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# Anniversary Commemoration and Work of the International Law Commission's Seventieth Session

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## CURRENT DEVELOPMENTS

### ANNIVERSARY COMMEMORATION AND WORK OF THE INTERNATIONAL LAW COMMISSION'S SEVENTIETH SESSION

*By Sean D. Murphy\**

The International Law Commission (ILC) held its seventieth session from April 30 to June 1 in New York and July 2 to August 10, 2018 in Geneva, under the chairmanship of Eduardo Valencia-Ospina (Colombia).<sup>1</sup> This session was the first time that the Commission had met outside of Geneva in twenty years and allowed for celebrations in two cities of the Commission's seventieth anniversary.

Notably, the Commission completed on second reading two topics: subsequent agreements and subsequent practice in relation to the interpretation of treaties; and identification of customary international law. The Commission completed on first reading two further topics: protection of the atmosphere; and provisional application of treaties. Progress was also made in developing draft conclusions on peremptory norms of general international law (*jus cogens*), draft principles on protection of the environment in relation to armed conflict, and draft articles on succession of states in respect of state responsibility.

The Commission commenced a debate but otherwise did not make progress with respect to its topic on the immunity of state officials from foreign criminal jurisdiction. The Commission, however, added a new topic to its agenda on general principles of law, and added two new topics to its long-term work program, namely on universal criminal jurisdiction and sea-level rise in relation to international law. The Commission did not work on a topic that completed its first reading in 2017 and that, after receiving reactions from governments and others, will likely undergo its second reading in 2019: crimes against humanity.

#### I. COMMEMORATIONS OF THE SEVENTIETH ANNIVERSARY OF THE COMMISSION

Based on a theme “70 Years of the International Law Commission—Drawing a Balance for the Future,” the Commission celebrated its seventieth anniversary with commemorative events in New York on May 21 and in Geneva on July 5–6, 2018.<sup>2</sup> The New York event consisted of a solemn half-day meeting<sup>3</sup> followed by two panels designed to allow for a “conversation” between

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<sup>1</sup> See Report of the International Law Commission on the Work of Its Seventieth Session, UN GAOR, 73rd Sess., Supp. No. 10, at 1–2, paras. 1, 4, UN Doc. A/73/10 (Sept. 3, 2018) [hereinafter 2018 Report]. This report and other International Law Commission documents are available online at <http://legal.un.org/ilc>. In addition, UN documents are generally available online at <https://documents.un.org/prod/ods.nsf/home.xsp>.

<sup>2</sup> *Id.* at 294–95, para. 335.

<sup>3</sup> Speeches at this meeting were delivered by: Eduardo Valencia-Ospina, chair of the Commission; Miroslav Lajčák, president of the UN General Assembly; Miguel de Serpa Soares, UN under-secretary-general for legal affairs and legal counsel (speaking on behalf of the UN secretary-general); Burhan Gafoor, chair of the Sixth Committee of the General Assembly; Jürg Lauber, permanent representative of Switzerland to the United Nations; and Jennifer Newstead, legal adviser of the U.S. Department of State (the host country of the United Nations). *Id.*

ILC members and representatives in the Sixth Committee of the UN General Assembly, as well as a keynote address.<sup>4</sup> The Geneva event similarly consisted of a solemn meeting,<sup>5</sup> a keynote address,<sup>6</sup> and five panels consisting of ILC members, legal advisers from states, and other international law experts, focusing on various aspects of the Commission’s work concerning the progressive development of international law and its codification.<sup>7</sup> A commemorative volume is expected to publish the contributions made at these various events.<sup>8</sup>

Given that the Commission was celebrating its seventieth anniversary, and given its atypical meeting in New York, there were a large number of additional side events involving ILC members, academics, representatives of states, international organizations, and non-governmental organizations, especially in New York.<sup>9</sup> Perhaps the most poignant of these panels, entitled “Seven Women in Seventy Years,” focused on the dearth of women who have been elected to the Commission over its life. The panel was organized by China, Finland, Portugal, Spain, Sweden, and Turkey (the states of nationality of the seven women who have served on the Commission).

As part of the anniversary celebration, the Codification Division of the UN Office of Legal Affairs, which serves as the Commission’s secretariat, prepared a photo exhibit to “visualize” the development of international law during the past 150 years. Its images, drawn from the League of Nations archives, the United Nations Photo Library, and other collections, illustrated the contributions of the Commission, while placing its work in historical perspective. The exhibit was officially opened at the UN Headquarters in New York in May 2018 and has since been on display at the Palais des Nations in Geneva and the Peace Palace in The Hague. It is scheduled to travel to Addis Ababa, Bangkok, and Santiago de Chile in the course of the coming year.

## II. SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

The topic of “subsequent agreements and subsequent practice in relation to the interpretation of treaties,” originally considered by a study group of the Commission within the broader topic “treaties over time,” was completed on second reading during the seventieth session.<sup>10</sup> Under the guidance of its special rapporteur, Georg Nolte (Germany), the Commission

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<sup>4</sup> The keynote address was delivered by Professor Nico Schrijver of Leiden University, who is also president of the Institute of International Law. *Id.* at 295, para. 336.

<sup>5</sup> Speeches were delivered by: Valencia-Ospina; de Serpa Soares; Corinne Cicéron Bühler, director, Directorate of International Law and legal advisor of the Swiss Federal Department of Foreign Affairs (the host country of the ILC); and Kate Gilmore, UN deputy high commissioner for human rights. *Id.* at 295, para. 342.

<sup>6</sup> This keynote address was delivered by Judge Abdulqawi Ahmed Yusuf, president of the International Court of Justice. *Id.* at 295, para. 343.

<sup>7</sup> *Id.* at 295–96, paras. 344–54.

<sup>8</sup> *Id.* at 297, para. 361.

<sup>9</sup> *Id.* at 296–97, para. 356.

<sup>10</sup> For the complete set of conclusions and commentaries, see 2018 Report, *supra* note 1, at 11–116. For discussion of prior work on these conclusions, see Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AJIL 164, 176 (2013) [hereinafter Murphy, *Sixty-Fourth Session*]; Sean D. Murphy, *Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission*, 108 AJIL 41, 48–51 (2014) [hereinafter Murphy, *Sixty-Fifth Session*]; Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission*, 109 AJIL 125, 136–38 (2015) [hereinafter Murphy, *Sixty-Sixth Session*]; Sean D. Murphy, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law*

adopted thirteen conclusions, with commentary, on the use of subsequent agreements and subsequent practice as a means of treaty interpretation, based on the Vienna Convention on the Law of Treaties (VCLT).<sup>11</sup>

The purpose of the second reading of a topic is to adjust the first reading text and commentaries to take account of the views and concerns of states. Based on the Fifth Report of the special rapporteur,<sup>12</sup> the conclusions themselves underwent relatively minor changes from those adopted at first reading in 2016, with more changes occurring in the Commission's commentary. Two changes to the draft conclusions bear mention.

First, the Commission altered Conclusion 5, originally entitled "Attribution of Subsequent Practice," so as to move away in paragraph 1 from saying that "subsequent practice" under VCLT Articles 31 and 32 "may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law."<sup>13</sup> Due to concerns that *ultra vires* conduct should not be viewed as being such subsequent practice, and yet may be attributable to the state, the Commission opted instead for a formulation that such subsequent practice "may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions," and changed the title of the conclusion to "Conduct as Subsequent Practice."<sup>14</sup> A similar formulation appears in the Commission's conclusions on identification of customary international law when identifying conduct of the state as state practice.<sup>15</sup>

Second, with respect to Conclusion 13 on "pronouncements of expert treaty bodies," the Commission revisited a savings clause that appears in the final paragraph. As a general matter, the conclusion is focused on how such pronouncements (for example, a comment issued by the Human Rights Committee) either might refer to a subsequent agreement or subsequent practice of parties to a treaty or might give rise to such agreement or practice by the reaction of parties to the pronouncement. The final paragraph at first reading, however, indicated that this "draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty."<sup>16</sup> Concerned that such a savings clause might not sufficiently recognize the role such contributions may make, the special rapporteur in his Fifth Report proposed a new paragraph that would precede the savings clause, which would have read: "A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph

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*Commission*, 109 AJIL 822, 836–38 (2015) [hereinafter Murphy, *Sixty-Seventh Session*]; Sean D. Murphy, *Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission*, 110 AJIL 718, 724–26 (2016) [hereinafter Murphy, *Sixty-Eighth Session*].

<sup>11</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969) [hereinafter VCLT].

<sup>12</sup> International Law Commission, Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/CN.4/715 (Feb. 28, 2018) (prepared by Special Rapporteur Georg Nolte) [hereinafter Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties].

<sup>13</sup> *Id.* at 13.

<sup>14</sup> 2018 Report, *supra* note 1, at 14 (draft Conclusion 5, para. 2).

<sup>15</sup> *Id.* at 120 (draft Conclusion 5).

<sup>16</sup> Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 123, para. 75, UN Doc. A/71/10 (Sept. 19, 2016) (draft Conclusion 13[12], para. 4) [hereinafter 2016 Report].

1, and 32.”<sup>17</sup> After much debate, the Commission decided not to include the paragraph, but slightly altered the savings clause so as to read that Conclusion 13 “is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.”<sup>18</sup> This formulation, while remaining a savings clause, may be viewed as more oriented toward a recognition by the Commission that such pronouncements do contribute to the interpretation of treaties.<sup>19</sup>

### III. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

At the seventieth session, the Commission also completed on second reading the topic “identification of customary international law,”<sup>20</sup> based upon the Fifth Report of the special rapporteur Michael Wood (United Kingdom).<sup>21</sup> Here, too, changes to the conclusions as adopted in 2016 at first reading were modest, while changes to the commentary were more extensive.<sup>22</sup> Conclusion 15 on the persistent objector rule was modified to include a new paragraph 3 reading: “The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).”<sup>23</sup> Conclusion 16, paragraph 2, was slightly modified by the addition of two words at the end (“among themselves”), so as to read: “To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.”<sup>24</sup>

Several changes to the conclusions proposed by the special rapporteur were not made. For example, the Commission revisited its Conclusion 4, paragraph 2, which at first reading provided: “In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.”<sup>25</sup> The special rapporteur proposed that the

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<sup>17</sup> Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *supra* note 12, at 41–43, paras. 137–46.

<sup>18</sup> 2018 Report, *supra* note 1, at 106 (draft Conclusion 13(4)).

<sup>19</sup> International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Charles Chernor Jalloh, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties,” at 16 (May 18, 2018), [available at](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sasp.pdf&lang=E) [http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018\\_dc\\_chairman\\_statement\\_sasp.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sasp.pdf&lang=E).

<sup>20</sup> For discussion of prior work on these draft conclusions, see Murphy, *Sixty-Fourth Session*, *supra* note 10, at 174; Murphy, *Sixty-Fifth Session*, *supra* note 10, at 52–53; Murphy, *Sixty-Sixth Session*, *supra* note 10, at 140–42; Murphy, *Sixty-Seventh Session*, *supra* note 10, at 822–32; Murphy, *Sixty-Eighth Session*, *supra* note 10, at 723–24.

<sup>21</sup> International Law Commission, Fifth Report on Identification of Customary International Law, UN Doc. A/CN.4/717 (Mar. 14, 2018) (prepared by Special Rapporteur Michael Wood); *see also* Fifth Report on Identification of Customary International Law, Addendum, UN Doc. A/CN.4/717/Add.1 (June 6, 2018) (Part A of this addendum lists writings dealing with customary international law and its identification in general, including textbooks; Part B contains studies on particular aspects of the identification of customary international law, and broadly corresponds to issues dealt with by the Commission’s conclusions on the identification of customary international law; Part C indicates studies relevant to the identification of customary international law in various fields).

<sup>22</sup> For the complete set of conclusions and commentaries, see 2018 Report, *supra* note 1, at 119–56. In addition to the conclusions and commentaries, the Commission’s work on this topic includes a study by the Secretariat on “Ways and Means for Making the Evidence of Customary International Law More Readily Available.” *See* UN Doc. A/CN.4/710\* (Jan. 12, 2018).

<sup>23</sup> 2018 Report, *supra* note 1, at 121 (draft Conclusion 15, para. 3).

<sup>24</sup> *Id.* at 122 (draft Conclusion 16, para. 2).

<sup>25</sup> *See* 2016 Report, *supra* note 16, at 76.

text be changed to say that the practice of international organizations “may also contribute” to the formation or expression of “a rule” of customary international law.<sup>26</sup> The Commission, however, decided to retain the original language. The chairman of the drafting committee explained that, while this “paragraph attracted much interest on the part of States and members of the Commission, as well as a range of opinions as to the appropriate way in which the relevance of practice of international organizations should be captured,” and while the proposed changes “aimed at emphasizing that caution was needed in assessing the relevance of the practice of international organizations, as well as better indicating that the practice of international organizations would not be relevant in all cases,” nevertheless “Members of the Committee were generally of the view that the text adopted on first reading was clear enough in this respect, and that the delicate balance achieved on first reading with regard to the wording of this paragraph would be altered by the proposed changes.”<sup>27</sup>

The Commission also decided not to adopt certain proposals because of a belief that they would make it too difficult to identify rules of customary international law. Thus, the special rapporteur proposed that Conclusion 6, paragraph 1, be modified so as to make it clear that *inaction* had to be “deliberate” in order to count as state practice (as the draft commentary had already specified).<sup>28</sup> Yet several members “considered that the term ‘deliberate’ might hinder the necessary flexibility in the identification of customary international law, as it might constitute too stringent a threshold for the identification of practice in relation to certain categories of rules.”<sup>29</sup> Likewise, the Commission declined to replace “consistent” with “virtually uniform”<sup>30</sup> in Conclusion 8, paragraph 1, which reads: “The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.”<sup>31</sup> Here, too, several members felt that “‘virtually uniform’ was only one of the terms used in the case-law, which all referred to a similar standard; and that it might be read to imply not only a stricter threshold of consistency, but also of participation by States in the relevant practice.”<sup>32</sup>

At the same time, some significant changes were made to the Commission’s commentary. While draft Conclusion 4 with respect to practice of international organizations was not changed, the commentary was adjusted to address strong concerns expressed by some states about an overemphasis on the role of international organizations. For example, the Commission indicated that the word “primarily” in Conclusion 4, paragraph 2, is intended in part to emphasize “the primary role of State practice in the formation and expression of rules of customary international law,”<sup>33</sup> and indicated that:

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<sup>26</sup> UN Doc. A/CN.4/717 at 22, para. 47.

<sup>27</sup> International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Charles Chernor Jalloh, Identification of Customary International Law, at 6–7 (May 25, 2018), *available at* [http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018\\_dc\\_chairman\\_statement\\_icil.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_icil.pdf&lang=E) [hereinafter Statement of the Chairman of the Drafting Committee on Identification of Customary International Law].

<sup>28</sup> UN Doc. A/CN.4/717, at 25, para. 55.

<sup>29</sup> Statement of the Chairman of the Drafting Committee on Identification of Customary International Law, *supra* note 27, at 8.

<sup>30</sup> UN Doc. A/CN.4/717, at 31, para. 69.

<sup>31</sup> 2018 Report, *supra* note 1, at 120 (draft Conclusion 8, para. 1).

<sup>32</sup> Statement of the Chairman of the Drafting Committee on Identification of Customary International Law, *supra* note 27, at 10.

<sup>33</sup> 2018 Report, *supra* note 1, at 130, para. (3) (commentary to Conclusion 4).

The practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties). The words “in certain cases” in paragraph 2 indeed serve to indicate that the practice of international organizations will not be relevant to the identification of all rules of customary international law, and further that it may be the practice of only some, not all, international organizations that is relevant.<sup>34</sup>

At the same time, the Commission signaled clearly its view that this contributory role of international organizations pervades the entire set of conclusions, by adding a sentence to the commentary that reads: “In those cases where the practice of international organizations themselves is of relevance . . . , references in the draft conclusions and commentaries to the practice of States should be read as including, *mutatis mutandis*, the practice of international organizations.”<sup>35</sup>

Adjustments to other parts of the commentary were also made to address concerns expressed by states. For example, in the commentary to Conclusion 8, a new reference to “specially-affected States” was included indicating that, when assessing a general practice, there may be circumstances where the practice of certain states is of particular significance. The relevant paragraph reads:

Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule (“specially affected States”) have participated in the practice. While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of relevant coastal States and flag States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. It should be made clear, however, that the term “specially affected States” should not be taken to refer to the relative power of States.<sup>36</sup>

#### IV. OTHER TOPICS ADDRESSED DURING THE SEVENTIETH SESSION

##### *Protection of the Atmosphere*

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<sup>34</sup> *Id.* at 131, para. (5) (commentary to Conclusion 4).

<sup>35</sup> *Id.* at 130, para. (4) (commentary to Conclusion 4).

<sup>36</sup> *Id.* at 136–37, para. (4) (commentary to Conclusion 8).

In prior sessions, the Commission adopted preambular paragraphs and draft Guidelines 1 to 9 for its topic on the protection of the atmosphere.<sup>37</sup> During the seventieth session, the Commission adopted three final draft guidelines based on proposals contained in the Fifth Report by the special rapporteur, Shinya Murase (Japan).<sup>38</sup>

New draft Guideline 10 on “Implementation” seeks to address generally measures by states at the national level relating to the protection of the atmosphere. It provides:

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.<sup>39</sup>

With respect to paragraph 1, the draft guidelines indicate in only three places “obligations” of states in respect of protection of the atmosphere: generally, an “obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law . . .” (draft Guideline 3);<sup>40</sup> an “obligation to ensure that an environmental impact assessment is undertaken of proposed activities . . . which are likely to cause significant adverse impact on the atmosphere . . .” (draft Guideline 4);<sup>41</sup> and an “obligation to cooperate, as appropriate, with each other and with relevant international organizations. . .” (draft Guideline 8).<sup>42</sup> The remaining draft guidelines contain recommendations to states.

New draft guideline 11 on “Compliance” focuses on the need for states to comply with their international legal obligations relating to protection of the atmosphere. Recognizing that compliance may arise through either facilitative or enforcement procedures, it provides:

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:

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<sup>37</sup> For discussion of prior work on this topic, see Murphy, *Sixty-Fifth Session*, *supra* note 10, at 56–57; Murphy, *Sixty-Sixth Session*, *supra* note 10, at 139; Murphy, *Sixty-Seventh Session*, *supra* note 10, at 832–35; Murphy, *Sixty-Eighth Session*, *supra* note 10, at 729–30; Murphy, *Sixty-Ninth Session*, *supra* note 10, at 980–81; Sean D. Murphy, *Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AJIL 970, 980–81 (2017) [hereinafter Murphy, *Sixty-Ninth Session*].

<sup>38</sup> See International Law Commission, Fifth Report on the Protection of the Atmosphere, UN Doc. A/CN.4/711 (Feb. 8, 2018) (prepared by Special Rapporteur Shinya Murase).

<sup>39</sup> 2018 Report, *supra* note 1, at 160.

<sup>40</sup> *Id.* at 159.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 160.



- (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 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 noncompliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.<sup>43</sup>

Finally, new draft Guideline 12 on “Dispute Settlement” provides:

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.<sup>44</sup>

Having completed its work on all of the proposals of the special rapporteur, the Commission revisited and made minor changes to earlier draft guidelines, and then adopted on first reading the preamble and twelve draft guidelines for this topic, with commentary.<sup>45</sup> The Commission will now wait to receive comments from governments by December 2019, after which it will return to this topic in 2020 for the second reading.

### *Provisional Application of Treaties*

At the seventieth session,<sup>46</sup> the Commission had before it the Fifth Report of the special rapporteur for this topic, Juan Manuel Gómez-Robledo (Mexico).<sup>47</sup> That report proposed two new draft guidelines for the topic: one on the formulation of reservations when agreeing to provisionally apply a treaty; and the other on termination or suspension of the provisional application of a treaty as a consequence of its breach.<sup>48</sup> The report analyzed but made no proposal with respect to amendments to such an agreement.<sup>49</sup> The report also proposed a series of model

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<sup>43</sup> *Id.* at 160–61.

<sup>44</sup> *Id.* at 161.

<sup>45</sup> *Id.* at 158–200.

<sup>46</sup> For discussion of prior work on these draft guidelines, see Murphy, *Sixty-Fourth Session*, *supra* note 10, at 171–73; Murphy, *Sixty-Fifth Session*, *supra* note 10, at 53–54; Murphy, *Sixty-Sixth Session*, *supra* note 10, at 143–44; Murphy, *Sixty-Seventh Session*, *supra* note 10, at 822–32; Murphy, *Sixty-Eighth Session*, *supra* note 10, at 742–45; Murphy, *Sixty-Ninth Session*, *supra* note 37, at 978–80.

<sup>47</sup> International Law Commission, Fifth Report on the Provisional Application of Treaties, UN Doc. A/CN.4/718 (Feb. 20, 2018) (prepared by Special Rapporteur Juan Manuel Gómez-Robledo) [hereinafter Fifth Report on Provisional Application of Treaties]. The addendum to the report, UN Doc. A/CN.4/718/Add.1 (June 21, 2018), provides a selected bibliography of books, articles, book chapters, case law, resolutions, and decisions of international organizations, and other documents concerning provisional application of treaties.

<sup>48</sup> Fifth Report on Provisional Application of Treaties, *supra* note 47, at 17, paras. 63–66.

<sup>49</sup> *Id.* at 19, paras. 70–72.

clauses that might be used by states when entering into an agreement on provisional application of a treaty.<sup>50</sup>

With respect to the first proposal, the Commission adopted a draft Guideline 7 on “reservations,” which reads as follows:

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.<sup>51</sup>

One interesting aspect of this draft guideline is that it is based on conjecture as to the possibility of reservations to an agreement on provisional application. The special rapporteur himself noted that he

has not yet encountered a treaty that provides for the formulation of reservations as from the time of provisional application, nor has he encountered provisional application provisions that refer to the possibility of formulating reservations. Furthermore, the memorandum by the Secretariat likewise does not identify any cases where a treaty has provided for the formulation of reservations in relation to its provisional application, or cases where a State has formulated reservations to a treaty that is being applied provisionally.<sup>52</sup>

The Commission appears not to have construed the lack of any such practice of States or international organizations as indicating an opposite conclusion to what is said in the draft guideline—a conclusion that “reservations” are not permitted for provisional application or are not permitted in circumstances different than those identified in the VCLT.<sup>53</sup>

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<sup>50</sup> *Id.* at 19–20, paras. 73–77.

<sup>51</sup> 2018 Report, *supra* note 1, at 204 (draft Guideline 7).

<sup>52</sup> Fifth Report on Provisional Application of Treaties, *supra* note 47, at para. 67; International Law Commission, Memorandum by the Secretariat on Provisional Application of Treaties, UN Doc. A/CN.4/707 (Mar. 24, 2017) [hereinafter Memorandum by the Secretariat on Provisional Application of Treaties].

<sup>53</sup> One scenario where an agreement on provisional application is silent on the issue of reservations, but where reservations might be regarded as impermissible, is where the treaty being provisionally applied precludes reservations. Another scenario might be where the agreement on provisional application is silent on reservations, but establishes a method for accepting provisional application that suggests reservations are not possible. For example, the Energy Charter Treaty might be viewed as precluding a “reservation” to provisional application of the agreement by providing that any signatory, when signing, may deliver to the depositary a declaration that it is not able to accept provisional application. Energy Charter Treaty, Art. 45(2), Dec. 17, 1994, 2080 UNTS 95, 34 ILM 360 (1995). Such an “opt-out” declaration is not a “reservation” within the meaning of the VCLT; rather, it is a decision not to accept the agreement on provisional application *ab initio*. Arguably, that is the exclusive means for avoiding provisional application of the treaty.

With respect to the second proposal, the Commission ultimately adopted a draft Guideline 9 on “termination and suspension of provisional application,” which reads as follows:

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.<sup>54</sup>

Paragraph 1 indicates the most typical way that provisional application of a treaty might be terminated, which is when the treaty actually enters into force. The paragraph carefully notes that it terminates as among the states or international organizations “concerned,” meaning that a treaty might enter into force for some states or international organizations (in which case provisional application terminates as among them), but does not enter into force for others (in which case provisional application of the treaty continues). This is a useful reminder, given that VCLT Article 25 curiously did not indicate that provisional application would terminate under such circumstances.

Paragraph 2, by contrast, picks up what is clearly stated in VCLT Article 25, paragraph 2, which is that provisional application of a treaty can terminate for a state “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.”

Paragraph 3 is a without prejudice clause that leaves open whether there are other ways of terminating or suspending an agreement on provisional application. As was the case for reservations, the special rapporteur found that there is no practice demonstrating termination or suspension for material breach.<sup>55</sup> The lack any such practice might be due to the ability (unless it has been otherwise agreed) of a state to terminate its provisional application of a treaty at any time through a simple notice (per paragraph 2), without a need to rely on a ground such as material breach.

By focusing in paragraph 3 solely on Part V, Section 3, of the VCLT, the Commission is not acknowledging the possibility that an agreement on provisional application might be invalid

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<sup>54</sup> 2018 Report, *supra* note 1, at 204 (draft Guideline 9).

<sup>55</sup> *Id.*, paras. 65–66.

*ab initio*, per VCLT Part V, Section 2 (Articles 46–53), nor that the procedural aspects of termination or suspension, found in VCLT Part V, Section 4 (Articles 65–68), are of relevance. Also left unaddressed is perhaps the most germane issue in this regard, which is whether a terminating or suspending state has any continuing obligations based on circumstances that arose during the period of provisional application.<sup>56</sup>

While general comments were made both in the plenary debate and in the drafting committee with respect to the proposed model clauses, the Commission did not have sufficient time to review and discuss fully such clauses. It remains possible that, during second reading, a set of draft model clauses will be annexed to the guide, based on a revised proposal of the special rapporteur.<sup>57</sup>

Having completed its work on all the proposals of the special rapporteur, the Commission adopted on first reading the twelve draft guidelines for this topic, with commentary, and decided to call it a “Guide to Provisional Application of Treaties.”<sup>58</sup> In doing so, certain revisions were made to previously adopted draft guidelines. Perhaps the most important of these revisions relates to draft Guideline 6, on “legal effect of provisional application.” That draft guideline was revised so as to read that 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 States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.”<sup>59</sup> The Commission will now receive comments from governments until December 2019, after which it will return to this topic in 2020 for the second reading.

### *Peremptory Norms of General International Law (Jus Cogens)*

During the seventieth session,<sup>60</sup> the Commission had before it the Third Report of the special rapporteur, Dire D. Tladi (South Africa), which proposed no less than fourteen new draft conclusions on this topic.<sup>61</sup> The drafting committee was unable to complete work on all of these proposals but was able to adopt the following seven draft conclusions.<sup>62</sup>

#### Draft Conclusion 8

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<sup>56</sup> For example, the Secretariat’s Memorandum notes the agreement between the European Community and Jordan on scientific and technological cooperation, which provides that projects started before the termination of provisional application will continue after its termination. Memorandum by the Secretariat on Provisional Application of Treaties, *supra* note 52, at para. 83.

<sup>57</sup> 2018 Report, *supra* note 1, at 202, para. 85.

<sup>58</sup> *Id.* at 203–23.

<sup>59</sup> For the prior text and some of the problems with it, see Murphy, *Sixty-Eighth Session*, *supra* note 10, at 743 (Guideline 7; Guideline 7 was renumbered in 2017 to be Guideline 8); Murphy, *Sixty-Ninth Session*, *supra* note 37, at 980.

<sup>60</sup> For discussion of prior work on this topic, see Murphy, *Sixty-Eighth Session*, *supra* note 10, at 730–31; Murphy, *Sixty-Ninth Session*, *supra* note 37, at 988–90.

<sup>61</sup> See International Law Commission, Third Report on Peremptory Norms of General International Law (*Jus Cogens*), UN Doc. A/CN.4/714 (Feb. 12, 2018) (prepared by Special Rapporteur Dire Tladi).

<sup>62</sup> International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Charles Chernor Jalloh, Peremptory Norms of General International Law (*Jus Cogens*), at 12–16 (July 26, 2018), available at [http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018\\_dc\\_chairman\\_statement\\_jc\\_26july.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_jc_26july.pdf&lang=E).

*Evidence of acceptance and recognition*

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

Draft Conclusion 9

*Subsidiary means for the determination of the peremptory character of norms of general international law (jus cogens)*

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).
2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).

Draft Conclusion 10

*Invalidity and termination of treaties in conflict with a peremptory norm of general international law (jus cogens)*

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Draft Conclusion 11

*Separability of treaty provisions in conflict with a peremptory norm of general international law (jus cogens)*

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.

2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:
  - (a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;
  - (b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of any party to be bound by the treaty as a whole; and
  - (c) continued performance of the remainder of the treaty would not be unjust.

#### Draft Conclusion 12

*Consequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (jus cogens)*

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:
  - (a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and
  - (b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).
2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

#### Draft Conclusion 13

*Absence of effect of reservations to treaties on peremptory norms of general international law (jus cogens)*

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.
2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Draft Conclusion 14<sup>63</sup>

*Procedural requirements*

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.
2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.
3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.
5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice and other applicable dispute settlement provisions agreed by the States concerned.

The drafting committee did not have sufficient time to consider the remaining proposals of the special rapporteur. Further, the draft conclusions indicated above have not yet been adopted by the Commission as a whole, because the special rapporteur prefers to wait until all the draft conclusions have been completed in the drafting committee before preparing a commentary, and the Commission only adopts draft articles or conclusions simultaneously with their commentary. The special rapporteur has indicated that a Fourth Report in 2019 could address miscellaneous issues, allowing the possibility for adoption of an entire set of draft conclusions with commentary on first reading.<sup>64</sup>

*Protection of the Environment in Relation to Armed Conflicts*

In 2017, the Commission appointed a new special rapporteur, Marja Lehto (Finland), to serve as special rapporteur for this topic,<sup>65</sup> and she produced a First Report for the seventieth

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<sup>63</sup> The Commission's draft indicates that the location of draft Conclusion 14, within the draft conclusions, will be determined at a later stage. *Id.* at 11.

<sup>64</sup> Third Report on *Jus Cogens*, *supra* note 61, at 69, para. 162.

<sup>65</sup> For discussion of prior work on this topic, see Murphy, *Sixty-Fifth Session*, *supra* note 10, at 55–56; Murphy, *Sixty-Sixth Session*, *supra* note 10, at 143; Murphy, *Sixty-Seventh Session*, *supra* note 10, at 838–41; Murphy, *Sixty-Eighth Session*, *supra* note 10, at 731–32; Murphy, *Sixty-Ninth Session*, *supra* note 37, at 992.

session.<sup>66</sup> That report focused principally on the protection of the environment in situations of occupied territory. Based on that report, the drafting committee provisionally adopted three draft principles reading as follows:

Draft principle 19

*General obligations of an Occupying Power*

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and wellbeing of the population of the occupied territory.
3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Draft principle 20

*Sustainable use of natural resources*

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21

*Due diligence*

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.<sup>67</sup>

Further, the special rapporteur developed commentary for the prior draft principles that had been adopted in the drafting committee, thereby allowing the Commission to adopt a nearly complete set of draft principles.<sup>68</sup> The special rapporteur has indicated an intention in her Second Report to address the protection of the environment in non-international armed conflicts, as well as certain questions related to the responsibility and liability for environmental harm in relation to

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<sup>66</sup> International Law Commission, First Report on the Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/CN.4/720 (Apr. 30, 2018) (prepared by Special Rapporteur Marja Lehto) [hereinafter First Report on the Protection of the Environment in Relation to Armed Conflicts].

<sup>67</sup> Protection of the environment in relation to armed conflicts: Title of Part Four and texts and titles of the draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session, UN Doc. A/CN.4/L.911 (July 20, 2018), available at <http://legal.un.org/docs/?symbol=A/CN.4/L.911>.

<sup>68</sup> 2018 Report, *supra* note 1, at 246–72 (draft principles 1–2, 4–18, and commentary).



armed conflicts. Along with completion of work on a preamble and definitions, the special rapporteur envisaged completion of the topic on first reading in 2019.<sup>69</sup>

### *Succession of States in Respect of State Responsibility*

In 2017, the Commission moved the topic of succession of states in respect of state responsibility onto the current program of work and appointed Pavel Šturma (Czech Republic) as special rapporteur.<sup>70</sup> Generally speaking, this topic analyzes the rules on state responsibility applicable to the rights and obligations of a predecessor state, a successor state, and third states, in situations where a succession of states occurs.<sup>71</sup>

The special rapporteur has so far produced a First Report<sup>72</sup> and a Second Report,<sup>73</sup> which have resulted in the transmittal of several draft articles to the drafting committee. While the special rapporteur contemplated in his First Report a general rule of succession of state responsibility with exceptions, his Second Report was firmly in the camp of those who see a rule of *non-succession* of state responsibility when the predecessor state continues to exist, but with exceptions or special rules in some instances. This change in orientation appears consistent with the views expressed by a number of states in the Sixth Committee of the General Assembly that “considered that the principle of non-succession regarding state responsibility reflected the current law on the matter.”<sup>74</sup> Those states included Austria, Iran, Japan, Russia, and Vietnam.

Based on this approach, the special rapporteur advanced certain exceptions or special rules for cases of succession where a predecessor State continues to exist, where two or more states unified, or where a state dissolves into two or more states. For example, in case of a separation or transfer of part of a territory, “if the particular circumstances so require,” the obligations arising from an internationally wrongful act of the predecessor state would transfer to the successor state when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor state.

Yet the drafting committee found it difficult to make much progress on the proposals. Ultimately, it provisionally adopted just two modest draft articles. Draft Article 5, on “Cases of

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<sup>69</sup> First Report on the Protection of the Environment in Relation to Armed Conflicts, *supra* note 66, at 49, para. 100.

<sup>70</sup> Report of the International Law Commission on the Work of Its Sixty-Ninth Session, UN GAOR, 72nd Sess., Supp. No. 10, at 203, para. 211, UN Doc. A/72/10 (Sept. 11, 2017). For discussion of prior work on this topic, see Murphy, *Sixty-Ninth Session*, *supra* note 37, at 990–92.

<sup>71</sup> For the syllabus of the topic, see 2016 Report, *supra* note 16, at 400, Annex B. In recent years, other bodies have also studied this issue. See International Law Association, Report of the Seventy-Third Conference, Rio de Janeiro, Aug. 17–21 2008, at 250 et seq.; Institute of International Law, Fourteenth Commission, State Succession in Matters of State Responsibility, Provisional Report of the Rapporteur, Mr. Marcelo G. Kohen; Institute of International Law, Resolution on Succession of States in Matters of International Responsibility, Aug. 28, 2015.

<sup>72</sup> See International Law Commission, First Report on Succession of States in Respect of State Responsibility, UN Doc. A/CN.4/708 (May 31, 2017) (prepared by Special Rapporteur Pavel Šturma).

<sup>73</sup> See International Law Commission, Second Report on Succession of States in Respect of State Responsibility, UN Doc. A/CN.4/719 (Apr. 6, 2018) (prepared by Special Rapporteur Pavel Šturma) [hereinafter Second Report on Succession of States in Respect of State Responsibility].

<sup>74</sup> A/CN.4/713, para. 65. At the same time, several other states “were inclined to support the preliminary conclusion of the Special Rapporteur [in the First Report] that the ‘traditional’ theory of non-succession had recently been challenged.” *Id.* (in this camp fall Belarus, Croatia, Czech Republic, and Slovenia).

Succession of States Covered by the Present Draft Articles,” provides: “The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”<sup>75</sup> This draft article mirrors the approach taken in the Vienna Conventions on succession issues<sup>76</sup> and in the Commission’s Articles on Nationality of Persons in Relation to the Succession of States.<sup>77</sup> The drafting committee also adopted a draft Article 6 entitled “No Effect Upon Attribution,” which reads: “A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.”<sup>78</sup>

In 2019, the drafting committee will continue work on the special rapporteur’s proposals. Further, according to the special rapporteur, a Third Report in 2019 “will focus on the transfer of the rights or claims of an injured predecessor State to [a] successor State.”<sup>79</sup> A Fourth Report in 2020 might then address procedural and miscellaneous issues, allowing for a first reading of the entire topic in 2020 or 2021.<sup>80</sup>

### *Immunity of State Officials from Foreign Criminal Jurisdiction*

Toward the end of the seventieth session, the Commission received the Sixth Report on “Immunity of State Officials from Foreign Criminal Jurisdiction” by its second special rapporteur for this topic, Concepción Escobar Hernández (Spain).<sup>81</sup> The report discussed in general terms procedural issues relating to three issues: when it is that immunity should be considered by the authorities of the forum state;<sup>82</sup> the acts of the forum state authorities that are affected by immunity;<sup>83</sup> and the determination of immunity.<sup>84</sup> The Sixth Report made no proposals for additional draft articles.

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<sup>75</sup> International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Charles Chernor Jalloh, Succession of States in Respect of State Responsibility, at 8 (Aug. 3, 2018), *available at* [http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018\\_dc\\_chairman\\_statement\\_sosr.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sosr.pdf&lang=E) [hereinafter Statement of the Chairman of the Drafting Committee on Succession of States in Respect of State Responsibility].

<sup>76</sup> Vienna Convention on Succession of States in Respect of Treaties, Art. 6, *adopted* Aug. 23, 1978, 1946 UNTS 3, 17 ILM 1488 (1978); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Art. 3, *opened for signature* Apr. 8, 1983, UN JURIDICAL YEARBOOK (1983) (not yet entered into force).

<sup>77</sup> GA Res. 55/153, Articles on Nationality of Natural Persons in Relation to the Succession of States, Annex, Art. 3 (Dec. 12, 2000).

<sup>78</sup> Statement of the Chairman of the Drafting Committee on Succession of States in Respect of State Responsibility, *supra* note 75, at 9. A footnote to this draft article provides that “[t]aking into account the views expressed in the Drafting Committee, the present text will be revisited at a later stage.”

<sup>79</sup> Second Report on Succession of States in Respect of State Responsibility, *supra* note 73, at 52, para. 191.

<sup>80</sup> *Id.* at 52, paras. 191–92.

<sup>81</sup> International Law Commission, Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/722 (June 12, 2018) (prepared by Special Rapporteur Concepción Escobar Hernández) [hereinafter Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction]. For discussion of prior work on this topic, see Murphy, *Sixty-Fourth Session*, *supra* note 10, at 169–71; Murphy, *Sixty-Fifth Session*, *supra* note 10, at 41–48; Murphy, *Sixty-Sixth Session*, *supra* note 10, at 139–40; Murphy, *Sixty-Seventh Session*, *supra* note 10, at 842; Murphy, *Sixty-Eighth Session*, *supra* note 10, at 732–42; Murphy, *Sixty-Ninth Session*, *supra* note 37, at 981–88.

<sup>82</sup> See Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 81, ch. II (B).

<sup>83</sup> *Id.*, ch. II (C).

<sup>84</sup> *Id.*, ch. II (D).

The Commission commenced a debate on the Sixth Report, but was not able to conclude it before the end of the session, and therefore it will continue during the seventy-first session in 2019. The special rapporteur has indicated that she will also submit for that session a Seventh Report, which will propose provisions on procedural rules relating to the immunity of State officials, and which might allow for adoption of a full set of draft articles and commentaries on first reading.

## V. OTHER DECISIONS AND FUTURE WORK

During the seventieth session, the Commission placed two new topics on its long-term work program: (1) universal criminal jurisdiction;<sup>85</sup> and (2) sea-level rise in relation to international law.<sup>86</sup> During the present quinquennium, the Commission may decide to place one or both of these topics on its agenda.

The first topic on “universal criminal jurisdiction” is contemplated as being pursued by appointment of a special rapporteur. The topic proposal notes:

12. The Sixth Committee has been debating the topic annually since 2009. While important progress has been made in clarifying areas of difference of view concerning universal jurisdiction during the last nine years, in other respects, progress has not been as substantial as was initially envisaged. The [African Union] as recently as January 2018, adopted a decision in which it expressed regret at the “apparent impasse” in the debate of the universality topic in the General Assembly and consequently called on the African Group in New York to “make recommendations to the Summit on how to move this discussion forward.” The lack of meaningful progress seems due, at least partially, to the political disagreements concerning the potential for selective and arbitrary application of this jurisdictional principle. Indeed, during the 2017 General Assembly debate on the issue, the overwhelming majority of delegations could agree on the need to advance the discussion on universal jurisdiction, while differing over its definition, nature, scope and limits. The same pattern can be discerned from earlier debates of the Sixth Committee dating back to October 2010.

13. In these circumstances, if focused on a limited set of core legal issues rather than the entire panoply of issues identified by States as areas reflecting their differing views . . . , the Commission would appear to be particularly well placed to assist States by formulating guidelines or drawing conclusions clarifying the nature, scope, limits and procedural safeguards that guide the proper application of universal jurisdiction.<sup>87</sup>

The second topic on “sea-level rise in relation to international law” is viewed within the Commission as being best suited for a study group. If taken up, the study group no doubt will benefit from recent work by the International Law Association (ILA), which has already studied or is studying the same issues that the ILC proposes to pursue. Indeed, the topic of sea-level rise

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<sup>85</sup> 2018 Report, *supra* note 1, at 307–25, Annex A. The topic was proposed by Charles Chernor Jalloh (Sierra Leone).

<sup>86</sup> *Id.* at 326–34, Annex B. The topic was proposed by a group of ILC members: Bogdan Aurescu (Romania); Yacouba Cissé (Côte d’Ivoire); Patrica Galvão Teles (Portugal); Nilüfer Oral (Turkey); and Juan José Ruda Santolaria (Peru).

<sup>87</sup> *Id.* at 311–12, paras. 12–13 (footnotes omitted).

was initially examined by the ILA Committee on Baselines Under the International Law of the Sea, which stated in its final report considered at the Sofia Conference in 2012 that “the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.”<sup>88</sup>

At the same time, the ILA Committee on Baselines Under International Law recognized “that substantial territorial loss resulting from sea-level rise is an issue that extends beyond baselines and the law of the sea and encompasses consideration at a junction of several parts of international law.”<sup>89</sup> For that reason, the ILA in 2012 established a new ILA Committee on International Law and Sea Level Rise. That Committee decided to focus its work on three main issue areas: the law of the sea; forced migration and human rights; and issues of statehood and international security. An interim Committee report, which was presented at the Johannesburg Conference in 2016,<sup>90</sup> focused on issues regarding the law of the sea and migration/human rights. Another report was considered at the Sydney Conference in 2018,<sup>91</sup> which completed the Committee’s work on law of the sea issues.

Based on that report, the ILA adopted a resolution that: (1) noted “that the Committee has presented evidence of the emergence of State practice, particularly in the South Pacific region, indicating that small island States intend to maintain the baselines and limits of their current maritime zones established in accordance with the 1982 Law of the Sea Convention for the future, notwithstanding physical coastline changes brought about by sea level rise”; (2) endorsed

the proposal of the Committee that, on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline;

and (3) further endorsed

the Committee’s proposal that the interpretation of the 1982 Law of the Sea Convention in relation to the ability of coastal and archipelagic States to maintain their existing lawful

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<sup>88</sup> See International Law Association Committee on Baselines Under the International Law of the Sea, Final Report (2012), Sofia Conference, at 30, *available at* <http://ilareporter.org.au/wp-content/uploads/2015/07/Source-1-Baselines-Final-Report-Sofia-2012.pdf> [hereinafter Final Report (2012)]. For that committee’s final report (under its extended mandate) on straight baselines, see International Law Association Committee on Baselines under the International Law of the Sea, Final Report (2018), Sydney Conference, *available at* [http://www.ila-hq.org/images/ILA/DraftReports/DraftReport\\_Baselines.pdf](http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Baselines.pdf) [hereinafter Final Report (2018)]. The Sydney conference also adopted a resolution containing twelve “Sydney Conclusions on Baselines Under the International Law of the Sea.” See ILA Resolution 1/2018, Sydney Conference (2018), *available at* [http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution\\_1\\_2018\\_BaselinesundertheInternationalLawoftheSea.pdf](http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_1_2018_BaselinesundertheInternationalLawoftheSea.pdf).

<sup>89</sup> Final Report (2018), *supra* note 88, at para 2.

<sup>90</sup> See Interim Report of the ILA Committee on International Law and Sea Level Rise (2016), Johannesburg Conference, *available at* <http://www.ila-hq.org/index.php/committees>.

<sup>91</sup> See Draft Report of the ILA Committee on International Law and Sea Level Rise (2018), Sydney Conference, at 19, *available at* [http://www.ila-hq.org/images/ILA/DraftReports/DraftReport\\_SeaLevelRise.pdf](http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf).

maritime entitlements should apply equally to maritime boundaries delimited by international agreement or by decisions of international courts or arbitral tribunals.<sup>92</sup>

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<sup>92</sup> See ILA Resolution 5/2018, Sydney Conference (2018), available at [http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution\\_5\\_2018\\_SeaLevelRise.pdf](http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_5_2018_SeaLevelRise.pdf).