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STATEMENT OF THE CHAIR OF THE INTERNATIONAL LAW COMMISSION,

MR. MAHMOUD HMOUD

25 October 2021

Madam Chair,

These have been trying times. It is pleasant to have a semblance of normalcy and to be having a debate even in these still precarious circumstances. International law holds us together even in times of peril. I bring with me warm greetings from the International Law Commission, which finally managed to convene its seventy-second session in a hybrid setting. On behalf of the Commission, I wish to thank the Sixth Committee for providing the necessary support since the Commission last met in 2019, and to you, Madam Chair, for the kind and generous sentiments of appreciation addressed to the International Law Commission. It is a singular honour for me to be representing the Commission and I am proud that you, a distinguished daughter from our Arab and Middle Eastern region, are chairing the Sixth Committee. The Commission and the Sixth Committee have a shared interest in the progressive development of international law, and its codification, that goes far back to the founding of the United Nations. The imprimatur of the Sixth Committee, working through the various processes at its disposal, serves as the final seal of approval for any instrument it negotiates based on drafts prepared by the Commission. Please accept the warm felicitations, and the best wishes, to you all, from the Commission for successful deliberations on the occasion of the current session of the Sixth Committee. Our two bodies share a common objective. The interaction that the Commission has with the Sixth Committee during the debate on the annual report, as well as the interactive dialogue, provides a useful framework for an exchange of views between our two bodies. During the coming days, my colleagues some of whom are here and others observing from afar look forward to a useful exchange of views, and to hearing your comments.

Madam Chair,

The pandemic is still with us and is having its toll globally. It is in such challenging circumstances that the Commission was convened. The Commission is most grateful to those many within the United Nations, here in New York, and in Geneva, as well as the Commission's host, Switzerland, for working tirelessly to ensure that the necessary arrangements and measures

are in place for the Commission to meet in a safe environment. We witnessed first hand international cooperation at work. It was not easy, but it was worth it. The fact that the session was held in a hybrid session, on a platform with easy functionality, was a difference maker. In the course of its deliberations the Commission made substantial progress in its work,. In making this statement today, I intend to follow the example of my immediate predecessor Pavel Šturma who introduced the report of the Commission in one single intervention. Accordingly, the present statement covers the entirety of the Commission at its seventy-second session.

Madam Chair,

The overall achievements of the Commission are summarised in Chapter II. The Commission concluded the second reading of two topics: The “Protection of the atmosphere”, concerning which the Commission adopted an entire set of draft guidelines comprising a draft preamble and 12 draft guidelines, together with commentaries thereto; and “Provisional application of treaties,” in relation to which it adopted an entire Guide, comprising 12 draft guidelines and a draft annex, containing examples of provisions on provisional application of treaties, together with commentaries thereto.

On the topic, “Immunity of State officials from foreign criminal jurisdiction, with the adoption of 6 draft articles on procedural aspects and safeguards, at the present session, the Commission is drawing closer to the completion of first reading. The Commission also made greater strides on the topics “Succession of States in respect of State responsibility,” “General principles of law”, and “Sea-level rise in relation to international law”, a topic included in its work programme in 2019, but first considered this year. Moreover, the Commission has included the topic, “Subsidiary means for the determination of rules of international law in its long-term programme of work. The syllabus of this topic appears as an annex to the Commission’s the report. Chapter III of the report draws the attention of Governments to information on practice that the Commission needs to advance on its work on a variety of topics. Such information is crucial and it is a collaborative working method that makes the Commission’s work in the progressive development of international law, and its codification, unique.

In its report, the Commission, pursuant to resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020, has again commented on its current role in promoting the rule of law and has reiterated its commitment to the rule of law in all of its activities. The Commission has also drawn attention to questions concerning budgetary resources in relation to the convening of its future sessions, proposing the possibility of establishing a trust fund, and has shared its experiences on the convening of the session in a hybrid format. We simply had to adjust to the circumstances. Our work remains intrinsically linked to in person meetings, particularly the Drafting Committee, and the many informal consultations and contacts that inform the collegiate nature of the Commission’s work, and its output. Owing to the coronavirus disease (COVID-19) pandemic, Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission virtually on 22 July 2021. The Commission regrettably was unable to have its traditional

exchanges of information with the other bodies, even though it was able to have an informal exchange of views with the International Committee of the Red Cross on 15 July 2021. For two years running, the Commission was unable, and ruefully, to host the International Law Seminar. As you know, this is an important component of the Commission's work in the teaching, study, dissemination and wider appreciation of international law. The Commission decided that its seventy-third session next year would be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022. It is hoped the circumstances will be much more congenial to undertake some of these other activities.

Before moving on from this introductory part, allow me to acknowledge the invaluable assistance of the Codification Division of the Office of Legal Affairs in the technical and substantive servicing of the Commission. The success of the hybrid session owes in most part to the excellent preparations of our Secretariat. The Secretariat is in every much an integral part of the working methods of the Commission, and this is not a cliché. Permit me also to respectfully note, sadly, of the passing of two of our distinguished former members who walked the corridors of the *Palais des Nations* and left an indelible mark in their contributions to work of the Commission and to international law. On 3 September 2020, a memorial meeting 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**”, while on 22 July 2021, a memorial meeting was convened in honour of the memory of Judge James Crawford, Special Rapporteur for the “**Responsibility of States for internationally wrongful acts**”. They left a legacy to the academy, which will still live on.

Madam Chair,

Permit me now to delve a bit more on the substantive output of the Commission. I will start with the topic “**Protection of the atmosphere**”. This is addressed in **chapter IV** of the report. In undertaking the second reading of the topic, the Commission had before it the sixth report (A/CN.4/736), of the Special Rapporteur, as well as comments and observations received from Governments and international organizations (A/CN.4/735). Following a substantive review, the Commission adopted 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 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. Please join the Commission in paying tribute to the Special Rapporteur, Shinya Murase, for his outstanding contribution, tireless efforts, and devoted work, which enabled the Commission to conclude its work successfully.

This topic was first placed on the programme of work of the Commission in 2013. The scientific evidence, fortified by more recent reports, is clear. Both the human and natural environments can be adversely affected by certain changes caused by human activities in the condition of the atmosphere. In this topic, the Commission seeks to assist the international

community as it addresses critical questions relating to transboundary and global protection of the atmosphere focusing mainly on transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change.

The **draft preamble**, setting out the contextual framework of the guidelines, consists of eight preambular paragraphs. **Draft guidelines 1 and 2** are introductory and definitional in nature. **Draft guideline 1** is on the “use of terms”. **Draft guideline 2**, entitled “Scope”, consists of three paragraphs. **Draft guidelines 3 to 8** form the core of the text of the draft guidelines. **Draft guideline 3** is a central provision. It sets out the “Obligation to protect the atmosphere”. **Draft guidelines 4, 5 and 6** address, respectively, “Environmental impact assessment”, “Sustainable utilization of the atmosphere”, and “Equitable and reasonable use of the atmosphere”, which all flow from draft guideline 3. As stated in draft guideline 5, the atmosphere is a natural resource with a limited assimilation capacity. This is an importance orientation of the draft guidelines. It highlights the point that the atmosphere is a finite resource, which requires sustainable use. **Draft guideline 7** deals with “Intentional large-scale modification of the atmosphere”, covering activities the very purpose of which is to alter atmospheric conditions. **Draft guideline 8** addresses “International cooperation”, among States as well as between States and international organizations. Draft guidelines 9 to 12 cover procedural considerations. **Draft guideline 9**, entitled “Interrelationship among relevant rules”, seeks to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law, which needs to be borne in mind the assure effective protection of the atmosphere. **Draft guidelines 10 to 12**, comprise provisions concerning implementation, compliance and dispute settlement.

The text adopted on second reading largely resembles the first reading text. Let me however draw attention to some notable changes and adjustments. First, the preamble underwent a reordering of preambular paragraphs, and some substantive changes were introduced. Focusing on the latter, in the first preambular paragraph there was an added emphasis to the idea of the atmosphere as a natural resource “with a limited assimilation capacity”, a proposition also reflected in draft guideline 5. The notion of “pressing concern of the international community as a whole” was replaced with “a common concern of humankind”. It will be recalled that the Commission on adopting the first reading text signaled a willingness to revisit this matter in the light of the adoption in 2015 of the Paris Agreement. The last preambular paragraph was reformulated, to attenuate the prior reference to the 2012 understanding.

Turning to the content of draft guidelines, in guideline 1 (use of terms), the definition of “atmosphere” has been simplified to reflect that it is the “envelope of gases surrounding the Earth” as provided the Intergovernmental Panel on Climate Change, without specially alluding to the atmosphere as a median within which transport and dispersion of polluting and degrading substances occurs. The definition of atmospheric pollution now includes an express reference to the introduction or release of “energy” into the atmosphere, a matter which was previously addressed in the commentary. The qualifier “significant” is the threshold in both atmospheric pollution and atmospheric degradation, a term which previously only applied to the definition of atmospheric degradation. Guideline 2 addresses issues relating to the 2013 understanding in a simplified form. Finally, let me note that the commentaries underwent streamlining to reflect the second reading nature of the commentaries.

The other topic on which the Commission completed a second reading is “**Provisional application of treaties,**” which is addressed in **Chapter V** of the report. As earlier mentioned, the Commission adopted on second reading the Guide to Provisional Application of Treaties, which comprises of 12 draft guidelines, with commentaries thereto, and an annex containing examples of provisions on provisional application of treaties.

The Commission proceeded on the basis of 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 purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. The Guide takes as a point of departure article 25 of both the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations, which it tries to clarify and explain, based on the practice of States and international organizations. **Draft guidelines 1 and 2** deal with the **scope and purpose** of the draft guidelines, respectively, and **draft guideline 3** restates the **general rule** on provisional application of treaties based on article 25 of the Vienna Conventions on the Law of Treaties. **Draft guideline 4** outlines different **forms of agreement** on provisional application of treaties. **Draft guideline 5** concerns the **commencement** of provisional application of a treaty, and **draft guideline 6** deals with the legal effect of provisional application. **Draft guideline 7** contains a without prejudice clause regarding the possibility of making **reservations** relating to the provisional application of a treaty. **Draft guideline 8** concerns the **responsibility for breach** of a provisionally applied treaty, and **draft guideline 9** stipulates different scenarios regarding the **termination** of provisional application. **Draft guidelines 10 and 11** address the role of the **internal law of States and the rules of international organizations** with respect to the provisional application of a treaty. Finally, **draft guideline 12** contains a without prejudice clause pertaining to **limitations to the agreement to provisional application deriving from internal law of States or rules of international organizations**.

The Guide also contains an **annex** with examples of provisions on provisional application. This annex is the result of the initial proposal by the Special Rapporteur to include model clauses in the Guide. As explained in the introductory paragraph to the annex, the examples of provisions are intended to assist States and international organizations in drafting an agreement to apply provisionally a treaty or a part of a treaty. They do not cover all possible situations and are not intended to prescribe any specific formulation. The examples providing for the provisional application of treaties, found in both bilateral and multilateral treaties, are organized according to certain issues that typically arise. They come from recent practice, and, to the extent possible, they reflect regional diversity. However, the list of examples is not exhaustive.

Madam Chair,

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, and to request that the Secretary-General 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 them over the years, together with other materials relevant to the topic.

Please once more join the Commission in paying tribute to the Special Rapporteur, Juan Manuel Gómez Robledo, for his outstanding contribution, tireless efforts, and devoted work, which enabled the Commission to conclude its work successfully.

Let me now turn to **Chapter VI** of the report, which relates to topic “**Immunity of State officials from foreign criminal jurisdiction.**” This topic has been on the Commission’s agenda since 2008. This year, Commission had before it the eighth report (A/CN.4/739) of the Special Rapporteur, Concepción Escobar Hernández. This particular report examines the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals and considers a mechanism for the settlement of disputes between the forum State and the State of the official. To this end, proposals for draft articles 17 and 18 were presented. It also considered, without any text of a draft article being proposed, the question of good practices that could help to resolve problems that arise in practice in the process of determining and applying immunity. 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 debate of the Commission consisting of the introduction by the Special Rapporteur, the summary of the debate members and concluding remarks by the Special Rapporteur, is reflected in **paragraphs 61 to 79, paragraphs 80 to 99, and paragraphs 100 to 113** of the report of the Commission, respectively.

the Commission also 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. These draft articles deal with procedural aspects and safeguards. **Draft article 8 *ante*** concerns the “application of Part Four”. **Draft article 8**, is entitled “examination of immunity by the forum State”; **draft article 9** concerns “notification of the State of the official”; **draft article 10** addresses “invocation of immunity”; draft article 11 concerns “waiver of immunity” while **draft article 12** relates to “requests for information”. It will be recalled that the Commission has already addressed matters of scope, as well as immunity *ratione personae* and immunity *ratione materiae*, and to this end, to date, the Commission has adopted 7 draft articles, contained in three parts, together with an annex. The text of the draft articles provisionally adopted by the Commission so far appears in **paragraph 114 of the report**.

The text of the draft articles 8 *ante*, 8, 9, 10, 11 and 12, together with commentaries thereto, appears in **paragraph 115** of the report. Draft article 8 *ante* makes certain that the procedural provisions and safeguards forming Part Four of the draft articles are 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 draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.

Draft articles 8 to 12 address questions concerning procedural provisions and safeguards. They seek to address sequentially the various steps that need to be taken, procedurally, to facilitate an eventual determination of immunity, starting with the process of examination, notification, invocation and possible waiver, and requests for information.

Allow me to highlight an issue that the Commission seeks particular comment from Governments which relates to paragraph 5 of draft article 11, according to which waiver of immunity once manifested is irrevocable. There were various views expressed in the Commission as the commentary on the paragraph shows. However, given possible specific exceptional situations where, for example, new relevant facts could be discovered or where an exceptional or fundamental change occurs, for instance, regarding the human rights situation of a potential forum State, it was considered that views of member States were merited, as to whether there could be exceptions to irrevocability of waiver, despite the certainty that the proposition presents.

The hope of the Commission is to complete the first reading next year. The Commission would still welcome any information from Governments first requested in 2019, preferably by **31 December 2021** on 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.

Madam Chair,

I now turn to the topic “**Succession of States in respect of State responsibility**”, addressed in **chapter VII** of the report. The topic, on the Commission’s agenda since 2017, aims at clarifying the interaction and fill possible gaps between the law of succession of States and the law of responsibility of States for internationally wrongful acts, while bearing in mind the importance of maintaining consistency with the previous work of the Commission on various aspects of the two areas, including the 1978 Vienna Convention on Succession of States in respect of Treaties; the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts; the 1999 Articles on nationality of natural persons in relation to the succession of States (annexed to General Assembly resolution 55/153 of 12 December 2000); and the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (annexed to General Assembly resolution 56/83 of 12 December 2001).

This year, the Commission had before it the fourth report, (A/CN.4/743), of the Special Rapporteur Pavel Šturma. The report covered, *inter alia*, questions related to the impact of succession of States on forms of responsibility, in particular different forms of reparation (restitution, compensation and satisfaction), the obligation of cessation, as well as assurances and guarantees of non-repetition. Five new draft articles (draft articles *7bis*, 16, 17, 18 and 19) were proposed in the fourth report. After the debate in plenary, the Commission decided to refer the five new proposed draft articles, as contained in the fourth report, to the Drafting Committee. The debate of the Commission on the Special Rapporteur’s fourth report is contained in

paragraphs 126 to 163 of the Commission’s report.

Moreover, the Commission received reports of the Drafting Committee on previously referred to draft articles and provisionally adopted **draft articles 7, 8 and 9**, with commentaries thereto, which appear in **paragraphs 164 and 165 of the report**. These three draft articles address acts having a continuing character (**draft article 7**), attribution of conduct of an insurrectional or other movement (**draft article 8**), and cases of succession of States when the predecessor State continues to exist (**draft article 9**). The Commission also 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, which was presented to the Commission for information only.

It is anticipated that in his next report, the Special Rapporteur will focus on matters related to the plurality of injured successor States, as well as the plurality of responsible States. He will also address miscellaneous and technical issues, including the renumbering of the draft articles and their final structure.

State practice is crucial in the consideration of this topic. In this connection, the Commission would appreciate receiving examples, relevant to the succession of States in respect of State responsibility, of: (a) treaties, including lump sum agreements and other relevant multilateral and bilateral agreements; (b) domestic law, including legislation implementing multilateral or bilateral agreements; and (c) decisions of domestic, regional and subregional courts and tribunals. The Commission would welcome such and any additional information by **31 December 2021**.

Madam Chair,

The Commission commenced the substantive consideration of the topic “**General principles of law**” in 2019. The debate this year is reflected in **chapter VIII**. The topic concerns “general principles of law” as a source of international law. The Commission had before it the second report (A/CN.4/741 and Corr.1), of the Special Rapporteur, Marcelo Vázquez-Bermúdez. It addressed, *inter alia*, 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. Six draft conclusions were proposed in the second report (draft conclusions 4 to 9). The Commission also had before it the memorandum by the Secretariat surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the scope of the topic (A/CN.4/742).

After the debate in plenary, the Commission decided to refer the six draft conclusions, as contained in the second report, to the Drafting Committee. The debate of the Commission on the Special Rapporteur’s second report is contained in **paragraphs 173 to 237 of the Commission’s report**. Moreover, the Commission provisionally adopted draft conclusions 1, 2 and 4, with

commentaries thereto, which appear in **paragraphs 238 and 239 of the report**. These three draft conclusions address scope (draft conclusion 1), recognition (draft conclusion 2), and the identification of general principles of law derived from national legal systems (draft conclusion 4). The Commission also considered the report of the Drafting Committee on draft conclusion 5, provisionally adopted by the Drafting Committee, and took note of such draft conclusion.

It is anticipated that in his next report, the Special Rapporteur will focus on the question of the functions of general principles of law and their relationship with norms from other sources of international law.

It should be recalled that, in 2019, the Commission sought to be provided by States with 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. . The Commission would welcome such and any additional information, preferably by **31 December 2021**.

Madam Chair,

The last substantive chapter, which is **chapter IX**, deals with the topic “**Sea-level rise in relation to international law**”, included in the Commission’s programme in 2019. It also established a Study Group, to be co-chaired, on a rotating basis, by Bogdan Aurescu, Yacouba Cissé, Patrícia Galvão Teles, Nilüfer Oral and Juan José Ruda Santolaria, and agreed on the Study Group’s membership, methods and programme of work, based on the three subtopics identified in the syllabus, namely law of the sea, statehood and human rights.

Consistent with that programme of work, this year the Study Group focused on the subject of sea-level rise in relation to the law of the sea, based on the first issues paper (A/CN.4/740, Corr.1 and Add.1) prepared in 2020 by Bogdan Aurescu and Nilüfer Oral. In addition, in considering this sub-topic, the Study Group took into account contributions made by members of the Study Group, as well as statements delivered during the first part of the session, and an interactive discussion conducted during its second part, which aimed at exploring a range of views expressed and issues raised.

Further to a presentation of the first issues paper, Yacouba Cissé, also in his capacity as Co-Chair of the Study Group, outlined the maritime delimitation practice of African States. In addition to making general comments on the topic and on the first issues paper, Members of the Study Group considered the views expressed by the Sixth Committee and State practice, and the work of the International Law Association. They further reflected on questions of interpretation of the United Nations Convention on the Law of the Sea with regard, in particular, to ambulatory vs. fixed baselines. They further considered other sources of law as well as questions concerning the potential permanency of the exclusive economic zone and the continental shelf, the relationship between sea-level rise and article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, and the status of islands, artificial islands and rocks.

In concluding its work during the first part of the session, the Study Group made a number of suggestions with regard to its future work and working methods. These suggestions were further debated during the second part of the session. The Study Group then undertook a substantive discussion on the sub-topic on the basis of questions prepared by the Co-Chairs with a view to identifying areas for further in-depth analysis on which the Study Group would focus on a priority basis in the near future. These areas are as follows: (a) sources of law; (b) principles and rules of international law; (c) practice and *opinio juris*; (d) navigational charts.

The Study Group also agreed that it might call upon scientific and technical experts to assist them in their task, on the understanding that they would do so in a selective, useful and limited manner.

The work of the Study Group next year will focus on issues related to statehood, as well as those related to the protection of persons affected by sea-level rise, with Galvão Teles and Ruda Santolaria serving as cochairs. It is expected that the Study Group will then also pursue its consideration of the law of the sea component through informal consultations and sub-studies or research to be undertaken by members of the Study Group on matters meriting further enquiry, or providing an exposition of State practice, before formally returning to it in two years' time, i.e., during the first year of the next quinquennium of the Commission.

In this connection, the attention of delegations is drawn to questions in **Chapter III** of the Commission's report. Governments are encouraged to respond these questions, and provide the information requested in relation to (a) the subtopics of sea-level rise in relation to statehood and the protection of persons affected by sea-level rise by **31 December 2021**, and (b) the subtopic of sea-level rise in relation to the law of the sea **by 30 June 2022**,

Madam Chair,

This concludes my presentation of the entire report and I thank you very much for your kind attention.

Stay well and stay safe.