Canada

UNGA Sixth Committee (2021)

International Law Commission Report (2021)

Canada Statement – Cluster 1

28 October 2021

Mr./Madame Chair,

Thank you for the opportunity for Canada to speak today regarding the 2021 Report of the International Law Commission. We note with pleasure the issuance of this Report, given that a comparable version was not completed in 2020, due to the unfortunate and challenging circumstances surrounding the ongoing COVID-19 pandemic. We regard the work of the ILC as an essential component in the maintenance and strengthening of the international rules-based order. As such, we welcome this latest Report.

To begin, Canada notes with interest the work of the ILC on the provisional application of treaties, in particular the *Guide to Provisional Application of Treaties* and its model clauses. We commend the Commission and the Special Rapporteur for their efforts to develop the Guide, which will provide a common base for the international community on provisional application, and provide a template for consistent use among States. With consistency comes shared practices and a strengthened rules-based order.

Article 25 of the *Vienna Convention on the Law of Treaties* has been the long-standing authority on provisional application. However, its implementation in practice has created some uncertainties in bilateral and multilateral settings.
The issuance of the Guide greatly contributes to clarifying issues surrounding Article 25. We hope that it will serve as a practical foundation for negotiating States considering the inclusion of provisional application in a treaty text. In particular, the model clauses

included in the Guide provide treaty negotiators with the essential elements to include in a provisional application provision.

Provisional application is an integral part of Canada's treaty adoption process, though we generally prefer to rely on entry-into-force provisions as a straightforward mechanism. Canada's current practice is that provisional application may only take effect following the signing of a treaty, and if no domestic implementing legislation is required. If implementing legislation is required, provisional application is delayed until the required legislation enters into force.

There have also been instances where provisional application has, in practice, been limited to specific provisions of a treaty, rather than to the treaty as a whole. Ultimately, the intent of the relevant parties needs to be reflected in the provisional application provisions, as in the rest of the relevant treaty, bearing in mind that the need for coherence and consistency is paramount. Canada looks forward to strengthening its practices regarding the provisional application of treaties with the help of the valuable work of the ILC.

Mr./Madame Chair,

Canada would also like to take the floor to speak to the work of the ILC, and in particular the Special Rapporteur, on protection of the atmosphere. Canada acknowledges that atmospheric degradation is of serious concern to the international community. This is

an important subject that is intricately linked to ongoing work in other international fora, such as ongoing discussions surrounding climate change and prevention of ozone layer depletion, among others.

That said, we have several general points to make regarding the guidelines.

First, there are a number of international frameworks that deal with a range of atmospheric pollution problems. Much of what is contained in the guidelines and related commentary appears to mirror ongoing work in these other fora. It is important to ensure that the interpretation and implementation of these guidelines do not inadvertently conflict with ongoing legal and policy development in other international bodies.

Second, Canada supports overall efforts to promote consistency and compatibility across various international law regimes. However, we wish to note that the complexity of such efforts should neither be underestimated, nor understated. The specifics of each situation should be considered when striving to find solutions, where conflicts or overlaps may arise between different international legal regimes.

Finally, Canada notes that while these are supposed to be guidelines, the language used within periodically shifts from guideline-type language, such as “States should” or “States may include” toward more mandatory language, such as “States have an

obligation to," which would appear to extend beyond simple guidelines. This may be appropriate where the guidelines are reiterating established rules of international law.

While we do not necessarily disagree that States have obligations that may extend to atmospheric protection, it is not always apparent from the commentary how the ILC has determined that, in its view, these are current State obligations, in keeping with customary international law. Canada therefore considers these guidelines to be non-legally binding.

Mr./Madame Chair,

Canada would also like to take this opportunity to raise an issue not yet considered by the ILC, that being the issue of arbitrary detention as leverage in State-to-State relations. We consider this an emerging legal issue in international law, sitting at the juncture of consular and international human rights law. In February 2021, Canada launched the *Declaration Against the Use of Arbitrary Detention in State-to-State Relations*, which has been endorsed by more than 65 UN Member States to date. Canada also notes the 2021 *Annual Report of the Working Group on Arbitrary Detention*, which examines the *Declaration* as one of its thematic issues.

The use of arbitrary detention as leverage in State-to-State relations runs counter to basic principles of human rights law, such as the right to a fair trial for individuals whose detention may be influenced by extraneous and pretextual considerations. The

detention of foreign nationals also carries with it the risk of mistreatment in detention, and obligations arising from foreign nationality itself, such as consular access and access to adequate translation services in the course of judicial proceedings.

Additionally, the use of arbitrary detention as leverage in State-to-State relations carries with it the potential to undermine trust and friendly relations between States. Such relations lie at the heart of the UN system and its *Charter*.

Canada wishes to work with the International Law Commission, and indeed with all UN Member States, to pursue the necessary work toward international legal recognition and prohibition of this unacceptable practice. We raise this issue here today in light of the ILC's important role in the development of international law.

Thank you, Mr./Madame Chair.