The Work of the International Law Commission in Its Seventy-First and Seventy-Second Sessions: COVID, Cancellations and Much More

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Abstract

This contribution describes the work of the UN International Law Commission (ILC) during its seventy-first and seventy-second sessions. Due to the ongoing COVID-19 pandemic, the work of the Commission over the last three years has been severely hampered, yet the Commission was still able to produce significant work. In the seventy-first session, the Commission adopted, on first reading, the Articles on the Prevention and Punishment of Crimes against Humanity. It also adopted two instruments on first reading, namely the Draft Conclusions on Peremptory Norms of General International Law and the Draft Principles on the Protection of the Environment in Relation to Armed Conflict. In the seventy-second session, the ILC adopted two first-reading texts, namely the guidelines on the protection of the atmosphere and the Guide to Provisional Application of Treaties. The Commission was also active in the relation to new topics. In the seventy-first session it placed on its current agenda, the topic sea-level rise in relation to international law. On its long-term programme of work, it placed two topics, namely piracy and robbery at sea under international law and reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law. In the seventy-second session it placed on its agenda the topic subsidiary means for the determination of rules of international law.

Keywords: International Law Commission; codification; progressive development; crimes against humanity; peremptory norms (*jus cogens*); protection of the environment; sea-level rise; provisional application of treaties

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Introduction

The COVID-19 pandemic has left an indelible mark on our lives and has affected global activities for the last two years. The International Law Commission (ILC or the Commission) has not been spared the wrath of the pandemic with one of its sessions having to be postponed. Yet the Commission has been active and has adopted a number of instruments in the period since the last *SAYIL* contribution on the work of the Commission.

The current contribution will cover two sessions of the Commission. First, it will address the seventy-first session held in 2019, at which a number of significant texts were adopted, and second, the postponed seventy-second session in 2021, significant not only because of the substance of the work but also because of the circumstances under which it was held. During the seventy-first session, the Commission adopted, on second (and final) reading, a set of Articles on the Prevention and Punishment of Crimes against Humanity.[1] The Commission also adopted two instruments on first reading,[2] namely the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)[3] and the Draft Principles on the Protection of the Environment in Relation to Armed Conflict.[4] The Commission also considered other topics, including the first report of the Special Rapporteur Marcelo Vasquez Bermudez, on general principles of law, the third report of the Special Rapporteur Pavel Sturma, on succession of States in respect of State responsibility, and the seventh and eighth report of the Special Rapporteur Concepcion Escobar Hernandez, on immunity. The Commission also decided to place the topic of sea-level rise in relation to international law on its agenda.[5] This contribution, however, will focus on the instruments adopted on first and second reading, ie the Articles on the Prevention and Punishment of Crimes against Humanity, the Draft Conclusions on Peremptory Norms of General International Law and the Draft Principles on the Protection of the Environment in Relation to Armed Conflict.

The work of the Commission in the seventy-second session took place under rather anomalous circumstances. First, the session did not take place when it was supposed to take place, in 2020, but was postponed to 2021. Second, and extraordinarily, the General Assembly decided that it would extend the term of the current members of the

1 Articles on the Prevention and Punishment of Crimes against Humanity, *Report of the International Law Commission*, Seventy-First Session (A/74/10).

2 The practice of the Commission is to adopt its instruments in two phases: the first reading text is adopted in order to provide States the opportunity to comment, and the second reading text is the final text of the instrument taken on the basis of written comments received from States.

3 Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), *Report of the International Law Commission,* Seventy-First Session (A/74/10).

4 Principles on the Protection of the Environment in Relation to Armed Conflict, *Report of the International Law Commission,* Seventy-First Session (A/74/10).

5 See Annex (See Level Rise in Relation to International Law), *Report of the International Law Commission,* Seventy-First Session (A/74/10).

Commission so that instead of expiring at the end of 2021, the current quinquennium would expire at the end of 2022. The elections for new members, whose terms would only begin in 2023, would, however still take place in November 2021, thus creating the interesting situation that in 2022, there will be two sets of Commissions—one concluding its term and the other preparing to begin its term. The second anomaly is that the seventy-second session of the Commission took place in a hybrid format with some members joining the session virtually. During the seventy-second session, the Commission adopted two texts on second reading, namely the protection of the atmosphere and provisional application of treaties. The Commission also considered other topics, namely, immunity of State officials from foreign criminal jurisdiction,[6] general principles of law, succession of States and sea-level rise in relation to international law. This contribution will, however, focus on the two instruments adopted on second reading. Given the significance and novelty of the sea-level rise, some comments will also be made on that topic. I will now provide an overview of the Commission's work in the seventy-first and seventy-second sessions.

The Commission's Work During the Seventy-First Session

Crimes against Humanity

The adoption of the Articles on the Prevention and Punishment of Crimes against Humanity (hereinafter the 'Articles on Crimes against Humanity' or, if the context permits, simply the 'Articles') on second reading represents a major achievement for the Commission. It is for the first time in the current century that the Commission has adopted an instrument unequivocally intended to form the basis of convention.[7] On adoption, the Commission recommended 'the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the Articles'.[8] Given the growth in the significance of international criminal law, and the move towards domestic level implementation of international criminal law, the Articles on Crimes against Humanity are an important contribution to the concept of complementarity under the Rome Statute.

The set of Articles, on its own terms, is not intended to be codification of existing customary international law but rather seeks to propose a draft treaty. Moreover, the commentaries also state that that 'while some aspects of these Draft Articles may reflect customary international law, codification of existing law is not the objective of these

6 While this topic is, of course, extremely important and one which gets most international lawyers excited, the really substantive issues concerning this topic were addressed in the previous sessions of the Commission. The contribution to SAYIL on the seventy-third session of the Commission will provide a full discussion of this topic since it is expected that a first reading of the Draft Articles on the immunity of State officials from foreign criminal jurisdiction will be adopted by the Commission.

7 See para 3 of the general commentary to the Draft Articles on Crimes against Humanity (n 1).

8 See *Report of the International Law Commission*, Seventy-First Session (A/74/10) para 42.

Draft Articles.'[9] It should therefore not be lightly assumed that the Articles are an expression of customary international law.

The main contribution of the Articles is to provide a robust interstate cooperation mechanism for the prosecution of crimes against humanity. The interstate cooperation mechanism provided for in the Draft Articles includes *aut dedere aut judicare*[10] and the processes for mutual legal assistance[11] and extradition.[12] These provisions describe the interstate cooperation mechanism that is at the heart of the set of Articles. For the most part, in these provisions, the Commission simply adopted formulations from other regimes. The *aut dedere aut judicare* provision,[13] for example, relies on what is commonly referred to as the 'Hague formula'.[14] As the Commission explains, the obligation on the State under this provision is not to prosecute but to *submit the matter to the competent authorities for the purposes of prosecution*.[15] It is for the authorities to determine, in accordance with their normal rules and procedures, whether to, in fact, prosecute.[16] The rather long provisions on the procedures for extradition and mutual legal assistance, were based on Article 44 of the 2000 United Nations Convention against Corruption.

These interstate cooperation obligations, which are at the heart of the instrument, are intended to give effect to the broader obligations on States to prevent and punish crimes against humanity.[17] The general obligation to prevent crimes against humanity includes the duty to take effective measures in any 'territory under its jurisdiction' and to cooperate with other States and international organisations.[18] It is within this context of cooperation with other States and international organisations that the interstate cooperation mechanisms are provided. The duty to punish is given effect through a series of provisions under the Articles, namely the obligation to criminalise crimes against humanity under national law,[19] the obligation to establish national jurisdiction

9 ibid.
10 Article 10 of the Articles on Crimes against Humanity (n 1).
11 ibid, Art 14.
12 ibid, Art 13.
13 Article 10 provides: 'The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purposes of prosecution.'
14 This formula is based on Art 7 of the 1970 Hague Convention for Suppression of Unlawful Seizure of Aircraft. This formula is also used, for example, in Art 7 the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Punishment.
15 See para 3 of the Commentary to Art 10 of the Articles on Crimes against Humanity (n 1).
16 ibid.
17 See Art 3 of the Articles on Crimes against Humanity (n 1).
18 ibid, Art 4.
19 ibid, Art 6.

over such crimes,[20] the obligation to investigate the commission of crimes,[21] and the obligation to take preliminary measures, such as taking alleged offenders into custody, when it appears that such crimes have been committed.[22]

The set of Articles also sets out particular provisions designed to protect the fundamental rights of persons. Article 5, for example, provides for the obligation of *non-refoulement* of persons to places where they may be subjected to crimes against humanity.[23] Article 11, in contrast, seeks to protect the fundamental rights of persons who may be accused of committing crimes against humanity. It provides that persons accused of crimes against humanity ('person against who measures are being taken') 'shall be guaranteed … fair treatment, including fair trial, and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law.'[24]

These Articles were elaborated in the midst of a number of debates concerning the effects of peremptory status of norms such as the prohibition of crimes against humanity on, for example, immunities of State officials. The Articles do not explicitly address the issue. Instead, the Articles provide that the fact that crimes against humanity were committed 'pursuant to an order of Government or of a superior … is not a ground for excluding criminal responsibility.'[25] While this language might appear to address immunity, it in fact does not address immunity at all. In the context of the Articles on Crimes against Humanity, the Commission makes explicit that the provision does not apply to immunity and that there is a difference between this responsibility language and the doctrine of immunity.[26]

As described in previous contributions, the Draft Articles are restricted to crimes against humanity and do not address other international crimes.[27] To avoid conflict with the Rome Statute, the Commission's Articles on Crime against Humanity borrows the

20 ibid, Art 7.
21 ibid, Art 8.
22 ibid, Art 9.
23 ibid, Art 5(1), which provides as follows: 'No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to crimes against humanity.'
24 ibid, Art 11(1).
25 ibid, Art 11(1).
26 ibid, see para 31 of the Commentary to Article 6 ('By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.').
27 ibid, para 2 of the Commentary to Article 1. Dire Tladi, 'Progressively Developing and Codifying International Law: The Work of the International Law Commission in its Sixty-Seventh Seventh Session' (2015) 40 South African Yearbook of International Law 205, 209–210.

definition of Article 7 of the Rome Statute almost word for word.[28] An important departure from the Rome Statute is that the definition of crimes against humanity in the Rome Statute defines gender as referring 'to two sexes, male and female'.[29] The Commission decided that this definition was out of touch with developments of international human rights law concerning gender and sexual identity.[30] The Commission also, in order to account for the possibility of more progressive definitions, inserted a without prejudice clause, which foresees the possibility of a 'broader definition' whether under customary international law or domestic law.[31]

As described above, the Commission had embarked on the elaboration of the Articles on Crimes against Humanity, with a view to recommending that they be turned into a convention. In 2019, having considered this request, the General Assembly decided first to take note of the completion of the work of the Commission on Crimes against Humanity,[32] and, in a separate resolution, decided to 'include in its provisional agenda' for 2021, the topic crimes against humanity, with a view to 'continue to examine the recommendation of the Commission contained in paragraph 42 of its report.'[33] Whether in 2021, the General Assembly takes up the request of the Commission remains to be seen. However, the track record of other topics the General Assembly decided to consider at a later stage, including State responsibility, diplomatic protection and protection of persons suggests that the General Assembly is unlikely to take the matter further. Paradoxically, this might have the unintended effect of giving the Articles even more prominence through their use by courts and tribunals, much like the Articles on State Responsibility.[34]

Peremptory Norms of General International Law

The adoption of the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) on first reading in 2019 marked the first occasion that the draft conclusions were made public.[35] In contrast to the normal practice of the Commission, the Commission decided to keep all the draft conclusions within the Drafting Committee for the full period in which the Commission had been seized with the topic (since 2016).

28 Some of the modifications are minor and have no substantive consequences. For example, instead of 'For the purposes of this Statute', the Articles provide 'For the purposes of the present Draft Articles'.

29 See Art 7(3) of the Rome Statute.

30 See para 41 of the Commentary to Art 2 of the Articles on Crimes against Humanity (n 1).

31 Article 2(3) of the Articles on Crimes against Humanity.

32 See para 1 General Assembly Resolution 74/186 (Report of the International Law Commission on the Work of its Seventy-First Session) (2019).

33 See para 3 of General Assembly Resolution 74/187 (Crimes against Humanity) (2019).

34 Dire Tladi, 'The Fate of the Draft Articles on State Responsibility: Act Soon or Face the Further Erosion of the Role of States in the International Law-Making Process' 2015 Annuario de Dereito Internacional 2013, 87.

35 Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), *Report of the International Law Commission,* Seventy-First Session (A/74/10).

The Draft Conclusions are divided into four parts: an introductory part, a part concerning how *jus cogens* norms are to be identified, a third part on the consequences of *jus cogens*, and finally a part currently titled 'General Provisions'.[36]

The introductory part, in addition to describing the scope of the draft conclusions, includes a definition of peremptory norms and provision describing the general nature of *jus cogens*. The definition of peremptory norms in the draft conclusions is based on Article 53 of the 1969 Vienna Convention on the Law of Treaties.[37] Draft Conclusion 3, which sets forth the what the draft conclusion refers to as 'general nature', provides that norms of *jus cogens* 'reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable'. While these characteristics are not contained in the Vienna Convention, they are omnipresent in the practice of States and judicial decisions.[38] According to the Commission, while these characteristics are not constitutive of *jus cogens*, and do not form part of the criteria for its identification, 'they may provide an indication of the peremptory status of a particular norm.'[39] By this the Commission means that evidence that a norm contains the characteristics in Draft Conclusion 3 'may serve to support or confirm the peremptory status of a norm.'[40]

Draft Conclusion 4 sets forth two criteria for the identification of *jus cogens*, which are derived from the definition in Draft Conclusion 2. The first criterion is that the norm in question must be a general norm of international law. The second criterion is, in fact, a composite criterion and, at first glance, appears to be multiple criteria. The second criterion contained in Draft Conclusion 4 is that the norm in question must be 'accepted and recognised by the international community of States as one from which no derogation is permitted and which can be modified only by a norm of the same character.' The easiest way to explain this composite criterion is that it is the

36 For an overview, see Dire Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*): Making Wine from Water or More Water than Wine' (2020) 89 Nordic Journal of International Law 244.

37 Draft Conclusion 2 of the Draft Conclusions on Peremptory Norms (n 35) provides as follows: 'A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

38 See, eg ibid, paras 4 *et seq.* of the Commentary to Draft Conclusion 3. For contrasting views on Draft Conclusion 2, see Robert Kolb, 'Peremptory Norms as a Legal Technique Rather than Substantive Super-Norms' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021) and Patrícia Galvão Teles, 'Peremptory Norms of General International Law (*jus cogens*) and the Fundamental Values of the International Community' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021).

39 ibid, para 14 of the Commentary to Draft Conclusion 3.

40 ibid.

requirement that the norm in question be accepted, as a matter of *general* international law, as non-derogable. The constituent elements of this criterion, including the meaning of 'international community of States', and what is meant by acceptance and recognition, is the subject of draft conclusions 6 to 9.

The third part of the Draft Conclusions concerns the consequences of *jus cogens*. Draft conclusions 10 to 13 concern the consequences of *jus cogens* for treaty law and are based mainly on the Vienna Convention on the Law of Treaties.[41] The other sources of obligations, customary international law, unilateral acts and decisions of international law are addressed in subsequent draft conclusions.[42] In respect of the sources, the main area of controversy was whether the general rule applicable to sources, namely invalidity,[43] applied equally to decisions of the UN Security Council adopted under Chapter VII of the UN Charter.[44] While most members of the Commission supported the view that UN Security Council decisions were subject to *jus cogens*,[45] other members questioned this conclusion.[46] The Commission decided not to specifically mention the UN Security Council in the text but to make clear in the commentary that the provision applied equally to the UN Security Council.[47] Draft conclusions 17 to 19, also in the second part, address the rules on State responsibility and how these rules are affected by peremptory norms.

41 The one provision that does not come from the Vienna Convention is Draft Conclusion 13 on reservations to treaties. The basic thrust of that draft conclusion is that while reservations contrary to *jus cogens* are not invalid, they do not affect the applicability of the peremptory norm. See for a criticism of the ILC's position Gentian Zyberi, 'Aspects of Invalidity of Treaties on Account of Conflict with *Jus Cogens*' in Tladi (n 38).

42 Customary international law is addressed in Draft Conclusion 14, unilateral acts are addressed in Draft Conclusion 15, and decisions of international organisations are addressed in Draft Conclusion 16.

43 For treaties, the basic rule in the Draft Conclusions is that a treaty that conflicts with a *jus cogens* norm is invalid or becomes invalid if a peremptory norm subsequently arises (Draft Conclusion 10); for customary international law, the language used to indicate invalidity is 'does not come into existence' or 'ceases to exist' (Draft Conclusion 14); for unilateral acts, the language used is 'does not create obligations' or the 'obligation … ceases to exist' (Draft Conclusion 15). For decisions of international organisations, the language used is 'does not create obligations' (Draft Conclusion 16).

44 The position adopted in the Third Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms (*jus cogens*) (A/CN.4/714), at paras 150 *et seq* is that indeed, decisions of the UN Security Council that conflicted with *jus cogens* could not create obligations.

45 Mr Saboia (A/CN.4/SR.3415); Mr Nguyen (A/CN.4/SR.3415); Mr Sturma (A/CN.4/SR.3416); Mr Ruda Santolaria (A/CN.4/3417); Ms Lehto (A/CN.4/SR.3417); Mr Jalloh (A/CN.4/SR.3418); Mr Hassouna (A/CN.4/SR.3419); Ms Oral (A/CN.4/SR.3419); Mr Reinisch (A/CN.4/SR.3419); Mr Peter (A/CN.4/SR.3421).

46 Mr Zagaynov (A/CN.4/SR.3416); Mr Murphy (A/CN.4/SR.3416); Mr Huang (A/CN.4/SR.3419); Mr Wood (A/CN.4/SR/3421).

47 See Draft Conclusion 16 of the Draft Conclusions on Peremptory Norms (n 35). See especially para 4 of the Commentary to Draft Conclusion.

One of the fears often associated with *jus cogens* is that States may decide not to act in accordance with their obligations on the basis of a unilateral determination that those obligations conflict with *jus cogens*. To address this problem of unilateralism, the Commission decided to include a provision on procedural requirements setting the process for determining that a rule, whether contained in a treaty, customary international law or decision of an international organisation, was invalid for being contrary to *jus cogens*.[48] This provision is novelle and in no way reflects existing law. Yet what it attempts to do is to encourage States to avoid unilateral invocation of peremptory norms to invalidate obligations.[49]

Finally, the draft conclusions contain an annex with a non-exhaustive list of norms previously recognised by the Commission as having peremptory status.[50] The norms identified therein are what one might call the usual suspects.[51] There are certainly arguments to be made for the inclusion of other norms. Questions may be asked, for example, whether the time has not come for the inclusion of environmental concerns[52] or gender issues[53] in this list. For that matter it may be asked why other fundamental principles of the system, such as sovereign equality have not been included in this list.[54]

The Protection of the Environment in Relation to Armed Conflict

The Commission also adopted, on first reading, a set of Draft Principles on the Protection of the Environment in Relation to Armed Conflict.[55] These principles address the area of international law that is at the intersection of international environmental law and the law of armed conflict. The purpose of the Draft Principles is to enhance 'the protection of the environment in relation to the environment … through preventive measures for minimising damage to the environment'.[56] For this purpose, the instrument sets forth a number of principles to be applied before, during and after armed conflict.[57] The set of Draft Principles is divided into four parts. The second part of the draft principles contains principles of general application, ie those principles applicable

48 ibid, Draft Conclusion 21.
49 See for discussion Michael Wood 'The Unilateral Invocation of *jus cogens*' in Tladi (n 38).
50 See Draft Conclusion 23 and the Annex to Draft Conclusions on Peremptory Norms (n 35).
51 The prohibition of aggression, the prohibition of genocide, the prohibition of crimes against humanity, the basic rules of international humanitarian law, the prohibition of racial discrimination and apartheid, the prohibition of slavery, the prohibition of torture and the right of self-determination.
52 See in this respect Nilufer Oral, 'Environmental Protection as a Peremptory Norm: Is it Time?' in Tladi (n 38).
53 Mary Hansel, '"Magic" or Smoke and Mirrors? The Gendered Illusion of *Jus Cogens*' in Tladi (n 38).
54 Hannah Woolaver, 'Sovereign Equality as a Peremptory Norm of General International Law' in Tladi (n 38).
55 Draft Principles on the Protection of the Environment in Relation to Armed Conflict, *Report of the International Law Commission,* Seventy-First Session (A/74/10).
56 ibid, Draft Principle 2.
57 ibid, Draft Principle 1.

before, during and after armed conflict. Part Three concerns principles applicable during armed conflict, while Part Four contains principles that are applicable in situations of occupation. Finally, the fifth part sets forth principles applicable after armed conflict.

The principles contained in Part Two, though generally applicable, really concern measures that the State should adopt before the outbreak of conflict, with the understanding that the duties provided therein remain applicable even during armed conflict and certainly after the conflict. The main duty on States is to 'take effective legislative, administrative, judicial and other measure to enhance the protection of the environment in relation to armed conflict.'[58] The measures referred to here are those that States are obliged to under existing international law.[59] Yet Draft Principle 3 also makes provision for States to take measures, beyond those required under international law, to enhance the protection of the environment in relation to armed conflict.[60] In particular, the draft principles provide that States 'should designate', including through agreement, 'areas of major environmental and cultural importance as protected zones'.[61] Another principle of general application is the taking of 'appropriate measures … to protect the environment of the territories that indigenous peoples inhabit.'[62] The draft principles also provide for the inclusion of provisions on the protection of the environment in status of forces agreements, including provisions on 'preventive measures, impact assessments, restoration and clean-up measures.'[63]

The role of corporate entities in environmental degradation has received a fair amount of attention in recent years.[64] Draft Principle 10 provides that States 'should take … measures aimed at ensuring that corporations operating in or from their territories exercise due diligence with respect to the protection of the environment'.[65] This obligation is on the State and not the corporate. However, the key element of this provision, in my view, is that it introduces an element of extraterritoriality in the duty of the State by imposing a duty on the State in respect of entities 'operating … from their territories' and not only those 'operating in … their territories'. Draft Principle 11 concerns the liability of corporates. Yet even this principle does not impose obligations on corporate entities directly. Rather, the principle requires States to 'take appropriate

58 ibid, Principle 3(1).
59 ibid, see also para. 2 of the Commentary to Draft Principle 3 ('Paragraph 1 reflects that States *have obligations under international law to* enhance the protection of the environment in relation to armed conflict.').
60 ibid, Principle 3(2).
61 ibid, Principle 4.
62 ibid, Principle 5.
63 ibid, Principle 6.
64 Sufyan Droubi, 'Transnational Corporations and International Human Rights Law' (2016) 6 Notre Dame Journal of International Comparative Law 119.
65 Draft Principle 10 of the Draft Principles on the Protection of the Environment (n 55).

… aimed at ensuring that corporations … operating in and from their territories can be held liable for harm caused by them to their environment.'

This provision in Part Three of the Draft Principles is the Martens Clause, adapted to the protection of the environment. It provides that for 'cases not covered by international agreements, the environment remains under the protection and authority of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'[66]

The particular principles identified in Part Two as being applicable during armed conflicts include the general obligation to respect and protect the environment 'in accordance with applicable international law'.[67] In particular, Draft Principle 13 provides that '[c]are shall be taken to protect the environment against widespread, long-term and severe damage.'[68] More specifically, Principle 13 that '[n]o part of the natural environment may be attacked, unless it has become a military objective'. The general principles to protect and respect the environment are further elaborated to include the principles of international humanitarian law 'distinction, proportionality, military necessity and precaution in attacks',[69] that environmental considerations are to be 'taken into account when applying the principle of proportionality and the rules on military necessity',[70] the prohibition of attacks on the environment as reprisals,[71] the duty to protect areas designated as environmentally and culturally important from attacks,[72] and the prohibition of pillage.[73] Additionally, Principle 19 provides that States may not 'engage in military or other hostile use of environmental modification techniques have widespread, long-lasting or severe effects'.[74]

Part Four of the Draft Principles sets forth principles relevant to situations of occupation. The general obligations identified in Part Four include the 'duty to respect and protect of the occupied territory in accordance with applicable international law'.[75] In addition to the duty of due diligence,[76] the ILC's also requires where the Occupying Power uses the resources of the occupied territory,[77] it shall do so in a way that ensures sustainable

66 ibid, Principle 12.
67 ibid, Principle 13(1).
68 ibid, Principle 13(2).
69 ibid, Principle 14.
70 ibid, Principle 15.
71 ibid, Principle 16.
72 ibid, Principle 17.
73 ibid, Principle 18.
74 ibid, Principle 19.
75 ibid, Principle 20. In this respect, the Principles state that the Occupying Power 'shall take appropriate measures to prevent harm to the environment.'
76 ibid, Principle 22.
77 The language chosen by the Commission suggests some doubt as to whether the Occupying Power may actually use the resources of the occupied territory ('To the extent that an Occupying Power is

use and minimises environmental harm.[78] The final part of the draft principles is concerned with the situation after conflict. It includes principles concerning the peace process and the peace agreement,[79] and the various measures that should be adopted to restore and protect the environment.

Other Topics and Decisions

In addition to the substantive issues, the Commission also made a number of other decisions. First, for the first reading texts, the Draft Principles on the Protection of the Environment in Relation to Armed Conflict and the Draft Conclusions on Peremptory Norms of General International Law, the Commission, through the Secretary-General of the United Nations, requested States to provide written comments and observations by 20 December 2020. Owing the fact that the 2020 session was postponed to 2021, the Commission decided to extend this deadline to 30 June 2021. The Special Rapporteurs of both of those topics will prepare final reports proposing modifications of the texts to take into account of the comments and observations of States.

The Commission also made decisions concerning new topics. First, it placed on its long-term programme of work—ie a list of topics that the Commission could take up in the future—the topic 'reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law' on the basis of a paper prepared by Claudio Grosmann.[80] The Commission also placed the topic 'prevention and repression of piracy and armed robbery at sea' on the basis of a paper prepared by Yacouba Cissé.[81] The Commission also decided to place on its current agenda, the topic sea-level rise in relation to international law. This topic was to be addressed through a study group and was considered for the first time in 2021. The main issues under consideration, for which the study group and the Commission will continue to consider, was whether baselines from which the territorial sea (and other maritime zones) were ambulatory or permanent.

permitted to administer and use the natural resources'). See para 2 of the commentary to Principle 21, which stats that international generally 'prohibits "wasteful and negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation"'.

78 Principle 21 of the Draft Principles on Environmental Protection (n 55).

79 ibid, Principle 23 provides that the peace process and any peace agreement should 'where appropriate … address matters relating to the restoration and protection of the environment damaged by the conflict'.

80 See Annex B, *Report of the International Law Commission,* Seventy-First Session (A/74/10).

81 ibid, Annex C.

The Commission's Work During the Seventy-Second Session

The Protection of the Atmosphere

The Commission adopted the Guidelines on the Protection of the Atmosphere on second reading.[82] The text of the Guidelines consists of twelve guidelines covering various aspects of the protection of the atmosphere and international law. Much of the discussions in the seventy-second session focused on 'the understanding' that formed the basis for the topic's inclusion on the Commission's agenda. It is worth recalling the salient parts of text of the understanding, significant as it was for how the topic would be handled. In that understanding, the Commission decided, in part that '(a) work on the topic will … not interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary pollution' and 'will not deal with, but will also be without prejudice to, questions such as the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries.'[83] The understanding also stated that the topic will not 'seek to "fill" gaps in treaty regimes', and will not 'seek to impose on current treaty regimes legal rules or legal implications not already contained therein.'[84]

It will not be lost on the reader that the first part of this understanding removes all the critical elements of the topic. The second part of the understanding as described (seeks to not fill gaps and to not impose legal rules) seeks to limit the impact of the Guidelines in the future, ie it sends the message that whatever the Commission decides on this topic, it should not be used as an interpretative in respect of existing regimes. The question for the Commission was whether this understanding should be reflected in the second (final) reading text of the Draft Guidelines. Not referring to the first part of the understanding might create the impression that the Commission considered all aspects of the topic and decided that the principles mentioned therein, such as the common but differentiated responsibilities principle and the precautionary principle, were not principles of international law.

In the end, the Commission decided to refer to both elements in two separate ways. The second part would be referred to in a preambular paragraph which recalls that the guidelines 'were elaborated on the understanding that they were not to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles' which were not part of such treaty regime.[85] The first part of the understanding is addressed in the scope provision, making it plain that the Commission's silence on the

82 Guidelines on the Protection of the Atmosphere, *Report of the International Law Commission,* Seventy-Second Session (A/76/10).

83 *Report of the International Law Commission*, Sixty-Fifth Session (A/68/10), para 168.

84 ibid.

85 Eighth Preambular Para of the Guidelines on the Protection of the Atmosphere (n 82).

enumerated principles does not mean that they are not principles of international law.[86] In explaining this provision, the commentary explains that 'in not dealing with these three specified principles, this paragraph does not in any way imply the legal irrelevance of those principles.'[87]

The preamble to the Guidelines identifies important principles of international environmental law. The first of these is the notion that 'atmospheric pollution and atmospheric degradation are a common concern of humankind'.[88] According to the Commission, the concept of 'common concern' is intended to indicate that a particular problem, in this case 'atmospheric pollution and atmospheric degradation' requires 'cooperation from the entire international community.'[89] Yet the commentary also states that the concept 'does not create, as such, rights and obligations' and that 'it does not entail *erga omnes* obligations'.[90] The preamble also references both intergenerational equity[91] and intragenerational equity.[92] Thus, while many of the principles of international environmental law are excluded from the scope of the project, these two preambular paragraphs serve to remind us that these principles underly the area of international law in which this topic is situated.

The basic principle set forth in the Guidelines is the obligation on States to protect the environment.[93] This obligation is to be fulfilled through the 'exercise of due diligence in taking appropriate measures … to prevent, reduce or control atmospheric pollution and atmospheric degradation.'[94] In addition, the Guidelines require States to conduct environment impact assessments when 'proposed activities within their jurisdiction or control … are likely cause significant adverse impact on the atmosphere.'[95] Also included in the Guidelines are principles common international environmental law, such as the principle of sustainable utilisation[96] and the principle of equitable and reasonable utilisation.[97] More concretely, the guidelines provide that 'intentional large-scale

86 ibid, Guideline 2(2).
87 ibid, Para 6 of the Commentary to Guideline 2.
88 ibid, Third Preambular Para.
89 ibid.
90 ibid.
91 ibid, Seventh Preambular Paragraph ('*Recognising* that the interests of future generations of mankind in the long-term conservation of the quality of the atmosphere should be fully taken into account.').
92 ibid, Fourth Preambular Paragraph (*'Aware* of the special situation and needs of developing countries').
93 ibid, Guideline 3.
94 ibid.
95 ibid, Guideline 4.
96 ibid, Guideline 5 ('Given that the atmosphere is a natural resource with limited assimilation capacity, its utilisation should be undertaken in a sustainable manner'). Sustainable utilisation is described as including the 'need to reconcile economic development with the protection of the atmosphere.').
97 ibid, Guideline 6 ('The atmosphere should be utilised in an equitable manner, taking fully into account the interests of present and future generations.').

modification of the atmosphere should only be conducted with prudence and caution'.[98] It will be noted that first, the provision is couched hortatory language ('should') and second does not prohibit intentional large-scale modification but merely requires that, when conducted, it should be done with prudence and caution.

The Guidelines also include a number of interstate rules designed to contribute to meeting the overarching obligation to protect the atmosphere. The first of these interstate rules is the obligation of States to cooperate with each other and, 'as appropriate', with international organisations for the protection of atmosphere.[99] Presumably, this obligation foresees States cooperate to go beyond the obligations already contained in the guidelines. Also within this category of these interstate rules is the duty on States to promote interrelationships amongst relevant rules of international law that could impact on the protection of the atmosphere.[100] These include, for example, rules on international investment law, international trade law and the laws of the sea and human rights. This principle is based on the spirit of systemic integration in accordance with Article 31(3)(c) of the Vienna Convention.

Provisional Application of Treaties

The Commission also adopted the Guide to Provisional Application of Treaties during the postponed seventy-second session.[101] The Guide to Provisional Application did not raise too many controversies. Its purpose was to build on Article 25 of the 1969 Vienna Convention on Law of Treaties, practice and other international instruments, with a view to providing practical guidance on provisional application.[102] The main (perhaps only) issue of contention concerned the tension between the institution of provisional application and (domestic) democratic accountability—an issue I briefly discuss below.

The basic rule provided for in the guide is that a 'treaty or part of treaty is applied provisionally pending its entry into force … if the treaty so provides, or if in some other manner it is so agreed.'[103] In addition to the treaty providing for provisional application, provisional application can be provided for in a separate treaty, or resolution or decision of an international organisation or intergovernmental conference.[104] The instrument adopted by the Commission also makes provision for the unilateral decision by States to have to apply a treaty provisionally if that unilateral commitment is accepted by the other States 'concerned'.[105] According to the commentary, the provisional application

98 ibid, Guideline 7.
99 ibid, Guideline 8.
100 ibid, Guideline 9.
101 The Guide to Provisional Application of Treaties, *Report of the International Law Commission,* Seventy-Second Session (A/76/10).
102 ibid, Guideline 2.
103 ibid, Guideline 3.
104 ibid, Guideline 4.
105 ibid, Guideline 4(b).

will be applicable only in the relations between the State making the unilateral declaration and those States that explicitly accept the provisional, ie mere non-objection is not sufficient.[106] The broad reference to States, raises the question: Which States? Under the terms of Article 25 of Vienna Convention, provisional application is open to negotiating States. According to the Commission, the contemporary practice does not limit the possibility of provisional application to negotiating State.[107]

As mentioned above, the only contentious issues concerning provisional application is the matter of domestic accountability. Provisional application, almost by definition, undermines the mechanisms provided for ratification process which, in most States, take place after legislative approval. Provisional application means that the executive, without having gone through that internal process, can establish binding obligations, albeit provisionally. To this end, Guideline 6 provides that 'provisional application of a treaty … produces legally binding obligation to apply the treaty' to the extent foreseen by the instrument of provisional application or as otherwise agreed. Moreover, under the Guide, a State may not invoke its internal law, including laws concerning competence to conclude treaties, as justification for non-performance of obligations pursuant to provisional application.[108] Furthermore, the normal consequences for breach of a treaty obligation apply to non-performance of obligations pursuant to provisional application.[109]

It should be stressed that, though it may not be clear from the text adopted by the Commission, provisional application is ultimately dependent on the consent of the State. Thus, the fact that a treaty provides for provisional application does not mean that any State, including States that had participated in the negotiations of the treaty, would be bound to apply the treaty provisionally. A State would need to, in some form, express its consent to provisional application.

The text of the guide also provides for the termination of provisional application.[110] The most orthodox way for provisional application to come to an end is through the entry into force of the treaty in question. The provisional application of the treaty will also come to an end for a State if that State notifies the other States that it intends not to become a party to the treaty. Indeed, as a matter of international law, it can be said that a State has an almost limitless scope for the termination of provisional application of treaties, subject to whatever notification requirements may be required.

106 ibid, Para 7 of the Commentary to Guideline 4.

107 ibid, Para 6 of the Commentary to Guideline 4.

108 ibid, Guideline 10 and Guide 11.

109 See ibid, Guideline 8 ('The breach of an obligation arising under a treaty or part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.).

110 ibid, Guideline 9.

Other Topics

While the Commission considered other topics, such as the immunity of State officials from foreign criminal jurisdiction and general principles of law, perhaps the most notable 'other' topic considered by the Commission was sea-level rise in relation to international law.[111] In this, the first year of the consideration of that very important topic, the study group had before it an issues paper prepared by two of the co-chairs of the study group on baselines in international law. The principal question addressed by the issues paper and the study group was whether the baselines from which the territorial sea (and other maritime zones) were measured were ambulatory or permanent. If the baselines were ambulatory, for the purposes of the sea-level rise, States could lose territory because of rising sea-levels. Indeed, in the worst-case scenarios, whole States could disappear. On the other hand, permanent baselines would mean that, even if the baselines shifted landwards, the territory of the State would remain unaffected meaning that States would not lose territory on account of sea-level rise. The Commission agreed that the issues raised were complex and required further and more detailed study.

The Commission also decided to place on its long-term programme work another source-related topic. On the basis of a paper prepared by Charles Jalloh, the Commission decided to place the topic 'subsidiary means for the determination of rules of international law'. This topic would, if placed on the agenda of the Commission, consider the role of judicial decisions and writings under international law.

Conclusion

This contribution has covered two sessions of the Commission which, due the COVID-19 pandemic, were held over a period of three years. Yet even with the challenges of the COVID-19 pandemic, the seventy-first and seventy-second sessions of the Commissions have been very productive. In those sessions, the Commission adopted three full texts on second reading and the two full texts on first reading. The Draft Articles on the Prevention and Punishment of Crimes Against Humanity, the Guidelines on the Protection of the Atmosphere and the Guide to Provisional Application of Treaties were all adopted on second reading. The Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) and the Draft Principles on the Protection of the Environment in Relation to Armed Conflict were adopted on first reading.

In these trying times, the Commission also showed an ability to adapt. Holding its seventy-second session in hybrid format, with some members of the Commission joining online, the Commission was able to consider many topics—apart from the two first reading texts—while navigating complicating issues pertaining to time-differences, decision-making and technology issues. No one knows what the year 2022 holds, but

111 See Chapter IX, *Report of the International Law Commission,* Seventy-Second Session (A/76/10).

with the prospect of second reading adoptions of the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) and principles on the protection of the environment in relation to armed conflict, one only hopes that the Commission will be able to outdo itself.

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