of the present Draft Guidelines,
(a) "Atmosphere" means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur;
(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

Draft Guideline 2. Scope of the Guidelines

1. The present Draft Guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present Draft Guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present Draft Guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present Draft Guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

41. Upon suggestions received from States the Special Rapporteur noted that paragraph 2 of Draft Guideline 2 does not make sense, as pointed out above by some States, because it is a "double negative" formula, which states "do not deal with, but without prejudice to". Furthermore, the Draft Guidelines on this topic have not touched on the principles enumerated in this paragraph. Thus, this paragraph should be deleted. Paragraph 3 should also be deleted for the reason mentioned above.[8]

Draft Guideline 3. Obligation to Protect the Atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

42. The Special Rapporteur pointed out that as noted by many States the word "or" in the Draft Guideline should be changed to "and" in line with language of the United Nations Convention on the Law of the Sea. Further, as suggested by many States the Special Rapporteur noted that the obligation to protect the atmosphere is an obligation *ergaomnes*, which should be mentioned, at least in the commentary. Reference should also be made to "precautionary measures" in the commentary, he stated that he would make proposals to this effect in due course.[9]

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

[8]The Special Rapporteur proposes the following text:

Guideline 2. Scope of the Guidelines

1. The present Draft Guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. Nothing in the present Draft Guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

[9]The Special Rapporteur proposes the following text:

Guideline 3. Obligation to Protect the Atmosphere

Draft Guideline 4. Environmental Impact Assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

43. While suggesting no changes to the Draft Guideline, the Special Rapporteur noted that as indicated by the UNEP an environmental impact assessment entails procedural considerations, but such considerations may not be appropriate for guidelines of this nature. It may be rather questionable to refer to "national capabilities and circumstances" in the context of an environmental impact assessment." He further noted that he would make proposals in due course to amend the commentary, in order to address some of the concerns raised by States.

Guideline 5. Sustainable Utilization of the Atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

44. While noting that the core aspect of the concept of sustainable development is the balance between economic development and environmental protection, for which an imperative (or obligatory) statement may not be fully fitting, the Special Rapporteur suggested no changes to the Draft Guideline.

Guideline 6. Equitable and Reasonable Utilization of the Atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

45. Noting that words expressing an obligation may not be appropriate for this Draft Guideline, and that many of the concerns raised by States may be addressed in due course in the commentary, the Special Rapporteur suggested no changes to the Draft Guideline.

Guideline 7. Intentional Large-Scale Modification of the Atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

46. As suggested by some States, the Special Rapporteur conceded that while environmental impact assessment is referred to in the commentary, it ought to be also mentioned in the Draft

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States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or and control atmospheric pollution and atmospheric degradation.

Guideline. Therefore, the Special Rapporteur proposes adding the phrase "including those relating to environmental impact assessment" at the end of the sentence.[10]

Guideline 8. International Cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

47. The Special Rapporteur agrees with the suggestion by some States that cooperation should go beyond "enhancing scientific knowledge" and with the drafting suggestion by UNEP to add the words "and technical" after the word "scientific" in the second paragraph.[11]

Guideline 9. Inter-relationship among Relevant Rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, inter alia, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

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[10] The Special Rapporteur proposes the following text:
Guideline 7
Intentional large-scale modification of the atmosphere
Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law, including those relating to environmental impact assessment.

[11] The Special Rapporteur proposes the following text:
Guideline 8 International cooperation
1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation. 2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

48. The Special Rapporteur did not consider that the comments made by States warrant any changes to the text of the Draft Guideline, that some of the concerns raised by States may be addressed in the commentary in due course, and that he would eventually make proposals to this effect.

Guideline 10. Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present Draft Guidelines, may take the form of legislative, administrative, judicial and other actions.

2. States should endeavour to give effect to the recommendations contained in the present Draft Guidelines.

49. Following the suggestions of some States, the Special Rapporteur proposed to insert a new paragraph 2, to read as follows: "Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law." He further noted that the Commission decided not to include a Draft Guideline on the responsibility of States originally proposed by the Special Rapporteur, noting that the Articles on responsibility of States for internationally wrongful acts adopted in 2001 "are equally applicable in relation to environmental obligations, including protection of the atmosphere from atmospheric pollution and atmospheric degradation"; however, he stated that it is useful to articulate it explicitly in the Draft Guideline itself.[12]

Guideline 11. Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the

[12] The Special Rapporteur proposes the following text:
Guideline 10
Implementation
1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present Draft Guidelines, may take the form of legislative, administrative, judicial and other actions.
2. Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.
3. States should endeavour to give effect to the recommendations contained in the present Draft Guidelines.

States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

50. As States generally supported the Draft Guideline, no changes were proposed by the Special Rapporteur.

Guideline 12. Dispute Settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.

2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

51. While suggesting no changes to the Draft Guideline, the Special Rapporteur noticed that there were a number of useful comments by States that should be included in the commentary, and that he would make proposals to this effect in due course.

C. Consideration of the Topic at the Seventy-Second Session

52. The Commission considered the Sixth Report of the Special Rapporteur at its meetings held from 26 April to 4 May 2021, and decided to refer to the Drafting Committee the text of the Draft Guidelines with the draft preamble on "Protection of the atmosphere", as proposed by the Special Rapporteur in his Sixth Report on the topic, together with the comments and suggestions made during the debate.

53. The Drafting Committee had before it the text of the entire set of Draft Guidelines and the preamble as adopted on first reading in 2018, together with the recommendations of the Special Rapporteur contained in his Sixth Report, the changes suggested by the Special Rapporteur taking into account the plenary debate, as well as the comments and observations received from Governments and international organizations.

54. The Drafting Committee noted that the Draft Guidelines follow the structure of the first reading text, starting with the preamble, introductory guidelines (Draft Guidelines 1 and 2), the substantive guidelines (Draft Guidelines 3 to 8) and then guidelines of a procedural nature (Draft Guidelines 9 to 12). As a part of the review on second reading, and on the basis of proposals by the Special Rapporteur, the preamble and the Draft Guidelines were shifted around or modified as given below:

Preamble

55. The Committee noted that the first preambular paragraph has the overarching purpose of acknowledging the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. The text has been adopted with one change to the text adopted on first reading to incorporate the formulation "a natural

resource, with a limited assimilation capacity" between the words "is" and "essential", responding to a proposal by the Special Rapporteur to introduce the wording "a limited natural resource". The proposal to use instead the formulation "a natural resource, with a limited assimilation capacity," was deemed both consistent with the wording "a limited assimilation capacity" used in Draft Guideline 5 and a more accurate characterization of the atmosphere. Therefore, the first preambular paragraph as adopted thus reads:

"*Acknowledging that the atmosphere is a natural resource, with a limited assimilation capacity, essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems*".

56. With regards to the second preambular paragraph, which was proposed by the Special Rapporteur to be deleted and moved back to Draft Guideline 1(a), the Committee took the view that as it addresses the functional aspect of the atmosphere as a medium through which the transport and dispersion of polluting and degrading substances occurs, it must be adopted without changes to the text adopted on first reading.

The second preambular paragraph as adopted, thus reads:

"*Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere*".

57. With regards to the third preambular paragraph, while noting that it underlines the importance of addressing the problems relating to the atmosphere, the guideline was altered to read as follows:

"*Considering that atmospheric pollution and atmospheric degradation are a common concern of humankind*".

58. The now fourth to seventh preambular paragraphs were adopted as such without any changes by the Drafting Committee.

59. A last and eighth preambular paragraph was considered by the Committee in conjunction with paragraph 2 of Draft Guideline 2, given that both provisions reflected the limitations imposed on the scope of the topic by the 2013 understanding. As a result of the extensive discussions within the plenary as well as the Committee, the paragraph as adopted by the Drafting Committee, now reads as follows:

"*Recalling that the present Draft Guidelines were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein*,"

Guideline 1
Use of Terms

60. As against the changes suggested by the Special Rapporteur in paragraphs 1(a), the Committee adopted it without any changes to the text adopted on first reading. The paragraph now reads as follows:

"atmosphere" means the envelope of gases surrounding the Earth".

61. The Committee further introduced two amendments to the text of paragraph (b), following proposals by some States, by the Special Rapporteur, and by members of the Commission, which now reads as follows:

"atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment".

Guideline 2
Scope

62. As against the suggestion by the Special Rapporteur to delete the second paragraph, the same was retained and modified by the Committee, and now reads as follows:

"*The present Draft Guidelines do not deal with and are without prejudice to questions concerning the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle*".

Guideline 3
Obligation to Protect the Atmosphere

63. As against some minor change suggested by the Special Rapporteur to this guideline, it was nevertheless adopted by the Drafting Committee without any change to the text adopted on first reading. The text now reads as follows:

"*States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation*."

Guideline 6
Equitable and Reasonable Utilization of the Atmosphere

64. This guideline was adopted by the Committee with one change introduced by the Special Rapporteur to insert the term "fully" between "taking" and "into account". The text now reads as follows:

"*The atmosphere should be utilized in an equitable and reasonable manner, taking fully into account the interests of present and future generations*."

Guideline 7
Intentional Large-Scale Modification of the Atmosphere

65. The text as adopted on first reading was amended by the Committee to include two proposals made by the Special Rapporteur and a third proposal introduced by a member in the course of the discussion. The text now reads:

"*Activities aimed at intentional large-scale modification of the atmosphere should only be conducted with prudence and caution, and subject to any applicable rules of international law, including those relating to environmental impact assessment*."

Guideline 8
International Cooperation

66. The Committee adopted the guideline with the amendment as introduced by the Special Rapporteur.

Guideline 10
Implementation

67. In spite of the suggestion of the Special Rapporteur to insert a new paragraph two, entailing State Responsibility for failure to implement the obligations, amounting to breach, the Committee adopted this Draft Guideline without changes to the text adopted on first reading. The text now reads:

"*1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present Draft Guidelines, may take the form of legislative, administrative, judicial and other actions.*

2. States should endeavour to give effect to the recommendations contained in the present Draft Guidelines."

Guideline 12
Dispute Settlement

68. The first paragraph was adopted without any changes to the first reading text. Minor technical changes were made to the second paragraph.

The second paragraph now reads:
"*2. Since such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of scientific and technical experts*".

69. At the meeting held on 27 May 2021, the chair of the Drafting Committee presented his report on "Protection of Atmosphere".[13]The Commission considered the report and adopted the preamble and the following Draft Guidelines on second reading: 1 (Use of terms), 2 (Scope), 3 (Obligation to protect the atmosphere), 4 (Environmental impact assessment), 5 (Sustainable utilization of the atmosphere), 6 (Equitable and reasonable utilization of the atmosphere), 7 (Intentional large-scale modification of the atmosphere), 8 (International cooperation), 9 (Interrelationship among relevant rules), 10 (Implementation), 11 (Compliance), 12 (Dispute settlement). The Commission adopted, on second reading, the entire set of Draft Guidelines on the protection of the atmosphere, comprising a draft

[13]A/CN.4/L.951.

preamble and 12 Draft Guidelines. It subsequently adopted commentaries to the entire set of Draft Guidelines on the protection of the atmosphere.

D. Present Status and Future Work

70. The Commission decided, in accordance with Article 23 of its statute, to recommend that the General Assembly: (a) take note in a resolution of the draft preamble and guidelines on the protection of the atmosphere, annex the Draft Guidelines to the resolution, and ensure their widest possible dissemination; (b) commend the draft preamble and guidelines, together with the commentaries thereto, to the attention of States, international organizations and all who may be called upon to deal with the subject. It needs to be noted, however, that the Draft Guidelines are a contribution to the work of progressive development and codification of international law, without aiming at replacing an existing convention or eventually becoming a convention themselves.

III. PROVISIONAL APPLICATION OF TREATIES

A. Introduction

71. The Vienna Convention on the Law of Treaties, 1969 ("Vienna Convention"), in its Article 25 provides for the possibility of the application of treaties on a provisional basis. The provision originated when proposal for a clause recognizing the practice of the "provisional entry into force" of treaties, was made by Special Rapporteurs Gerald Fitzmaurice and Humphrey Waldock, during the consideration by the Commission of the Law of Treaties (Article 22 of the 1966 Draft Articles). The provision was amended at the Vienna Conference on the Law of Treaties, 1968, and substituted by "provisional application". It was finally adopted as such at the Second Session of the Vienna Conference in 1969, and renumbered as Article 25.

Article 25 of the Vienna Convention 1969 reads as follows:

"Article 25
1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
(a) The treaty itself so provides; or
(b) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

72. At its Sixty-Fourth Session, held in 2012, the Commission included the topic "provisional application of treaties" in its programme of work, and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. The Special Rapporteur has thus far submitted six reports, which the Commission considered at its Sixty-Fifth to Seventy-Second Sessions (2013-2021).[14] The Commission has also had before it three memorandums, prepared by the Secretariat, at the Sixty-Fifth (2013)[15], Sixty-Seventh (2015)[16], and Seventieth (2018)[17] Sessions.

73. The first four Reports of the Special Rapporteur have amongst other things affirmed the purposes and usefulness of provisional application of treaties, systematized some general aspects of the concept, and also identified some of the contentious issues related to it such as the fact that State practice is neither uniform nor consistent - warranting an in-depth consideration of State practice, and the relationship between the Article 25 regime and other provisions of the Vienna Convention, as well as other rules of international law. At its Sixty-

[14] A/CN.4/664 (first report, considered at the Sixty-Fifth session), A/CN.4/675 (second report, considered at the Sixty-Sixth session), A/CN.4/687 (third report, considered at the Sixty-Seventh session), A/CN.4/699 and Add.1 (fourth report, considered at the Sixty-Eighth session), A/CN.4/718 and Add.1 (fifth report, considered at the Seventieth session), and A/CN.4/738 (sixth report, considered at the Seventy-Second session).
[15] A/CN.4/658.
[16] A/CN.4/676.
[17] A/CN.4/707.

Ninth Session, in 2017, the Commission provisionally adopted a first complete set of guidelines (Draft Guidelines 1–11), together with their respective commentaries.

74. At its Seventieth Session, in 2018, the Commission had before it the Fifth Report of the Special Rapporteur. In his Fifth Report, the Special Rapporteur continued the analysis of views expressed by Member States on the topic. The Special Rapporteur, further proposed 2 Draft Guidelines, in addition to the 11 already adopted by the Commission in 2017: (a) Termination or Suspension of the Provisional Application of a Treaty as a Consequence of its Breach; and (b) Formulation of Reservations. The Special Rapporteur further proposed a set of eight model clauses that had been prepared taking into account the time frame for the provisional application of a treaty and the scope of provisional application. The Commission adopted the entire set of Draft Guidelines on provisional application of treaties, consisting of 12 Draft Guidelines, as the "draft Guide to Provisional Application of Treaties", on first reading. The draft Guide was transmitted, through the Secretary-General, to Member States for their consideration. The Commission was not able to consider the draft model clauses because of a lack of time, but it left open the possibility of returning to the matter at the following session.

75. At its Seventy-First Session, in 2019, the Special Rapporteur held informal consultations with members of the Commission on the draft model clauses and presented an oral report to the Commission on the outcome of those consultations, which was duly noted by the Commission. The revised proposal annexed to the Commission's report to the General Assembly, with a view to seeking comments from Member States and international organizations in advance of the second reading of the draft Guide to Provisional Application of Treaties at its Seventy-Second session.

76. At the Seventy-Second Session the Commission had before it the Sixth report (A/CN.4/738) of the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, as well as comments and observations received from Governments and international organizations. The report examined the comments and observations received from Governments and international organizations on the draft Guide, as adopted on first reading, and on the draft model clauses, as proposed by the Special Rapporteur to the Commission at its Seventy-First Session (2019). It also contained proposals of the Special Rapporteur for consideration on second reading.

B. The Sixth Report of the Special Rapporteur

77. The Special Rapporteur firstly considers that even though Article 25 of the 1969 Vienna Convention is framed as a relatively straightforward provision which makes available to States and international organizations a voluntary mechanism for giving immediate effect to all or some of the provisions of a treaty, prior to the fulfillment of the conditions and formalities required for the treaty's entry into force, including the avoidance of the formalities required for denouncing a treaty that is in force; however, the provision is silent on a number of issues, such as its legal effects, which appear to be highly pertinent at a time of increasing recourse to provisional application by States and also international organizations. Practice shows that continuing uncertainty among States has led to the Article 25 procedure's being used in an inconsistent and at times even rather confusing manner. The Commission, therefore, has taken the view that the contours of Article 25 remained

somewhat unclear and that its legal regime should therefore be clarified for the benefit of States and international organizations and, more generally, the users of treaty law.

78. The study of the provision in the Commission has been based on the following premises:

(a) That, while provisional application was inadequately defined and its legal regime is confusing, the 1969 Vienna Convention nonetheless remains the source in which clarification of the regime must be sought;

(b) That, while the primary purpose of provisional application is to prepare for the entry into force of a treaty, its increasing use may be due to other reasons;

(c) That the main advantage of provisional application lies in its inherent flexibility and in its exceptional nature, which is reflected in the freedom of the parties to resort to it or not; and

(d) Lastly, that, since provisional application may give rise to situations that are not in accordance with procedures of the internal law of States or the rules of international organizations as regards the expression of consent to be bound by the treaty, account must be taken of the limitations that may derive from the internal law of States and the rules of international organizations.

79. One of the other questions to be considered is that if the natural vocation of any treaty is to reach the point at which it comes fully into force and, in the case of a multilateral treaty, achieves universality, then what role does provisional application play? It is, therefore, necessary to understand why States and international organizations resort to the provisional application of treaties in order to identify the advantages, as well as any disadvantages, of that procedure as provided by the 1969 Vienna Convention.

80. Further, it was also to be noted that the present Study might be perceived as the Commission seeking to encourage recourse to provisional application, which, although in complete conformity with the law of treaties, might lead to non-compliance with the rules of domestic law governing the procedures for a State to consent to be bound by a treaty. The Commission, therefore, undertook, on the one hand, to identify the practice of States and international organizations and, on the other hand, to study the relationship between Article 25 of the Vienna Convention of 1969 and other treaty rules of the law of treaties, in order to ascertain more precisely the legal effects of provisional application and to draw more clearly the distinction between provisional application and the regime of the entry into force of treaties.

81. Finally, in preparing the present report, the Special Rapporteur reviewed all the comments made by States and international organizations from 2015 to the time of writing, both those expressed in the debates in the Sixth Committee and those transmitted in writing in response to the requests made by the Commission in the course of its consideration of the topic. However, as a large number of the concerns expressed have subsequently been addressed by the Commission, the Special Rapporteur has, therefore, focused on responding to those concerns that have been made known since the adoption of the draft Guide, on first reading, in 2018.[18]

[18] Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), chap. VII.

Consideration of Each of the Draft Guidelines by the Special Rapporteur

Guideline 1
Scope

"*The present Draft Guidelines concern the provisional application of treaties.*"

82. Upon suggestions received from States in this respect, the Special Rapporteur was of the view that the Drafting Committee might give consideration to merging Draft Guideline 1 with Draft Guideline 2. He also agreed with the proposal of making clear that the draft Guide refers also to the provisional application of treaties by international organizations; and thus proposed to revise the wording of the provision in this regard.[19]

Guideline 2
Purpose

"*The purpose of the present Draft Guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of international law*."

83. The Special Rapporteur noted in this regard that even though the draft Guide is not a legally binding instrument, there are still a large number of instruments which for the sake of clarity have a structure that is close to that of a treaty. There were no other changes suggested to the guideline.

Guideline 3
General Rule

"*A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed*."

84. With regard to the majority of the concerns raised by States, the Special Rapporteur was of the opinion that given the broad support for the wording of Draft Guideline 3, these concerns can be addressed in the commentary. In respect of the possibility of merging Draft Guidelines 3 and 4 - subject to the decision of the Drafting Committee - the Special Rapporteur considered it preferable to keep the two Draft Guidelines separate, given the support for that structure among the delegations that have spoken on the subject. No changes were suggested to the text of the guideline.

Guideline 4
Form of Agreement

[19]Text suggested by the Special Rapporteur:
Guideline 1. Scope
The present Draft Guidelines concern the provisional application of treaties *by States and international organizations*.

"*In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:*

(a) a separate treaty; or
(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned."

85. The Special Rapporteur's opinion on the matter was that the expression "that is accepted by the other States or international organizations concerned" should be understood to apply to both "declaration" and "resolution adopted by an international organization or at an intergovernmental conference". The Special Rapporteur has therefore proposed, in annex I, an amended version of Draft Guideline 4.[20] He further took note of the proposals for enriching the commentary, which will be incorporated in due course into the commentary to Draft Guideline 4.

Guideline 5
Commencement of Provisional Application

"*The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed*."

86. Upon receiving various comments from States in this regard, the Special Rapporteur was of the view that the reference to entry into force "between" the States "or" international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force. This is irrespective of the question of whether the treaty as such has entered into force in accordance with its provisions. No changes were suggested to the text of the guideline.

Guideline 6
Legal Effect of Provisional Application

"*The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the*

[20] Text suggested by the Special Rapporteur:
Guideline 4. Form of Agreement
In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:
(a) a separate treaty; or
(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, *if such resolution has not been opposed by the State concerned*, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed."

87. Regarding the concern expressed by many States in this matter that the question of whether the legal effects of provisional application should be described as being the same "as if the treaty were in force", as it has given rise to diverging views that cannot be reconciled, the Special Rapporteur was of the view that, at the heart of the matter, there is a fear that recourse to provisional application could be abused, to the detriment of domestic legal procedures relating to the expression of a State's consent to be bound by a treaty. This has been a constant issue throughout the consideration of the topic. In this regard the Special Rapporteur does not believe that such issues can be fully addressed in the commentary alone, even if an additional effort is made to better document and analyse the practice of States and international organizations; which has already been attempted not only through the five reports of the Special Rapporteur to date, but also through the third memorandum prepared by the Secretariat,[21] as well as through the additional examples of practice in connection with the draft model clauses provided by the Special Rapporteur. In the light of the foregoing, the Special Rapporteur has proposed an amendment to Draft Guideline 6[22] and, in due course, he would suggest to the commentary as well.

Guideline 7
Reservations

"*1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied mutatis mutandis, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.*

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty."

88. Upon comments received from States, the Special Rapporteur was of the view that with regard to the question whether the Draft Guideline on reservation should be retained or removed, further discussion within the Commission would be useful, bearing in mind that most of the States that have taken a position in this regard are in favour of retaining Draft Guideline 7, with some of them making that stance contingent on further analysis of the issue. No changes as such were suggested to the text of the guideline.

Guideline 8
Responsibility for Breach

[21] A/CN.4/707.

[22] Text suggested by the Special Rapporteur:
Guideline 6. Legal Effect of Provisional Application
The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

"*The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law*."

89. Upon comments received from States, the Special Rapporteur stated that as has been suggested by the States that Draft Guideline 8 does not constitute a safeguard clause. It is a direct expression of the principle that the breach of an international obligation gives rise to international responsibility, and thus strengthens Draft Guideline 6. In the Special Rapporteur's view, the affirmation of this principle is unrelated to the existence of contentious cases in which the breach of an obligation under a treaty that is being applied provisionally has led to the activation of mechanisms under international law for the attribution of international responsibility to a particular State or international organization. The Special Rapporteur, therefore, suggests that Draft Guideline 8 be left unchanged. He stated that in due course, he would propose that the commentary include a reference to the *pacta sunt servanda* principle, in line with the observations made by some States.

Guideline 9
Termination and Suspension of Provisional Application

"*1.The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.*

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present Draft Guideline is without prejudice to the application, mutatis mutandis, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension."

90. The Special Rapporteur was of the view that there is a need to address the suggestions by many States concerning situations in which a State decides to terminate the provisional application of a treaty without linking that decision to an intention not to become a party to the treaty. The Special Rapporteur also considers that the Draft Guideline would be enriched if it also addressed the consequences of the termination of a treaty provisionally applied in accordance with Article 70 of the 1969 Vienna Convention, particularly with regard to paragraph 1 (b) of that Article.[23] The Special Rapporteur, therefore, proposed an amended version of Draft Guideline 9.[24]

[23] Article 70 (1) (b) of the 1969 Vienna Convention provides as follows:
Article 70. Consequences of the termination of a treaty
1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
[...] (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

[24] Text suggested by the Special Rapporteur:
Guideline 9. Termination and Suspension of Provisional Application

91. With regard to the question of the relationship between the Article 25 regime and the Article 18 regime[25] of the 1969 Vienna Convention, the Special Rapporteur recalls that, when the Commission first embarked on the topic of provisional application, taking into account the views of Member States, it agreed that a distinction should be made between the two regimes, as they are intended to serve different purposes, and neither affects the obligations arising from the other. The Special Rapporteur therefore recommends that no element relating to Article 18 be incorporated into the Draft Guideline.

92. The Special Rapporteur lastly noted that the wording at the end of paragraph 3 of Draft Guideline 9 reflects the fact that the 1986 Vienna Convention has not yet entered into force and the Commission has preferred not to involve itself in the determination of which provisions of the 1986 Vienna Convention are part of customary international law; rather, it has preferred to make reference, throughout the Draft Guidelines, to other rules of international law that are applicable to international organizations.

Guideline 10. Internal Law of States and Rules of International Organizations, and the Observance of Provisionally Applied Treaties

"*1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.*

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application."

93. Upon comments and suggestions received from States, the Special Rapporteur recommended that the wording of Draft Guideline 10, as adopted by the Commission on first reading, be retained.

Guideline 11. Provisions of Internal Law of States and Rules of International Organizations Regarding Competence to Agree on the Provisional Application of Treaties

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2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization so notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally, *irrespective of the reason for such termination.*

4. *Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through such provisional application prior to its termination*.

[25]Article 18 of the 1969 Vienna Convention provides as follows:

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

"*1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance."

94. Upon suggestions received from States, the Special Rapporteur recommended that the wording of Draft Guideline 11, as adopted by the Commission on first reading, be retained.

Guideline 12. Agreement to Provisional Application with Limitations Deriving from Internal Law of States and Rules of International Organizations

"*The present Draft Guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization*."

95. Upon suggestions received from States, the Special Rapporteur recommended that the wording of Draft Guideline 12, as adopted by the Commission on first reading, be retained.

Draft Model Clauses

96. In 2019, the Special Rapporteur circulated an informal paper containing a revised set of draft model clauses, which then served as a basis for discussion in the informal consultations held at the Commission's Seventy-First Session in 2019. The draft model clauses were based on the following premises:

(a) the draft model clauses should be aimed at addressing the most common issues faced by States and international organizations who are willing to resort to provisional application;
(b) the draft model clauses should not pretend to address the whole range of situations that may arise;
(c) special care should be taken so as to avoid the draft model clauses overlapping with the guidelines contained in the Guide to Provisional Application of Treaties; and
(d) the draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

97. During the informal consultations in 2019 States were generally supportive of the proposal to include a set of draft model clauses, as an annex to the Guide to Provisional Application of Treaties, to be adopted on second reading at the following session. A concern, though, was expressed that the inclusion of a set of draft model clauses could be interpreted as the Commission encouraging States to resort to provisional application. However, the Special Rapporteur noted, that at all times, the optional and voluntary nature of provisional application had been emphasized. The draft model clauses would simply be provided to

facilitate drafting in those situations where negotiating parties decided to resort to the mechanism of provisional application.

C. Consideration of the Topic at the Seventy-Second Session

98. The Commission referred to the Drafting Committee the text of the Draft Guidelines on "Provisional application of treaties" together with the draft model clauses, as proposed by the Special Rapporteur in his Sixth Report, together with the comments and suggestions made during the debate. The Drafting Committee presented two reports to the Commission on "Provisional application of treaties".

Draft Guidelines Considered by the Drafting Committee

Guideline 1
Scope

99. The Drafting Committee slightly modified the amendment proposed by the Special Rapporteur in his Sixth Report by replacing "and" with "or by". Considering this amendment and the clarification implied therein, the Drafting Committee emphasized the added value of Draft Guideline 1 as a self-standing provision, which should not be merged with Draft Guideline 2.

The text now reads as follows:
"*The present Draft Guidelines concern the provisional application of treaties by States or by international organizations*."

Guideline 2
Purpose

100. The Drafting Committee slightly modified the amendment proposed by the Special Rapporteur in his Sixth Report. The text now reads as follows:

"*The purpose of the present Draft Guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law*."

Guideline 3
General Rule

101. The Drafting Committee largely retained the text of Draft Guideline 3 as adopted on first reading, with some minor changes, bringing Draft Guideline 3 further into line with the text of the Vienna Convention. The text now reads:

"*A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed*."

Guideline 4
Form of Agreement

102. Based on a proposal by the Special Rapporteur, the Drafting Committee added the words "between the States or international organizations concerned" in the chapeau of the provision to specify who may agree on provisional application by the forms listed in paragraphs (a) and (b). Paragraph (a) remained unchanged. Paragraph (b) was changed more significantly from the first reading version. As a result of an extensive discussion on the forms of agreement on provisional application other than a treaty, the Drafting Committee decided to split paragraph (b) into a chapeau and two subparagraphs to draw a clearer distinction between institutional means or arrangements on provisional application and declarations by individual States or international organizations to provisionally apply a treaty, which are a rare occurrence in practice.

The amended text now reads:

"*In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:*
(b) any other means or arrangements, including:
(i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;
(ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned."

Guideline 5
Commencement

103. The Drafting Committee decided to shorten the first reading title "Commencement of provisional application" to "Commencement", in order to align it with the titles of other Draft Guidelines.

104. Rejecting the proposal by the Special Rapporteur, in reaction to suggestions made by Governments, the Drafting Committee decided to delete the reference to "pending its entry into force between the States or international organizations concerned", which is already contained in the general rule in Draft Guideline 3. The text now reads:

"*The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed*."

Guideline 6
Legal Effect

105. The Drafting Committee slightly modified the first reading version of the guideline, along with the changes suggested by the Special Rapporteur. Firstly, the term "unless" was replaced with "except to the extent that" to avoid giving the impression that provisional application might not have any legal effect at all and to depict the flexibility of the provision more accurately. Secondly, a new sentence is added, "Such treaty or part of a treaty that is being applied provisionally must be performed in good faith", to include the good faith

obligation, as stipulated in article 26 of the Vienna Convention on the Law of Treaties in Draft Guideline 6.

The text now reads:
"*The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith*."

Guideline 7
Reservations

106. As the inclusion of a Draft Guideline on reservations on first reading was somewhat controversial, and was so included in order to seek the views of States and international organizations on the provision, and to receive information on their relevant practice, the first reading version of Draft Guideline 7 was recast in the form of a "without prejudice" clause. This was against the proposal of the Special Rapporteur that the Draft Guidelines "do not preclude the possibility for a State or an international organization to formulate, when agreeing to the provisional application of a treaty or part of a treaty, a reservation". The Committee was of the view that given the complexities involved in making reservations, a "without prejudice" clause would be preferred. The text now reads:

"*The present Draft Guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty*."

Guideline 9
Termination

107. The Committee made significant changes to the provision on second reading. Firstly, the title of the provision was changed to "Termination", as in view of the deletion of the first reading version of paragraph 3, the Drafting Committee omitted "and suspension", as well as "of provisional application" to further shorten the title.

108. The Drafting Committee did not modify the formulation of paragraph 1 as adopted on first reading. It decided to largely retain paragraph 2 of Draft Guideline 9 on first reading, with few changes. Next, the Drafting Committee adopted a new paragraph 3, based on a revised proposal by Special Rapporteur, dealing with other grounds of termination. The Committee further added a new paragraph 4 to Draft Guideline 9, based on the proposal by the Special Rapporteur in his Sixth Report, confirming that, in principle, the termination of the provisional application of a treaty would not affect any right, obligation or legal situation created through the execution of provisional application prior to its termination. The text now reads:

"2. *Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty*.

3. *Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.*

4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination."

109. The Commission considered the report of the Drafting Committee on "Provisional application of treaties" and adopted on second reading the texts and titles of the following Draft Guidelines and of the draft annex: 1 (Scope), 2 (Purpose), 3 (General rule), 4 (Form of agreement), 5 (Commencement), 6 (Legal effect), 7 (Reservations), 8 (Responsibility for breach), 9 (Termination/Extinction), 10 (Internal law of States, rules of international organizations and observance of provisionally applied treaties), 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties), and 12 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations).

110. Regarding the inclusion of a draft annex containing a set of draft model clauses designed to assist treaty negotiators, there were concerns expressed by some Members, that any model clause might be perceived as indicating a preference by the Commission, which could adversely affect the freedom of States and international organizations. Therefore, upon informal consultations on the issue it was decided, on the suggestion of the Special Rapporteur, to instead present an annex containing mere examples of provisions in existing agreements and other instruments, as a reference for future treaty negotiators. Furthermore, there is no intention to cover all possible situations, nor to prescribe any specific formulation. The examples were selected from recent practice and the Drafting Committee sought, to the extent possible, to reflect regional diversity, even if not exhaustively so.

D. Present Status and Future Work

111. The Commission adopted the "Guide to Provisional Application of Treaties" as a whole on second reading. The Commission subsequently adopted commentaries to the Guide. In accordance with Article 23 of its statute, the Commission recommended to the General Assembly to take note of the Guide on Provisional Application of Treaties and to encourage its widest possible dissemination, to commend the Guide, and the commentaries thereto, to the attention of States and international organizations, and to request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

IV. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

112. The Commission, at its Fifty-Ninth Session (2007), decided to include the topic "Immunity of State Officials from foreign criminal jurisdiction" in its programme of work[26]. Mr. Roman A. Kolodkin of Russia was appointed as Special Rapporteur for this topic. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its Sixtieth Session (2008). The Special Rapporteur, Mr. Kolodkin submitted three reports. The Commission received and considered the preliminary report at its Sixtieth Session (2008) and the second and third reports at its Sixty-Third Session (2011). The Commission was unable to consider the topic at its Sixty-First (2009) and Sixty-Second (2010) Sessions.

113. At its Sixty-Fourth Session (2012), Ms. Concepción Escobar Hernández of Spain was appointed as the Special Rapporteur for the topic replacing Mr. Kolodkin who was no longer a member of the Commission. The Commission received and considered the preliminary report of the Special Rapporteur at the same session. The second, third and fourth reports were received in the Sixty-Fifth (2013), Sixty-Sixth (2014), Sixty-Seventh (2015) Sessions respectively. The fifth report of the Special Rapporteur on limitations and exceptions to immunity, widely believed to be the most contentious aspect of the topic was considered during the Sixty-Eighth (2016) and Sixty-Ninth (2017) Sessions. The sixth report was considered during the Seventieth (2018) and Seventy-First (2019) Sessions. The seventh report was also considered during the Seventy-First Session (2019). Based on the Draft Articles proposed by the Special Rapporteur in the second, third, fourth and fifth reports, the Commission has provisionally adopted seven Draft Articles and commentaries thereto. Draft Article 2 on definitions is still in the process of development.

114. The Seventy-Second Session discussed this topic in the backdrop of the eighth report of the Special Rapporteur. The report examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; considered a mechanism for the settlement of disputes between the forum State and the State of the concerned official. Good practices considered to be helpful to solve the problems that arise in practice during the immunity determination and application process were considered as well.

115. The Commission considered the eighth report at its 3520th, 3521st and 3523rd to 3528th meetings, from 12 to 21 May 2021. Following its debate on the report, the Commission, at its 3528th meeting, on 21 May 2021, decided to refer Draft Articles 17 and 18, as contained in the Special Rapporteur's eighth report, to the Drafting Committee, taking into account the debate, as well as proposals made, in the Commission.

[26] In Paragraph 7 of Resolution 62/66 of December 6, 2007, the General Assembly noted the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session in 2006.

116. At its 3530th and 3549th meetings, on 3 June and 26 July 2021, the Commission received and considered the reports of the Drafting Committee and provisionally adopted the Draft Articles 8 *ante*, 8, 9, 10, 11 and 12. At its 3557th to 3561st meetings, from 3 to 5 August 2021, the Commission adopted the commentaries to Draft Articles 8 *ante*, 8, 9, 10, 11 and 12.

B. The Eighth Report of the Special Rapporteur

117. The Commission had before it the eighth report of the Special Rapporteur. The Special Rapporteur recalled that in Chapter V of the seventh report, the Commission before the conclusion of the first reading made particular focus on three general issues that warranted examination. These issues were *firstly*, the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, *secondly*, the possibility of establishing a mechanism for the settlement of disputes and *lastly*, the possible inclusion of recommendations of good practices in the Draft Articles. These questions were considered in the eighth report.

118. The eighth report consists of an introduction and four chapters. The introduction describes the treatment of the topic by the Commission, whereas the chapters deal with specific dimensions of the topic. Chapter I examines the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. Chapter II addresses problems related to the settlement of disputes. Chapter III addresses the issue of recommended good practices and Chapter IV pertains to future work plan.

Relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals

119. The Special Rapporteur highlights the importance of this aspect of the topic by pointing to the fact that the issue has been present in the work of the commission from a very early stage. The document that provided the basis for the inclusion of the topic in the long-term work of the Commission as well as the memorandum prepared by the Secretariat in 2008 mentions this aspect as well. In addition, both the rapporteurs working on the topic have referred to this issue.

120. The Special Rapporteur clarified that notwithstanding the importance of this dimension to the topic, there has been some controversy in this regard as well since the scope of the work of the Commission on this topic is clearly limited to foreign criminal jurisdiction pertaining to horizontal relation between States[27]. In doing so, the Commission excluded the issue of immunity from international criminal tribunals from its ambit leaving the same to be dealt by the separate legal regime governing the field. However, while this demarcation of subject-matter boundaries was made, it was also clear to the Special Rapporteur that an examination of immunity of State officials from foreign criminal jurisdiction without examining its interface with the functioning of international criminal tribunals could present an incomplete picture of the legal regime governing the law of immunity of State officials

[27] Paragraph 1 of Draft Article 1 provisionally adopted by the Commission as follows: "The present Draft Articles apply to the immunity of State officials from the criminal jurisdiction of another State."

from criminal jurisdiction given the overlaps that are possible. Such an effort could also undermine the substantive and institutional strides made in the area of international criminal law over the years as per the Special Rapporteur.

121. In this regard, the Special Rapporteur concluded that it was appropriate to adopt a 'without prejudice' clause (Draft Article 18) and exclude, *a contrario* the immunity regime of international criminal tribunals from the scope of the present Draft Articles. In this process, it was clarified by the Special Rapporteur that the scope of the Draft Articles being worked upon by the Commission would in no way impact the immunity regime applicable for international criminal tribunals.

122. In view of the same, Draft Article 18 was proposed as follows:

Article 18

The present Draft Articles are without prejudice to the rules governing the functioning of international criminal tribunals.

Settlement of Disputes

123. The Special Rapporteur highlighted that one of the key purposes of the procedural measures proposed in the seventh report was building trust between the State of the Official and the Forum State. A necessary postulate of this reality in the view of the Special Rapporteur was the need to provide for a specific provision in the Draft Articles dealing with dispute settlement in the context of applying and determining immunity of State officials. Acknowledging the fact that the Commission's practice mostly eschews the inclusion of dispute settlement provisions, which are also largely limited to treaty instruments, the Special Rapporteur thought it fit to propose a specific Draft Article (Draft Article 17) that addresses the issue of settlement of disputes in line with existing principles of international law[28].

124. Precedents in the work of the Commission (with respect to the topics "Peremptory norms of general international law (*jus cogens*)" and "Crimes against humanity" wherein specific dispute settlement mechanisms were adopted was highlighted by the Special Rapporteur. The majority of the Commission members who debated this issue in 2019 were in favour of adopting a dispute settlement mechanism in the Draft Articles. Additionally, the issue was also discussed in the Sixth Committee. Furthermore, the Special Rapporteur deemed it fit to include a provision on dispute settlement prior to the second reading of the Draft Articles so as to afford States a broader and more comprehensive view of the work of the Commission and a chance to submit their comments and observations that could be considered when adopting the Draft Articles on second reading.

125. Another important factor in the view of the Special Rapporteur was the need to afford possibility for States to settle disputes at a stage prior to the determination of immunity affording greater stability in international relations. States usually resort to traditional means of dispute settlements in the context of immunity only after the determination of immunity by the Forum State, a practice that normally precludes triggering of the dispute settlement

[28] At present, the final form of the Commission's engagement with this topic is also unclear.

process at an early stage. While consultation and exchange of information have been provided in the Draft Articles (Draft Articles 15 and 13 respectively), the possibility of providing for a binding dispute settlement mechanism involving a third-party (which remains voluntary and within the bounds of well-accepted international law principles) offers the possibility of putting on hold the judicial proceedings in the Forum State till a binding ruling is made.

126. In view of the same, Draft Article 17 was proposed as follows:

Article 17
Settlement of Disputes

1. *If, following consultations between the forum State and the State of the official, there remain differences with regard to the determination and application of immunity, the two States shall endeavour to settle the dispute as soon as possible through negotiations.*

2. If no negotiated solution is reached within a reasonable period of time, which may not exceed [6] [12] months, either the forum State or the State of the official may suggest to the other party that the dispute be referred to arbitration or to the International Court of Justice.

3. If the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling.

Recommended Good Practices

127. The Special Rapporteur suggested the possibility of including reference to "good practices" in the Draft Articles, which States could be recommended to adopt. In particular, this involved, *firstly*, the desirability of decisions relating to the determination and application of immunity being adopted by high-level national authorities; and *secondly*, the usefulness of States preparing manuals or guides intended for the State organs that may have to be involved in the process of determining and applying immunity.

128. The rationale for the same according to the Special Rapporteur was the finding that, in a number of cases, the competent State authorities were unfamiliar with the unique dimensions of immunity in international law including its relationship with the fundamental principles of international law or the impact that decisions of immunity would have on the international relations of the forum State.

129. The Special Rapporteur noted that during the seventy-first session, the members of the Commission expressed a wide variety of views on the issue of good practices. This ranged from views that good practices should be incorporated as an annex to the Draft Articles to views that the inclusion of good practices in the Draft Articles would not be a useful exercise. Others, while in principle agreeing with the idea of good practices, feared that efforts in this direction could stall the work of the Commission on the topic.

130. Additionally, it was noted by the Special Rapporteur that only one State had replied to the request of the Commission on information pertaining to the existence of manuals and

guidelines among others on the subject of immunity. The reply of the concerned State was in the negative.

131. Taking into account the considerations expressed, the Special Rapporteur explained that the eighth report contained no specific proposal on recommended good practices and was limited to the two points highlighted in 2019 without prejudice to its final inclusion in the Draft Articles, either in Part Four, or in the general commentary.

Draft Articles provisionally adopted by the Commission at its Seventy-Second Session with a brief summary of the commentaries

Article 8 *ante*

Application of Part Four

The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the Draft Articles contained in Part Two and Part Three of the present Draft Articles, including to the determination of whether immunity applies or does not apply under any of the Draft Articles.

132. This provision specifically provides that procedural safeguards (which is the subject matter of Part Four) applies in relation to all criminal proceedings against a foreign State official without distinction on the basis of the individual's current or former status for matters pertaining to Part Two and Part III (which are concerned with immunity *ratione personae* and immunity *ratione materiae* respectively). This Draft Article does not prejudge and is without prejudice to the possible adoption of any additional procedural guarantees and safeguards in the future nor concerned with the applicability of specific safeguards that may or may not apply to Draft Article 7.

Article 8

Examination of Immunity by the Forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

a. before initiating criminal proceedings;
b. before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

133. The general rule of "examination of immunity" in Draft Article 8 refers to measures necessary to assess whether or not an act of the authorities of the forum State seeking to exercise criminal jurisdiction may affect the immunity from criminal jurisdiction of the

concerned foreign official. This preparatory act marks the beginning of the process of determining immunity and ends with a formal determination as to the applicability of immunity or otherwise. While "examination of immunity" and "determination of immunity" are closely linked, they are distinct from each other and the latter is to be dealt with in a separate Draft Article that is yet to be considered by the Drafting Committee.

134. The Draft Article imposes an obligation on the forum State to examine the question of immunity "without delay". This expressly implies the obligation to do so when they "become aware that an official of another State may be affected by the exercise of its criminal jurisdiction".

Article 9

Notification of the State of the Official

1. *Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.*

2. *The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.*

3. *The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.*

135. The process of notifying the State of the official is a fundamental prerequisite for ensuring that the State of the official receives reliable information on the forum State's intention to exercise criminal jurisdiction over one of its officials. Since this benefit is accorded to the State and not the individual official, it is imperative for the forum State to notify the State of the official. Since time is the essence for both the concerned States in this matter, an adequate balance has to be struck between the need of the forum State to initiate criminal jurisdiction and the right of the State of the official to get appropriate timely information in this regard. To harmonise this aspect, the issue of the notification as per the Draft Article is prior to the initiation of criminal proceedings and the taking of coercive measures that may affect an official of another State. Three specific details have to be mentioned in the notification as follows:

a. The identity of the official
b. The grounds for the exercise of criminal jurisdiction
c. The competent authority to exercise jurisdiction.

Article 10

Invocation of Immunity

1. *A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.*

2. *Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.*

3. *Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.*

4. *The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.*

136. Draft Article 10 approaches the issue of invocation of immunity from two perspectives. Firstly, it recognizes the right of the State of the official to invoke immunity; and secondly, the procedural aspects relating to the timing, content and means of communication of the invocation of immunity. In addition, it also highlights the need to inform the competent authorities of the forum State that immunity has been invoked. The invocation of immunity is to be understood as an official act, whereby the State of the official seeks to inform the forum State that the concerned individual is an official of the former State and he or she enjoys immunity and the consequences that fall from such an assertion. The invocation of immunity must happen as soon as it becomes aware that criminal jurisdiction of another State could be or is being exercised over the official. However, nothing in the Draft Article precludes the State from invoking immunity at a later stage as well.

Article 11

Waiver of Immunity

1. *The immunity from foreign criminal jurisdiction of the State official may be waived by the State of the official.*

2. *Waiver must always be express and in writing.*

3. *Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable cooperation and mutual legal assistance treaties.*

4. *The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.*

5. *Waiver of immunity is irrevocable.*

137. Draft Article 11 approaches the issue of waiver of immunity from two perspectives. Firstly, the recognition of the right of the State of the official to waive immunity and secondly, the procedural aspects pertaining to the form that such a waiver could take and the means by which it ought to be communicated. The waiver of immunity by the State of the official is a formal act whereby such State waives its right to claim immunity and thus removing this barrier for the exercise of criminal jurisdiction by the forum State. Such an act renders otiose any debate on the application of immunity and consequent limits or exceptions to such immunity. There are no temporal limits on the waiver of immunity and a State may waive immunity at any time. Waiver once invoked is irrevocable.

Article 12

Requests for Information

1. *The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.*

2. *The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.*

3. *Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.*

4. *The requested State shall consider any request for information in good faith.*

138. Draft Article 12 provides that both the forum State and the State of the official may request any information from the other. It is the last of the procedural provisions in Part IV of the Draft Articles. The article underscores the point that both the State of the official and the forum State would need necessary information to invoke criminal jurisdiction and invoke or waive immunity respectively and in this regard smooth flow of information between the two States is important.

C. Consideration of the Topic at the Seventy-Second Session (2021)

139. Members commended the Special Rapporteur for her in-depth work on the topic. In their collective view, the work of the Special Rapporteur provided a clear, well-researched, succinct and comprehensive treatment of the topic in relation to its link with international criminal jurisdiction, the possibility of adopting a dispute settlement clause to the Draft Articles and recommended good practices. Efforts to hold informal consultations with the

members before and during the session was appreciated as well for the aid provided to the Drafting Committee to progress in its work at the current session.

140. On Draft Article 18, Members agreed that the question of immunity before international criminal tribunals was outside the scope of the present topic. Several members supported the conclusion of the Special Rapporteur of adopting a 'without prejudice' clause that forms the crux of Article 18. However, some members opposed the inclusion of Draft Article 18 on the ground sufficient clarity on the link between the topic and international criminal tribunals was already there in Draft Article 1, paragraph 1 and dealing with the issue in Draft Article 18 was unnecessary. Additionally, some members also held the view that an overlap between national and international jurisdictions was not sufficient to create a nexus between the two. It was proposed to use the nomenclature 'internationalized criminal tribunals' instead of 'international criminal tribunals' so as to accommodate the functioning of hybrid tribunals.

141. As regards the placement of the text, some members proposed that it would be appropriate to include it as a new paragraph 3 of Draft Article 1. It was felt that doing so would better clarify the relation between Draft Article 1, paragraph 2 and Draft Article 18. For others, the issue of placement was not problematic as a joint reading of both provisions would be inevitable in any case.

142. On Draft Article 17, members agreed with the inclusion of a Draft Article relating to the settlement of disputes. It was pointed out that a dispute resolution clause could be viewed as a final procedural safeguard adding to Draft Articles 8 to 16. However, views disagreeing with the logic of having a dispute settlement clause were expressed as well. Members expressed the opinion that normally dispute settlement provisions are included in Draft Articles that were intended to become treaties. For others, the inclusion of dispute settlement provision was acceptable, as the possibility of the Special Rapporteur's efforts resulting in a treaty could not be ruled out at this stage. For a number of members, dispute settlement provisions adopted by the Commission in recent works like Draft Conclusion 21 on peremptory norms of general international law (jus cogens) and Draft Article 15 of the Draft Articles on prevention and punishment of crimes against humanity were appropriate models that could be adopted. Several members were of the view that the means of dispute settlement mentioned in Draft Article 17 focussed on negotiation, arbitration and judicial settlement without full reference to the means of peaceful settlement mentioned in Article 33 of the UN Charter.

143. The freedom to choose appropriate means of dispute settlement did not find express mention in Draft Article 17, a point that was noted by a number of members and inclusion of the same either in the text of the Draft Article of the commentaries was deemed essential. In this regard, it was suggested that paragraph 1 could be amended to add "through any other means of their own choosing" to negotiations and change "as soon as possible" to "as soon as practical". A number of members highlighted the need to clarify the consequences if a State chose not to accept another State's invitation to dispute settlement whereas others pointed to the need to include conciliation, mediation and the use of good offices to the list of dispute settlement mechanisms. Mixed opinions were expressed on the question of suspending of domestic proceedings during the pendency of the inter-State dispute settlement process. Some suggested the use of the phrase "procedural requirements" to "settlement of disputes" as the latter creates the potential of imposing binding obligations on States.

144. On recommended good practices, members generally agreed with the Special Rapporteur that there is no need to propose new proposals with respect to recommended good practices. While members supported the idea of reflecting on good practices in principle, its inclusion in the form of Draft Articles was deemed unnecessary. In addition, it was felt that such an effort could unduly delay the conclusion of the first reading of the topic by the Commission. Several members supported the effort of the Special Rapporteur to engage with the issue in the context of good practices that could be identified in the Draft Articles already with the Commission. Additionally, it was felt that appropriate inference on good practices could be drawn from the comments of States and, hence, no specific reference to good practices may be needed at all directly in the work of the Commission.

D. Future Work of the Commission

145. As regards the future outcome of the Commission's work on the topic, the Special Rapporteur was of the view that the development of the topic had taken the form of Draft Articles, the purpose of which was to offer States a proposal on the general aspects of the topic. Thus, the efforts of the Commission were directed at articulating specific dimensions of the topic from a general perspective aimed at facilitating the codification and progressive development of international law on the topic. There was no need to change the format of the current engagement as per the Special Rapporteur and she believed the same to be position of the Commission as well. Thus, the continuation of this topic in the form of developing Draft Articles was the best way forward as was currently being pursued. While the possibility of the Commission recommending the General Assembly to use the work of the Special Rapporteur as the basis of a new treaty on the subject could not be ruled out at this stage, the current development of the topic and its future possibilities were two separate issues. Thus, the form of the topic in its current stage and future development as articles is without prejudice to future action on this front by the Commission.

V. SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

A. Introduction

146. At its Sixty-Ninth Session (2017), the Commission decided to include the topic 'Succession of States in respect of State responsibility' in its long-term programme of work on the basis of the proposal contained in the report to the UNGA on the work of the Commission at the Sixty-Seventh Session (2015).[29] At its Sixty-Ninth Session (2017), the Commission decided to include the topic "succession of States in respect of State responsibility" in its programme of work and appointted Mr. Pavel Šturma as Special Rapporteur. The UNGA subsequently vide Resolution 72/116 of December 2017,[30] took note of the decision of the Commission to include the topic in its programme of work.

147. At the same Session, the Commission considered the first report of the Special Rapporteur[31] which dealt with the scope and outcome of the topic and provided an overview of the general provisions relating to the topic. Following the debate in the Commission, it was decided to refer Draft Articles 1 to 4, as proposed in the first report to the Drafting Committee. Subsequently, the Drafting Committee provisionally adopted Draft Articles 1 and 2 and reported the same to the Commission for information purposes only.[32]

148. At the previous Seventy-First Session (2019), the Commission had before it the third report of the Special Rapporteur on the topic[33] as well as the memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[34] Further, the Commission provisionally adopted Draft Articles 1, 2, and 5 and the commentaries thereto at its 3589th meeting on 24 July 2019 and 3507th meeting on 9 August 2019 respectively.[35]

149. On 31 July 2019, at its 3495th meeting based on the discussion of the Draft Articles proposed in the second report of the Special Rapporteur three Draft Articles (7, 8, and 9) were adopted by the Drafting Committee and presented to the Commission for information purposes.[36]

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[29] ILC, 'Report of the International Law Commission on the Work of its 68th Session' 274 (2 May- 10 June and 4 July- 12 August 2016) UN Doc A/71/10.
[30] UNGA, 'Report of the International Law Commission on the work of its Sixty-Ninth Session' (7 December 2017) UN Doc. A/RES/72/116.
[31] ILC, 'First Report on succession of States in respect of State Responsibility by Pavel Sturma Special Rapporteur' (31 May 2017) UN Doc. A/CN.4/708.
[32] ILC, 'Statement of the Chairman of the Drafting Commission, Aniruddha Rajput, on the Succession of States in respect of State responsibility' <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf&lang=E> accessed 23 August 2019.
[33] ILC, 'Third Report on succession of States in respect of State Responsibility by Pavel Sturma, Special Rapporteur' (6 April 2018) UN Doc. A/CN.4/731.
[34] ILC, 'Memorandum by the Secretariat, Information on treaties which may be of relevance to the future work of the Commission on the topic' (20 March 2019) UN Doc. A/CN.4/730.
[35] ILC, 'Summary record of the 3589th meeting' (24 July 2019) UN Doc. A/CN.4/SR.3589; ILC, 'Summary record of the 3507th meeting' (9 August 2019) UN Doc. A/CN.4/SR. 3507.
[36] ILC, 'Summary record of the 3495th meeting' UN Doc. A/CN.4/SR.3495 (31 July 2019)

150. At the present session, at its 3528th meeting on 21 May 2021 the Commission provisionally adopted Draft Articles 7, 8 and 9[37] and the commentaries to the aforesaid Draft Articles at its 3560th to 3562nd meeting on 4 and 5 August 2021.[38]

151. The Commission at the present session also had before it the fourth report of the Special Rapporteur on the topic. The Commission considered the fourth report at its 3531st to 3537th meeting from 5 to 12 July 2021 and its 3537th meeting on 12 July 2021 decided to refer Draft Articles 7 bis, 16, 17, 18, and 19 as proposed in the fourth report of the Special Rapporteur to the Drafting Committee taking of the views expressed by the members in the plenary into account. At its 3552nd meeting on 28 July 2018 the Drafting Committee provisionally adopted Draft Articles 10 bis, and 11 (proposed by the third report) and presented them in an interim report to the Commission for information purposes.[39]

152. The Seventy-Second Session (2021) discussed the topic and considered the fourth report on succession of States in respect of State responsibility by the Special Rapporteur. The report included an overview of the work on the topic that included a summary of the views expressed by the UN Member States in the Sixth Committee of the UNGA and explanation of the methodology adopted in the report (part one); impact of the succession of States on forms of responsibility particularly reparation, and the obligations of cessation, assurances and guarantees of non-repetition (part two), and the future programme of work (part three).

B. The Fourth Report of the Special Rapporteur

153. As mentioned above, the fourth report on the topic consists of three parts, dealing with various aspects of the topic. Part one focuses on general considerations and provides a detailed summary of the different views expressed by the States in the Sixth Committee of the General Assembly.

154. Part two of the report deals with the impact of succession on different form of responsibility particularly reparation that includes restitution, compensation and satisfaction. It also deals with the obligation of cessation and assurances and guarantees of non-repetition.

155. Part three of the report addresses the Commission's future programme of work, indicating that the next report would focus on the legal problems arising in situations where there are several successor States- the problem of plurality of injured States and responsible states. In this context the report stated that the future report could also address the issue of shared responsibility and inquire into the question if and to what extent the concept could guide the application of rules on State succession in respect of State responsibility. The Draft Articles and commentaries can be found in Annex I.

[37] ILC, 'Summary record of the 3495th meeting' UN Doc. A/CN.4/SR.3495 (21 May 2019)
[38] ILC, 'Summary record of the 3560th meeting' UN Doc. A/CN.4/SR.3460 (4 August 2019); ILC, 'Summary record of the 3461st meeting' UN Doc. A/CN.4/SR.3461 (4 August 2019); ILC, 'Summary record of the 3462nd meeting' UN Doc. A/CN.4/SR.3462 (5 August 2019)
[39] ILC, 'Report of the International Law Commission on the work of its Seventy-Second Session (26 April–4 June and 5 July–6 August 2021)' UN Doc. A/76/10 (advanced version) <https://legal.un.org/ilc/reports/2021/english/a_7 6_10.pdf> accessed 6 September 2021.

C. Consideration of the Topic at the Seventy-Second Session (2021)

156. The fourth report on the topic prepared by the Special Rapporteur was welcomed by the members of the Commission who expressed their appreciation for his work. Several members made general comments on the fourth report of the Special Rapporteur. Members expressed agreement with the general understanding of the Draft Articles that would be subsidiary to agreements between States. Some member expressed that the commentaries may provide for some examples of such agreements, and that model clauses could be drafted and used as a basis for negotiation. Regarding the general rule of non-succession, there were differing views in the Commission. While some members agreed with the Special Rapporteur that neither the rule automatic succession nor the clean slate rule were firmly established in practice, there were some members who considered either of the rules to have primacy.

157. Members also made points in relation to the methodology of the rules that while stating that the transfer of responsibility of States is different from the transfer of rights and obligations arising from responsibility, the report did not sufficiently explain the difference. Further it was questioned as to what extent the report drew parallels with the succession of States in respect of debts and inspired by the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. As regards the state practice referred to in the report, concerns were raised regarding its geographic diversity and caution was advised against reliance on practice concerning lump sum agreements and inconsistent, insufficient and context specific state practice. Further suggestions in the general context were made that the commentary describe which Draft Articles were supported by State practice and which constituted progressive development and that the question of State succession in respect of state responsibility relating to claims of individuals be addressed.

158. With respect to Draft Article 7 *bis*, several members considered it to be a useful complement to Draft Article 7. With respect to the wording it was suggested that the Draft Article could place reliance on the definition of composite acts as contained in Article 15 of the articles on responsibility of States for internationally wrongful acts. Some members considered it necessary to further examine matters related to shared responsibility when a predecessor State continued to exist, and an analysis was called for of how the obligation of cessation applied in the case of a composite act or a continuing act which occurred during the succession process. The view was expressed that there was a lack of clarity on the difference between composite acts and continuing acts. Attention was drawn to the work of the Institute of International Law regarding succession and continuing and composite acts. Some member made drafting suggestions to streamline the provision, as some of its proposed content was deemed to have already been covered by the previous work of the Commission on State responsibility.

159. Generally, in relation to Draft Articles 16, 17, 18 and 19 that dealt with the impact of State succession on the forms of responsibility it was stated that the acts were not forms of responsibility but rather legal consequences of internationally wrongful acts. Several members questioned whether Draft Articles 16 to 19 were necessary given that the situations were covered by the previous work of the Commission on State responsibility. A number of member also considered the use of terms ‘may request’ or ‘may claim’ as ambiguous and it should be clarified that the said Draft Articles 16 to 19 apply only to an extent that a successor State was bound to provide reparation for the acts of the predecessor State.

160. With respect to Draft Article 16, several drafting proposals were made addressing concerns that were expressed by the Member States. Regarding paragraph 1 of Draft Article 16, some members stressed the need to explain why the predecessor State should make restitution, as in some cases the predecessor State might not be responsible and the wrongful act might not be attributable to it. It was noted that the formulation of paragraph 1 could be clearer and less subjective and could benefit from full consistency with Article 35 of the articles on responsibility of States for internationally wrongful acts. With respect to paragraph 2 of Draft Article 16, while some members suggested that the situation envisaged therein could be solved by applying the principle of unjust enrichment, doubt was expressed regarding its acceptance in international law. Several members observed that, in the context of paragraph 2, the successor State did not have an obligation to make restitution in lieu of the predecessor State. The view was expressed that paragraph 2 seemed to endorse "automatic succession". Further, suggestions were to made protect the rights of the injured states by including a "without prejudice" clause to that effect.

161. In relation to Draft Article 17, the members agreed that compensation is the most common form of reparation in cases where responsibility for internationally wrongful acts was affected by the succession of States. While it was expressed that equity could play a role in the quantification of damage, paragraph 1 did not contain a reference to financially assessable damage, unlike Article 36 of the articles on responsibility of States for internationally wrongful acts. It was suggested that the situation foreseen in paragraph 2 could be resolved by applying the principle of prohibition of unjust enrichment. In particular, that principle was relevant in situations in which the predecessor State ceased to exist. The need to clarify the circumstances that justified transferring obligations to the successor State whenever the predecessor State continued to exist was emphasized. The view was expressed that the idea contained in paragraph 2 was already contained in Draft Article 7. It was suggested that the two conditions envisaged in paragraph 2 should be cumulative instead of alternative. The same suggestion was made concerning the two conditions in paragraph 4. Clarification was requested as to whether the agreement referred to in paragraph 3 was opposable to injured States.

162. In relation to the obligation of satisfaction, members were generally concerned about whether the investigation and prosecution of international crimes were considered as satisfaction. It was also stated as that it was unclear that who was entitled to invoke responsibility for breaches of *jus cogens norms* and *ergaomnes* obligations and whether satisfaction would be the only form of reparation relevant therein.

163. In relation to Draft Article 19, calls were made by members to revise its provisions to make it clearer and more precise. It was expressed that there was a need to define continuing harm and that instances were needed to fully illustrate what circumstances were covered by paragraph 2.

D. Future Work of the Commission

163. As regards the future work of the Commission on the topic, the Special Rapporteur agreed with those members who stated that the Commission should decide at a later stage what outcome or final form the Draft Articles would take but personally was not in favour of changing its form. As regards the future report on the topic, it would focus on the legal

problems arising in situations where there are several successor States- the problem of plurality of injured States and responsible states. In this context the report stated that the future report could also address the issue of shared responsibility and inquire into the question if and to what extent the concept could guide the application of rules on State succession in respect of State responsibility. The Special Rapporteur also stated that owing to the current COVID-19 pandemic and the modified working arrangements for the Commission, the Commission might not be in a position to conclude its work on first reading by the end of the quinquennium.

VI. GENERAL PRINCIPLES OF LAW

A. Introduction

164. On the basis of the recommendation of the Working Group on the long-term programme of work, the Commission in 2017,[40] at its Seventieth session in 2018, decided to include the topic "General Principles of Law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.

165. During the Seventy-First Session in 2019, the Commission had before it the first report of the Special Rapporteur.[41] The report was considered at its 3488th to 3494th meetings, from 23 to 30 July 2019. At its 3494th meeting, on 30 July 2019, the Commission decided to refer Draft Conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary. At its 3503rd meeting, on 7 August 2019, the Chair of the Drafting Committee presented an interim oral report of the Drafting Committee on Draft Conclusion 1, provisionally adopted by the Drafting Committee.

166. At the present Seventy-Second Session in 2021, the Commission had before it the Special Rapporteur's second report on the identification of general principles of law and their relationship with other sources of international law.[42] The Commission considered the report at its 3536th, 3538th, 3539th, and 3541st to 3546th meetings, from 12 to 21 July 2021.

167. At its 3546th meeting, on 21 July 2021, the Commission decided to refer Draft Conclusions 4 to 9, as contained in the Special Rapporteur's second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[43]

168. At its 3557th meeting, on 3 August 2021, the Commission considered the report of the Drafting Committee on Draft Conclusions 1 (in French and Spanish), 2, 4 and 5, provisionally adopted by the Committee at the present session.[44] At the same meeting, the Commission provisionally adopted Draft Conclusions 1, 2 and 4, and took note of Draft Conclusion 5. At its 3561st and 3563rd meetings, on 5 and 6 August 2021, the Commission adopted the commentaries to Draft Conclusions 1, 2 and 4 provisionally adopted at the present session.[45]

B. The Second Report of the Special Rapporteur

169. In the second report, the Special Rapporteur made certain general observations about the topic reflecting upon the discussion in the Commission and the Sixth Committee and focused on the methodology for identifying general principles of law.

[40] A/72/10.
[41] A/CN.4/732.
[42] ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc. A/CN.4/741
[43] ILC, 'Summary Record of the 3546th meeting' UN Doc. A/CN.4/SR.3546 (21 July 2021)
[44] ILC, 'Summary Record of the 3557th meeting' UN Doc. A/CN.4/SR.3557 (3 August 2021)
[45] ILC, Summary Record of the 3564rd meeting' UN Doc. A/CN.4/SR.3563 (6 August 2021)

170. In Part One, the Special Rapporteur made the following general observations. Firstly, regarding the methodology of the work, the Special Rapporteur observed that the focus of the work of the Commission should remain on clarifying in a practical manner how to demonstrate the existence of a general principle of law, at its content at a specific point of time. Secondly, he observed that the recognition is an essential element for the existence of a general principle of law. Thirdly, the term 'civilized nations' employed in Article 38, paragraph 1(c) is anachronistic and various proposals were put forward by the Commission members as alternatives. The one preferred by the Special Rapporteur was 'community of nations.' Finally, it was recalled that the first report distinguished between general principles developed in national legal system and those that were formed within the international legal system.[46]

171. While recognizing that the members of the Commission unanimously supported the category of general principles of law derived from national legal systems and many Members supported the category of general principles of law formed within the international legal system; the Special Rapporteur devoted the report to study the two in different parts namely part two and three to study them in detail respectively.

172. Part Two addressed the identification of general principles of law derived from national legal systems. Chapter I briefly set forth the basic approach to the issue, namely that to identify general principles of law derived from national legal systems, a two-step analysis was required. Chapters II and III dealt with each of those steps in detail. Chapter IV addressed the distinction between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law.[47]

173. Part Three of the report concerned the identification of general principles of law formed within the international legal system. Chapter I recalled the main issues raised during the 2019 debate within the Commission at its Seventy-First Session and the Sixth Committee at the Seventy-Fourth Session of the General Assembly, and set forth the Special Rapporteur's general approach in that regard. Chapter II addressed the methodology to determine the existence of general principles of law formed within the international legal system. Chapter III dealt with the distinction between the methodology for identification of customary international law and the one for identification of general principles of law formed within the international legal system.[48]

174. In Part Four of the report, the Special Rapporteur followed the approach taken by the Commission in its work on the identification of customary international law while dealing with the subsidiary sources of international law mentioned in Article 38 (1)(d) of the Statute of the ICJ. In his view there was no difference in the manner in which subsidiary sources applied to the three other sources of international law mentioned in Article 38 of the Statute of the ICJ.

[46] ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' 4 (9 April 2020) UN Doc. A/CN.4/741

[47] ILC, 'Report of the International Law Commission on the work of its Seventy-Second Session' 172 (26 April–4 June and 5 July–6 August 2021) UN Doc. A/76/10 (advanced version) <https://legal.un.org/ilc/reports/2021/english/a_7 6_10.pdf> accessed 6 September 2021

[48] Ibid 173

175. In Part Five of the second report, the Special Rapporteur proposed the future programme of the work on the topic and stated that he intended to examine issues that may arise in relation to the second report during the debate at the present session[49] and in the Sixth Committee of the UNGA.[50] Further, he proposed that the third report would focus on the functions of general principles of law and their relationship with other sources of international law.[51] The Draft Conclusions can be found in Annex II.

C. Consideration of the Topic at the Seventy-Second Session (2021)

176. The Commission had before it the second report of the Special Rapporteur, which was welcomed by several members who commended the Special Rapporteur's survey of relevant State practice, jurisprudence and teachings. Some members noted the importance of the topic and recognized the need for a careful approach in relation to its discussion on the sources of international law and consideration of the opinion of States expressed during litigations. Caution was expressed as to the imprecise use of terminology and it was noted that several distinct terms such as 'general international law', 'general principles of international law' and fundamental principles of international law were often employed interchangeably and in practice and teachings.

177. There was general support for the approach taken by the Special Rapporteur to treat Article 38 (1)(c) of the Statute of the ICJ as the starting point of the work of the Commission, and members unanimously agreed with the points raised in the report regarding the analysis of the drafting of the provision and the anachronism of 'civilized nations' contained therein.

178. In relation to Draft Article 4 to 6 proposed in the second report, the members of the Commission were in general agreement with the two-step approach followed by the Special Rapporteur namely that of identification of general principle in principal domestic legal systems and its transposition into the international legal system.

179. Regarding the first step addressed in Draft Article 5, the members of the Commission generally agreed with the comparative approach advocated in the report which must be wide and representative of as many legal system and families as possible, although some members did express that the requirement may be too strict. Several members also expressed support to the inclusion of the practice of International Organizations in cases where they issued rules binding on their Member States directly applicable in their domestic legal systems.

180. The second step of the analysis dealing with the transposition of the general principles of law into the international legal system as addressed in Draft Conclusion 6 was met with concurrence with the members in agreement with the two-step approach. Some members disagreed with the two-step approach and stated that the same could not be borne out of the language of article 38 (1)(c) of the Statute of the ICJ as a necessary condition for recognition. With respect to the compatibility of the general principles with the fundamental principles of

[49] Ibid 174
[50] ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' 56 (9 April 2020) UN Doc. A/CN.4/741
[51] Ibid

international law, it was suggested that more specific and precise rules be formulated in this regard.

181. The Commission could not agree on the existence of general principles of law within the international legal system. While some members remarked that the existence of general principles of law in the international legal system was sign of its maturity and were relied on to not rule a claim *non liquet*, others refuted the claim stating that same were being conflated with principles of customary international law. A view was expressed that a perusal of the case-law and traveaux preparatoires of the Statute of the ICJ bore out that only general principles that were developed *in foro domestico* were included in the Statute.

182. In relation to Draft Conclusions 8 and 9 while several members agreed with the view of the Special Rapporteur to maintain consistency with the work of the Commission on the identification of customary international law in relation to the subsidiary sources of international law others maintained that domestic court decisions were not subsidiary means but direct means of identifying general principles of law.

D. Present Status of the Topic and Future Work

183. Members of the Commission generally supported the proposal by the Special Rapporteur to address the relationship between general principles and other sources of international law in the third report, some members expressed the view that it would be difficult to address the matter without consideration of how general principles of law emerged, changed and ceased to exist.

184. While several proposals were expressed by the members of the Commission as to the future work of the Commission the Special Rapporteur expressed his intention to address in the third report the question of the functions of general principles of law and their relationship with norms from other sources of international law. He also noted that the upcoming report could have an impact on the methodology followed for identifying general principles of law. To conclude he stated he would address the issues raised during the debate in the Commission and take into account the views expressed by the members.

VII. SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

A. Introduction

185. At its Seventy-First Session, in 2019 (3467th meeting on 21 May 2019), the Commission decided to include the topic "Sea-level rise in international law" in its programme of work, based on the recommendation of the Working Group on the long-term programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by: Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. The Commission, at its 3480th meeting on 15 July 2019, further received and took note of a joint oral report of the Co-Chairs of the Study Group on its consideration of an informal paper on the organization of its work containing a road map for 2019 to 2021.[52]

186. With regard to the programme of work, the Study Group was expected to work on the three subtopics identified in the syllabus prepared in 2018,[53] namely: issues related to the law of the sea, under the co-chairpersonship of Mr. Bogdan Aurescu and Ms. Nilüfer Oral; and issues related to statehood, as well as issues related to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria.

187. Regarding the methods of work, it was anticipated that approximately five meetings of the Study Group would take place at each session. It was agreed that, prior to each session, the Co-Chairs would prepare an issues paper, which would serve as the basis for the discussion and for the annual contribution of the members of the Study Group. These would also serve as the basis for subsequent reports of the Study Group on each subtopic. Recommendations would be made at a later stage regarding the format of the outcome of the work of the Study Group. It was also agreed that, at the end of each session of the Commission, the work of the Study Group would be reflected in a report, taking due account of the issues paper prepared by the Co-Chairs and the related contribution papers by members, while summarizing the discussion of the Study Group.

188. Owing to the outbreak of the COVID-19 pandemic, and the ensuing postponement of the Seventy-Second Session of the Commission, the Co-Chairs invited the Commission's members to transmit written comments on the first issues paper on the topic,[54] which was issued together with a preliminary bibliography,[55] directly to them.[56]

189. During its Seventy-Second Session, the Commission reconstituted the Study Group on the topic, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Bogdan Aurescu and Ms. Nilüfer Oral. The Study Group had before it the first issues paper

[52] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.
[53] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), Annex B.
[54] A/CN.4/740 and Corr. 1
[55] A/CN.4/740/Add.1
[56] Information was submitted by, *inter alia,* Singapore.

prepared by the Co-Chairs. The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021. The purpose of the initial four meetings held during the first part of the session was to allow for a substantive exchange, in the manner of a plenary, on the first issues paper and on any relevant matters that members might wish to address. A summary of that exchange, in the form of an interim report, then served as a basis for discussion at the meetings of the Study Group scheduled for the second part of the session. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[57]

B. The First Issues Paper by the Co-Chairs of the Study Group

190. The first issues paper is divided into an introduction and four parts.

191. The introduction addresses certain general matters: the consideration of the topic by the Commission; the positions of the Member States during the debates in the Sixth Committee in the previous years; outreach undertaken by the Co-Chairs of the Study Group; and scientific findings and prospects of sea-level rise, and the relationship thereof to the topic. It also addresses the previous references to the topic in the works of the Commission and the consideration of the topic by the International Law Association.

192. It would be pertinent to note that during the debate in the Sixth Committee at the Seventy-Fourth Session of the General Assembly, in 2019, 57 delegations – a larger number than in the previous year – referred to the present topic in their interventions.[58] Of that number, 49 delegations (some of them making statements on behalf of regional groups or organizations) expressed support for the decision taken by the Commission to include the topic in its current programme of work. 14 AALCO Member States feature in that list.[59]

193. One AALCO Member State delegation noted the decision,[60] and another delegation continued to express opposition, but with nuances compared to the position expressed in 2018.[61] Amongst the AALCO Member State delegations, one had expressed appreciation for the first issues paper,[62] and two others had referred to it.[63]

194. Part One of the issues paper presents the scope and outcome of the topic, the issues to be considered by the Commission, the final outcome to be reached, as well as the methodology to be used by the Study Group.

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[57] A/CN.4/SR.3550

[58] A/CN.4/740, para 19.

[59] Bangladesh (A/C.6/74/SR.31, para. 49), Egypt (A/C.6/74/SR.30, para. 30), India (A/C.6/74/SR.29, para. 26), Indonesia (A/C.6/74/SR.31, para. 29), Japan (A/C.6/74/SR.26, para. 41, and A/C.6/74/SR.30, para. 34), Lebanon (A/C.6/74/SR.30, para. 103), Malaysia (ibid., para. 83), Philippines (A/C.6/74/SR.27, para. 52, and A/C.6/74/SR. 31, para. 9), Republic of Korea (A/C.6/74/SR.30, para. 67), Sierra Leone (A/C.6/74/SR.29, paras. 70–71), Singapore (A/C.6/74/SR.28, para. 61), Thailand (A/C.6/74/SR.24, para. 109, and A/C.6/74/SR.29, paras. 99–100), Turkey (A/C.6/74/SR.29, para. 151), Viet Nam (A/C.6/74/SR.30, para. 40).

[60] People's Republic of China, which also expressed "hope that the Commission, with a full recognition of the complexity of this topic, will thoroughly analyse various State practice across the spectrum as well as related legal questions in order to produce objective, balanced and valuable outcomes" (A/C.6/74/SR.27, paras. 126–127)

[61] Cyprus (A/C.6/74/SR.30, para. 102)

[62] Turkey

[63] Republic of Korea and Sierra Leone

195. Part Two deals with the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces measured from the baselines, on maritime delimitations, as well as on the issue of whether sea-level rise constituted a fundamental change of circumstances, in accordance with Article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties. This part also deals with the legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals, as well as on the rights of third States and their nationals in maritime spaces in which boundaries or baselines have been established. It also includes the possible legal effects of sea-level rise on islands in so far as their role in the construction of baselines and in maritime delimitations is concerned.

196. Part Three covers possible legal effects of sea-level rise on the status of islands, including rocks, and on the maritime entitlements of a coastal State with fringing islands. It also deals with the legal status of artificial islands, reclamation or island fortification activities as a response/adaptive measures to sea-level rise. This part deals with, *inter alia*, two central issues, *viz.*, the potential legal consequences of the landward shift of a newly drawn baseline due to sea-level rise, and the impact of sea-level rise on the legal status of islands, rocks and low-tide elevations. An overview has been adduced of the possible consequences on the rights and jurisdiction of the coastal State, as well as third party States, in established maritime zones where maritime zones shift because part of the internal waters become territorial sea, part of the territorial sea becomes contiguous zone and/or exclusive economic zone, and part of the exclusive economic zone becomes high seas. The case of an archipelagic State where, due to the inundation of small islands or drying reefs, the existing archipelagic baselines could be impacted, potentially resulting in the loss of archipelagic baseline status, has been highlighted.

197. The status of islands and rocks under Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS or Convention) and the potential significant consequences of being reclassified as a rock due to sea-level rise, possibly becoming a rock that "cannot sustain human habitation or economic life of their own" under Article 121, paragraph 3, of the Convention has been discussed. Part Four presents observations and the future programme of work.

C. Consideration of the Topic at the Seventy-Second Session (2021)

198. The Study Group had before it the first issues paper concerning issues relating to the law of the sea, as well as informal contribution papers and comments submitted by members. The Study Group held a "plenary-like" debate on the various matters discussed in the first issues paper over five meetings, during the first part of the session. The Study Group subsequently undertook an interactive discussion in three further meetings held during the second part of the session, on the basis of, *inter alia*, a series of guiding questions prepared by the Co-Chairs. Thereafter, the Co-Chairs reported to the plenary on the work of the Study Group.

199. The first issues paper was introduced by the Co-Chairs of the Study Group (Mr. Aurescu and Ms. Oral) at the first meeting of the Study Group with a summary of key points and preliminary observations. The analyses undertaken in the paper were highlighted, and the quantum of engagement of the international community with the topic was pointed out.

200. The Co-Chair Mr. Cissé gave a presentation on the practice of African States regarding maritime delimitation. Since maritime delimitation was a recent process in Africa, with high stakes for coastal States, the legislative, constitutional and conventional practice of 38 African coastal States had been examined, as well as relevant judicial decisions rendered by international courts, in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits. The outcome of the survey was that, while there was some African legislative and constitutional practice on baselines and maritime borders, such practice was diverse. Nonetheless, the Co-Chair furnished several reasons supporting the standpoint that the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries.[64]

201. During the first part of the Session, general comments on the topic underlined the importance of the topic and the legitimacy of the concerns expressed by those States affected by sea-level rise, together with the need to approach the topic in full appreciation of its urgency. It was acknowledged that those States that had made statements on the subject had been largely supportive of the inclusion of the topic in the Commission's programme of work.

202. The lack of State practice, especially from certain regions of the world, was highlighted. Questions were also posed as to whether the statements by States and their submissions on State practice should be considered as giving rise to *emerging* rules, or could be considered as subsequent practice for purposes of interpretation of the relevant provisions of the UNCLOS. Some members questioned whether the statements by States in response to the first issues paper were adequate as evidence of State practice in favour of fixed baselines. In light of the insufficient availability of State practice, the view was also expressed that such statements by States in the Sixth Committee were important and relevant. It was further suggested that, in addition to requesting information from States, the Commission should conduct research, including reviewing the legislation of all States and the maritime zone notifications circulated by the Secretary-General under the UNCLOS.

203. Some members highlighted the work of the International Law Association's Committee on Baselines under the International Law of the Sea and Committee on International Law and Sea Level Rise, suggesting that the Study Group add more detail on their work and use it as a basis for analysis. In response to the diverse views expressed by members as to the existence of ambulatory or fixed or permanent baselines, a suggestion was adduced that the Commission ought to undertake additional research into whether a principle of stability existed under general international law, including a study of the law of river delimitation. It was also deemed important to closely consider the judgment rendered by the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case[65] in which the Court used a moving delimitation line for maritime delimitation.

[64] Report of the ILC, 72nd Session, A/76/10 (advance unofficial version), paras 259-261.

[65] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139

204. Some members expressed the view that, while the UNCLOS was a key source for its States parties, other sources should be analysed further. Specific questions were raised by some members concerning the relationship between the proposal of permanency of the continental shelf and the exclusive economic zone in relation to the reference, in the first issues paper, to a discrepancy that could emerge between the permanent outer limits of the continental shelf and possible ambulatory outer limits of the exclusive economic zone.

205. Several members commented on Article 62 of the Vienna Convention on the Law of Treaties and the question as to whether sea-level rise would constitute an unforeseen change of circumstances; and some members called for caution in addressing the topic of islands under Article 121 of the UNCLOS.

206. Suggestions were rendered by members on a wide array of issues, including the title of the topic, structure of the first issues paper, and mandate and methodological approach of the Study Group.

207. In the first meeting of the Study Group during the second part of the session, held on 6 July 2021, the Co-Chairs responded to comments made by members of the Study Group during the first part, and introduced a draft interim report. As a follow up to the debate held in the first part of the session, the Study Group elected to have a substantive discussion on the topic on the basis of questions prepared by the Co-Chairs. As an outcome of this interactive discussion, the Study Group identified the following issues as areas for further in-depth analysis on which it would focus on a priority basis in the near future. These studies would be undertaken on a voluntary basis by members of the Study Group:

a) *Sources of law*, in addition to the UNCLOS, as well as the regulations of relevant international organizations such as the International Hydrographic Organization;
b) The Study Group would examine various *principles and rules of international law* in more detail, such as the principle that the land dominates the sea, the principle of the immutability of borders, the principle of *uti possidetis juris*, the principle of *rebus sic stantibus*, etc.;
c) The Study Group would aim to extend its study of *State practice and opinio juris* to regions for which scarce, if any, information had been made available, including Asia, Europe and Latin America and continuing the work on Africa;
d) The Study Group would also consider suggestions that take into account the operational considerations and circumstances as well as practices of States as far as the updating of *navigational charts*.

D. Present Status of the Topic and Future Work

208. It has been proposed that at the Seventy-Third Session in 2022,[66] the Study Group will focus on the subtopics of sea-level rise in relation to statehood and the protection of persons affected by sea-level rise. The Study Group would seek to finalize a substantive report on the topic, in the first two years of the following quinquennium, by consolidating the results of the work undertaken during the Seventy-Second and Seventy-Third Sessions of the Commission.

[66]Report of the ILC, 72nd Session, A/76/10 (advance unofficial version), paras 26-28.

209. In this connection, the Commission is slated to receive, by 31 December 2021, any information that States and relevant international organizations could provide on their practice and other relevant information regarding sea-level rise in relation to international law.

210. As regards the subtopic of sea-level rise in relation to the law of the sea, the Commission, in its Report, has called for comments from States, by 30 June 2022, in addition to the specific issues on which comments were requested in chapter III of the report of its Seventy-First Session in 2019. If the Member States deem fit, AALCO could serve as a platform to collect and transmit such practice and information to the Commission on behalf of the Member States.

211. Pursuant to such calls from the Commission to provide it with examples of State practice and information on the afore-noted sub-topics, as well as any other examples of State practice and information relevant to the topic, from all regions and sub-regions of the world, it would be prudent for AALCO Member States, particularly the ones who are yet to voice their viewpoints on the topic, to seize the opportunity.

Annex- I

Draft Articles based on the fourth report on the succession of States in respect of State responsibility by Mr. Pavel Šturma.

Text of the Draft Articles proposed in the fourth report

Article 7*bis*
Composite acts

1. When an internationally wrongful act is of a composite character, the international responsibility of a predecessor State and/or that of a successor State is engaged if a series of actions or omissions defined in aggregate as wrongful occurs. If the action or omission, taken with the other action or omission, is sufficient to constitute the wrongful act of either the predecessor State or the successor State, such State is responsible only for the consequences of its own act.

2. However, if an internationally wrongful act occurs only after the last action or omission by the successor State, the international responsibility of this State extends over the entire period starting with the first of the actions or omissions and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

3. Provisions of paragraphs 1 and 2 are without prejudice for any responsibility incurred by the predecessor State or the successor State on the basis of a single act if and to the extent that it constitutes a breach of any international obligation in force for that State.

Article 16
Restitution

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make restitution, provided and to the extent that restitution is not materially impossible or does not involve a burden out of all proportion.

2. If, due to the nature of restitution, only a successor State or one of the successor States is in a position to make such restitution or if a restitution is not possible without participation of a successor State, a State injured by an internationally wrongful act of the predecessor State may request such restitution or participation from that successor State.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

4. A successor State may request restitution from a State which committed an internationally wrongful act against the predecessor State if the injury caused by this act continues to affect the territory or persons which, after the date of succession of States, are under the jurisdiction of the successor State.

Article 17
Compensation

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make compensation for the damage caused by its internationally wrongful act, insofar as such damage is not made good by restitution.

2. In particular circumstances, a State injured by such internationally wrongful act may request compensation from a successor State or one of the successor States, provided that the predecessor State ceased to exist or, after the date of succession of States, that successor State continued to benefit from such act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

4. A successor State may request compensation from a State which committed an internationally wrongful act against the predecessor State, provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to bear injurious consequences of such internationally wrongful act.

Article 18
Satisfaction

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury is not made good by restitution or compensation.

2. Paragraph 1 is without prejudice to an appropriate satisfaction, in particular prosecution of crimes under international law, that any successor State may claim or may provide.

Article 19
Assurances and guarantees of non-repetition

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States.

2. Provided that the obligation breached by an internationally wrongful act remained in force after the date of succession of States between a successor State and another State concerned, and if circumstances so require:

(a) a State injured by an internationally wrongful act of the predecessor State may request appropriate assurances and guarantees of non-repetition from a successor State; and

(b) a successor State of a State injured by an internationally wrongful act of another State may request appropriate assurances and guarantees of non-repetition from this State.

2.2. Text of the Draft Articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session.

Article 7
Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Commentary

(1) Draft Article 7 seeks to address the question of succession of State responsibility in respect of those acts having a continuing character that are commenced by a predecessor State before the date of succession and that continue thereafter by the successor State. In such circumstances, identifying and defining the scope of State responsibility in respect of predecessor and successor States was considered essential.

(2) Draft Article 7, which should be understood within the context of the articles on responsibility of States for internationally wrongful acts,[67] addresses acts having a continuing character.[68]

(3) The first sentence of Draft Article 7 sets forth the basic rule that, in the case of an internationally wrongful act of a continuing character that would continue to occur after a succession of States, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States.[69] This means that the successor State is held responsible only where an internationally wrongful act can be attributed to that State, and not to the predecessor State. This conclusion is in conformity with the articles on responsibility of States for internationally wrongful acts, wherein article 14, paragraph 2, concluded that "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."[70]

(4) The first sentence being the rule in the case of succession, the second sentence of Draft Article 7 addresses exceptional circumstances. It states that the international responsibility of the successor State also extends to the act of the predecessor States only if and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own.

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[67] General Assembly resolution 56/83 of 12 December 2001, annex. The Draft Articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[68] Article 14, ibid., at p. 59; see also para. (5) of the commentary to article 14 of the articles on State responsibility, ibid., at p. 60.

[69] *Affaire des biensbritanniques au Marocespagnol (EspagnecontreRoyaume-Uni)* [*Spanish Zone in Morocco Claims*] (1925), UNRIAA, vol. II, pp. 615–742, at pp. 648–649 (available in French only).

[70] See para. (1) of the commentary to article 11 of the articles on State responsibility, Yearbook ... 2001, vol. II (Part Two) and corrigendum, para. 77, at p. 52.

This conclusion derives from and builds upon the articles on responsibility of States for internationally wrongful acts, specifically article 11, which states that "[c]onduct which is not attributable to a State ... shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."[71] For example, in the Lighthouses arbitration, a tribunal held Greece liable for breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been endorsed and eventually continued by Greece, even after the acquisition of territorial sovereignty over the island. Even if the claim was originally based on a breach of a concession agreement, if the successor State, faced with a continuing breach on its territory, endorses and continues that situation, the inference may be drawn that it has assumed responsibility for it.[72]

Article 8
Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Commentary

(1) The purpose of this Draft Article is to address the specific situation of the conduct of an insurrectional or other movement.

(2) Paragraph 1 reaffirms the rule of attribution of the conduct of an insurrectional or other movement which prevails in establishing a new State, as contained in article 10, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.[73] The text of paragraph 1 of Draft Article 8 closely follows the text of article 10, paragraph 2, of those articles, except that it refers to a "predecessor" State instead of a "pre-existing" State.

(3) Paragraph 2 is a without prejudice clause, to account for a circumstance where a State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but failed to do so. This paragraph is modelled closely on article 10, paragraph 3, of the articles on responsibility of States for internationally wrongful acts, but with reference to a "predecessor State" in order to contextualize the provision in terms of succession of States. The reference to "the rules on responsibility of States for internationally wrongful acts" is to be understood as a reference to the rules of international law regarding

[71] See para. (1) of the commentary to article 11 of the articles on State responsibility, Yearbook ... 2001, vol. II (Part Two) and corrigendum, para. 77, at p. 52.
[72] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (1956), p. 155, at pp. 197–198; see also para. (3) of the commentary to article 11 of the articles on State responsibility, Yearbook ... 2001, vol. II (Part Two) and corrigendum, para. 77, at p. 52.
[73] *Ibid*., at pp. 50–51; A/CN.4/719 (second report of the Special Rapporteur), paras. 107–121.

attribution which are comprised generally in articles 4 to 11 of the articles on responsibility of State for internationally wrongful acts.[74]

Article 9
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

Commentary

(1) Draft Article 9 addresses the retention of obligations by the predecessor State arising from the commission of an internationally wrongful act by the predecessor State, when the predecessor State continues to exist after the date of the succession of States, as well as the possibility of an agreement between the successor State and the injured State. Such succession could occur in cases of separation of a part or parts of a State, establishment of a newly independent State, or transfer of part of the territory of a State.

(2) Paragraph 1 establishes the rule that, when an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist in the three specific cases listed thereunder, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession. As such, the entitlement of the injured State to invoke the responsibility of a

[74] See para. (1) of the commentary to chapter II of the articles on State responsibility, Yearbook ... 2001, vol. II (Part Two) and corrigendum, para. 77, at p. 38.

predecessor State is not affected after the date of a succession of States.[75] This is reflected in the choice of the terms "continues to" and "even after the date of succession".

(3) The text draws upon the articles on responsibility of States for internationally wrongful acts by using the formulation "invoke the responsibility". This formulation encompasses all rules on the responsibility of States for internationally wrongful acts. Further, the predecessor State may continue to rely on circumstances precluding the wrongfulness of internationally wrongful acts.[76]

(4) Paragraph 2 addresses exceptional situations where there is a direct link between the act or its consequences and the territory of the successor State or States. In such circumstances, the predecessor State may not be in a position to address the injury alone and cooperation with the successor State may be necessary. Paragraph 2 does not entail an automatic transfer of obligations to the successor State, but merely specifies that an agreement may be reached by the States depending on the factual situation and the form of reparation that is most appropriate.[77]

(5) The phrase "in particular circumstances" covers diverse situations where a successor State may be relevant for addressing the injury. For example, the successor State may be relevant in a situation where restitution of property is appropriate in order to address responsibility or there is a link between the territory or an organ of the successor State and the internationally wrongful act.416 Additionally, the successor State may be relevant for addressing the injury in a circumstance where the successor State would be unjustly enriched as a result of an internationally wrongful act committed before the date of succession. This may include, for example, cases where an expropriated factory belonging to foreign investors or an object of art belonging to another State is retained on the territory of the successor State.

(6) Paragraph 3 deals with the concept of shared responsibility and apportionment of responsibility between the predecessor State and the successor State by way of agreement. It is drafted without prejudice to the contents of paragraphs 1 and 2, and reaffirms the rule contained in Draft Article 1, paragraph 2, according to which "[t]he present Draft Articles apply in the absence of any different solution agreed upon by the States concerned". Paragraph 3 does not limit itself to questions of financial apportionment in case of compensation, recognizing that the form of reparation necessary under different factual circumstances may be distinct, leaving it open for the predecessor and the successor State to discuss the form of reparation in the agreement.

[75]See W. Czapliński, "La continuité, l'identité et la succession d'États – évaluation de casrécents", *Revue belge de droit international*, vol. 26 (1993), pp. 375–392, at p. 388; M. Koskenniemi, Report of the Director of the English-speaking Section of the Centre, *State Succession: Codification Tested against the Facts*, pp. 71 and 119 *ff*.; P. Pazartzis, *La succession d'États aux traitésmultilatéraux : à la lumière des mutations territorialesrécentes*(Paris, Pedone, 2002), pp. 55–56.

[76]See articles 20 to 27 of the articles on State responsibility and commentaries thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 72–86. Cf. also Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), "State succession in matters of international responsibility", Fourteenth Commission, Rapporteur: Marcelo Kohen, resolution, p. 711, at p. 714.

[77]A/CN.4/719 (second report of the Special Rapporteur), paras. 98–103.

Annex-II

The second report on the topic "General principles of Law" proposed the following Draft Conclusions.

Draft Conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the principal legal systems of the world; and

(b) its transposition to the international legal system.

Draft Conclusion 5
Determination of the existence of a principle common to the principal legal systems of the world

1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including different legal families and regions of the world.

3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Draft Conclusion 6
Ascertainment of transposition to the international legal system

A principle common to the principal legal systems of the world is transposed to the international legal system if:

(a) it is compatible with fundamental principles of international law; and

(b) the conditions exist for its adequate application in the international legal system.

Draft Conclusion 7
Identification of general principles of law formed within the international legal system

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

(a) a principle is widely recognized in treaties and other international instruments;

(b) a principle underlies general rules of conventional or customary international law; or

(c) a principle is inherent in the basic features and fundamental requirements of the international legal system.

Draft Conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.