

## **Report on the 72nd session (2021) of the International Law Commission**

61st meeting - Strasbourg, 23-24 September 2021

**by Mr. Mahmoud Hmoud  
Chair of the International Law Commission**

**23 September 2021**

Mr. Chair,

Members of the Committee of Legal Advisers on Public International Law,

Ladies and Gentlemen,

It is an honour and a pleasure for me to address the 61st meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) in my capacity as the Chair of the International Law Commission. I am grateful to the CAHDI for the opportunity to present the work of the Commission at its seventy-second session, which took place from 26 April to 4 June and from 5 July to 6 August this year.

Being here with you today, I am grateful to continue the tradition of this dialogue between our two entities and to present to you the work of International Law Commission over this past year. This is especially so since, owing to the coronavirus disease (COVID-19) pandemic, the Commission was regrettably unable to have its traditional exchange of views with the Chair of the CAHDI during its session. It is my hope that the circumstances will allow this tradition to resume at the seventy-third session of the Commission next year.

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The 72nd session of the International Law Commission was held, for the first time, in a hybrid format due to the COVID-19 pandemic. The hybrid format enabled members to participate either in person at the Palais des Nations or online through a platform with remote simultaneous interpretation into all official languages of the United Nations. The session of the Commission would have been impossible without the presence of members and the staff of the Secretariat in Geneva. Their presence allowed the Commission to hold its function effectively despite the difficulties encountered. The session was held in accordance with the health regulations and

COVID-19 mitigation measures in place at the United Nations Office in Geneva. This meant, for example, that the staff of the Secretariat were not permitted to distribute any paper copies of documentation. Documents required for participation in the meetings of the Commission were made available online through a dedicated drive set up by the Secretariat and through other electronic means.

The Commission acknowledges the extraordinary efforts made to ensure the smooth conduct of the Commission's deliberations, which enabled the Commission to complete its session. In particular, the Commission also expresses its appreciation to the Government of Switzerland, the host of the Commission, for taking the necessary measures that allowed the convening of the hybrid session and facilitated travel to Geneva for members who attended the session in person and the staff of the Secretariat.

However, the Commission wishes to note that the normal work of the Commission was disrupted significantly despite every effort and measures taken to ameliorate the issues. A variety of challenges were encountered, particularly during the first segment, including: (a) reduced hours of operation, especially for decision-making and negotiation, because of members being in different time zones; under the special conditions for the organization of the session, interpretation was assured for shorter periods than the usual three hours, thereby allowing the Commission to meet for fewer hours a day than the usual six; and, moreover, there was insufficient flexibility, as the meeting time not spent in plenary could not, under the circumstances, be used by the Drafting Committee, as would ordinarily have been the case, even though the members of the Commission did make use of that time for informal consultations; (b) members of the Commission having to work in different time zones meant a lot of adjustments to their work schedule, creating fatigue and additional stresses, particularly for those members who were continuously online either very early in the morning or very late at night; (c) given that collegiality is central to the functioning of the Commission and even though an attempt was made to ensure equality of members and to level the playing field, the impact was more glaring in the Drafting Committee, whose ability to work in the usual manner, including through informal contacts and exchanges, was affected; (d) it was challenging to engage in detailed drafting in a virtual setting and this was not helped by the restriction on the circulation of paper copies of documents; (e) there were occasions during which Internet connectivity and sound problems were encountered, which, *inter alia*, rendered

interpretation difficult; (f) access to Library facilities for members participating online proved to be a challenge, despite the improved availability of online resources and the bibliographical packages for members made available by the United Nations Library at Geneva; (g) the absence of the members' assistants from the Palais des Nations and from Geneva reduced the ability of members to involve them in their work, to the disadvantage of both; and (h) for the second year running, the International Law Seminar could not take place, which meant the loss of valuable interaction between members of the Commission and Seminar participants, who are usually young jurists and professors, specializing in international law, or government officials pursuing an academic or diplomatic career in posts in the civil service of their respective countries. Some of these challenges were to a slight extent overcome during the second part of the session; for example, there was flexibility in the working hours, more members attended in person and assistants were also able to attend in person.

Overall, the capacity of the Commission was reduced and, above all, the detailed negotiation of texts was rendered difficult. The Commission nevertheless notes that the convening of the session was a necessity and that some lessons may be learned that could be useful for adapting the working methods of the Commission.

Furthermore, despite the challenges presented by the extraordinary working conditions, the International Law Commission made substantial progress in its work. It concluded the second reading of two topics, adopting a full set of draft guidelines and commentaries thereto on the protection of the atmosphere and a draft Guide to Provisional Application of Treaties, comprising draft guidelines, an annex and commentaries. In addition, the Commission continued its consideration of four other topics. The Commission's report is available on its website.

As mentioned, on **second reading**, the Commission considered two topics.

With respect to the first, "**Protection of the atmosphere**", the Commission had before it the sixth report of the Special Rapporteur ([A/CN.4/736](#)), as well as comments and observations received from Governments and international organizations ([A/CN.4/735](#)). 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.

The Commission adopted, on second reading, the entire set of draft guidelines on the protection of the atmosphere, comprising a draft preamble and 12 draft guidelines, together with commentaries thereto. The draft guidelines are concerned with the protection of the atmosphere from atmospheric pollution and atmospheric degradation with anthropogenic causes, particularly on transboundary pollution and degradation. Among the draft guidelines are provisions on the obligation to protect the atmosphere, environmental impact assessment, sustainable utilization of the atmosphere, equitable and reasonable utilization of the atmosphere and intentional large-scale modification of the atmosphere. There are also guidelines relating to international cooperation, the interrelationship among relevant rules, implementation, compliance and dispute settlement. The 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. They were also not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein.

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.

With regard to the topic “**Provisional application of treaties**”, the Commission had before it the sixth report of the Special Rapporteur ([A/CN.4/738](#)), as well as comments and observations received from Governments and international organizations ([A/CN.4/737](#)). The report examined the comments and observations received from Governments and international organizations on the draft Guide, as adopted on first reading, and on several draft model clauses, 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, in the light of the comments and observations, as well as a proposal for a recommendation to the General Assembly.

The Commission adopted, on second reading, the entire Guide to Provisional Application of Treaties, comprising 12 draft guidelines and a draft annex containing examples of provisions on provisional application of treaties, together with commentaries thereto. As the commentaries explain, the purpose of the Guide “is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. States, international organizations and other user may encounter difficulties regarding, *inter alia*, the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice.” The draft annex to the Guide includes examples of provisions on the subject found in bilateral and multilateral treaties, which are intended to provide additional assistance to States and international organizations in provisional application without limiting the flexible and voluntary nature of provisional application.

In accordance with article 23 of its statute, the Commission recommended to the General Assembly to take note of the Guide to 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. It also recommended that the General Assembly 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.

As I mentioned earlier, the Commission also continued its work on four **other main topics**.

With respect to the topic “**Immunity of State officials from foreign criminal jurisdiction**”, the Commission had before it the eighth report of the Special Rapporteur, Ms. Concepción Escobar Hernández ([A/CN.4/739](#)), which 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 official;

considered the issue of good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity; and presented proposals for draft articles 17 and 18. Following the debate in plenary, the Commission decided to refer draft articles 17 and 18 to the Drafting Committee, taking into account the debate and proposals made in plenary. The Commission received and adopted the reports of the Drafting Committee on draft articles 8 *ante*, 8, 9, 10, 11 and 12, and provisionally adopted those draft articles together with the commentaries thereto.

On this topic, the Commission considers as still relevant the request for information contained in Chapter III of the report of its seventy-first session (2019). It would welcome any information that States could provide on the existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State.

With regard to the topic “**Succession of States in respect of State responsibility**”, the Commission had before it the fourth report of the Special Rapporteur, Mr. Pavel Šturma ([A/CN.4/743](#)), which addressed questions related to the impact of succession of States on forms of responsibility, in particular the different forms of reparation, the obligation of cessation and assurances and guarantees of non-repetition. Following the debate in plenary, the Commission decided to refer draft articles 7 *bis*, 16, 17, 18 and 19, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee, taking into account the comments made in plenary. The Commission provisionally adopted draft articles 7, 8 and 9, which had been provisionally adopted by the Drafting Committee at the seventy-first session, together with commentaries thereto. Furthermore, the Commission took note of the interim report of the Chair of the Drafting Committee on draft articles 10, 10 *bis* and 11, provisionally adopted by the Committee at the present session, which was presented to the Commission for information only.

In connection with its work on the topic, the Commission would appreciate being provided by States with information on their practice relevant to the succession of States in respect of State responsibility by 31 December 2021. The Commission would particularly appreciate receiving examples relevant to this topic of:

- treaties, including lump sum agreements and other relevant multilateral and bilateral agreements;
- domestic law, including legislation implementing multilateral or bilateral agreements;
- decisions of domestic, regional and subregional courts and tribunals.

With regard to the topic “**General principles of law**”, the Commission had before it the second report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez ([A/CN.4/741](#) and [Corr.1](#)), which discussed the identification of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Following the debate in plenary, the Commission decided to refer draft conclusions 4, 5, 6, 7, 8 and 9, as presented in the second report, to the Drafting Committee, taking into account the comments made in plenary. The Commission received and adopted the report of the Drafting Committee on draft conclusions 1, 2 and 4, and provisionally adopted those draft conclusions, together with commentaries. Furthermore, the Commission took note of draft conclusion 5, which was also contained in the report of the Drafting Committee.

As with the immunity topic, the Commission considers as still relevant the request for information relating to the topic “**General principles of law**” contained in its previous report. It would therefore appreciate receiving from States any further information on their practice relating to general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including as set out in: (a) decisions of national courts, legislation and any other relevant practice at the domestic level; (b) pleadings before international courts and tribunals; (c) statements made in international organizations, international conferences and other forums; and (d) treaty practice.

Finally, with respect to the topic “**Sea-level rise in relation to international law**”, the Commission reconstituted the Study Group on sea-level rise in relation to international law. The Study Group had before it the first issues paper ([A/CN.4/740](#) and [Corr.1](#) and [Add.1](#)) concerning issues relating to the law of the sea, prepared by two of the Co-Chairs of the Study Group, Mr.

Bogdan Aurescu and Ms. Nilüfer Oral, 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, over 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.

At the seventy-third session next year, 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. In this connection, the Commission would welcome receiving, by 31 December 2021, any information that States, relevant international organizations and the International Red Cross and Red Crescent Movement could provide on their practice and other relevant information regarding sea-level rise in relation to international law. A detailed set of questions is set out in chapter III of the report of the Commission, and has already been drawn to the attention of governments and international organizations, as appropriate.

The Commission would welcome receiving such examples of State practice and information, as well as any other examples of State practice and information relevant to the topic, from all regions and subregions of the world, including, in particular, from States within regions and subregions from whom it has received few or no submissions thus far.

As for other activities that took place during the 72nd session, as I mentioned earlier, it was regrettably not possible for the Commission to have its traditional exchanges of information with CAHDI, as well as with the African Union Commission on International Law, the Asian-African Legal Consultative Organization and the Inter-American Juridical Committee owing to the situation arising from coronavirus (COVID-19) pandemic. However, Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission virtually on 22 July 2021. Members of the Commission also held an informal exchange of views with the International Committee of the Red Cross.

The Commission has also held two special memorial meetings since its previous Chairperson last visited CAHDI. On 3 September 2020, a virtual informal memorial meeting of members of



the Commission was convened in honour of the memory of Judge Alexander Yankov, former Chair of the Commission and Special Rapporteur for the topic “Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”. At its 3547th meeting, held on 22 July 2021, the Commission convened a memorial meeting in honour of the memory of Judge James Crawford, Special Rapporteur for the topic “Responsibility of States for internationally wrongful acts”.

Before I conclude my account today, allow me to also say a few words about the Commission’s **future work**.

This year, the Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, which I chaired, and the Working Group on methods of work, chaired by Mr. Hussein A. Hassouna. It is expected that both bodies will submit their finalised reports to the Commission at the end of its current term next year.

The Commission decided to include in its long-term programme of work the topic “**Subsidiary means for the determination of rules of international law**”. The syllabus is contained in an annex to the report. Finally, I would like to inform you that the Commission decided that the seventy-third session of the Commission would be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022.

Let me conclude my presentation by reiterating the importance that the Commission attaches to its exchanges with the CAHDI. Experience has shown that we benefit greatly from each other’s work and from our regular interactions, which I hope will return to their normal format next year. I would like to express my gratitude once more for being able to speak with you about the Commission’s recent work.

Thank you for your attention.