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Peremptory Norms of General International Law (Jus Cogens) (Revisited) and Other Topics: The Seventy-Third Session of the International Law Commission

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CURRENT DEVELOPMENTS

PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) (REVISITED) AND OTHER TOPICS: THE SEVENTY-THIRD SESSION OF THE INTERNATIONAL LAW COMMISSION

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The International Law Commission (ILC) held its seventy-third session from April 18 to June 3 and from July 4 to August 5, 2022 in Geneva, under the chairmanship of Dire Tladi (South Africa).[1] This session was the final one of the quinquennium, which originally would have occurred in the summer of 2021. (Since the Commission did not meet in the summer of 2020 due to the outbreak of the <10>COVID-19<10> pandemic,[2] the 2020 and 2021 sessions were postponed to 2021 and 2022 respectively.) Although the pandemic continued in 2022, the members faced fewer health risks and travel difficulties; consequently, the Commission held its session with almost all members physically present in Geneva, and just a few occasionally participating online by means of Zoom.

During the seventy-third session, the Commission completed the second reading of two topics: peremptory norms of general international law (*jus cogens*); and protection of the environment in relation to armed conflicts. The Commission completed a first reading of the topic on immunity of state officials from foreign criminal jurisdiction. Progress was also made in developing draft guidelines on succession of states with respect to state responsibility and draft conclusions on general principles of law. Additionally, the Commission's study group on sea-level rise in relation to international law continued its work, which focused this session on matters relating to statehood and to the protection of persons affected by sea-level rise.

The Commission also added three topics to its agenda: settlement of international disputes to which international organizations are parties; prevention and repression of piracy and armed robbery at sea; and subsidiary means for the determination of rules of international law. Further, the Commission added to its long-term work program a topic on non-legally binding international agreements.

One unusual aspect of the session was that the election of the membership for the next quinquennium took place as originally scheduled in November 2021, but those elected will not commence their terms until 2023.

I. PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*)

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[1] *See* Report of the International Law Commission on the Work of Its Seventy-Third Session, UN GAOR, 77th Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/77/10 (2022) [hereinafter 2022 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.

[2] *See generally* Sean D. Murphy, *Effects of the <8>COVID-19<8> Pandemic on the Work of the International Law Commission*, 114 AJIL 726 (2020) [hereinafter Murphy, *Effects of the <8>COVID-19<8> Pandemic*].

The Commission completed the second reading of the topic on peremptory norms of general international law (*jus cogens*),[3] based on a fifth report by the special rapporteur, Dire Tladi,[4] and on comments received from governments regarding the text and commentary adopted at first reading in 2019.[5] The outcome of this topic is 23 draft conclusions and an annex with commentary. Relatively modest changes were made to the text of the draft conclusions and annex that was adopted at first reading.

The title was expanded to be draft conclusions on *identification and legal consequences of* peremptory norms of general international law (*jus cogens*), which is intended to more closely delineate the scope and purpose of the topic.[6] Consistent with Article 53 of the Vienna Convention on the Law of Treaties (VCLT),[7] draft conclusion 3 defines a peremptory norm of general international law (*jus cogens*) as "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."[8]

The draft conclusion on the "nature" of *jus cogens*—which was criticized by some governments for potentially creating new criteria for identifying a norm as *jus cogens*[9]—was relocated to appear before, rather than after, the definition of *jus cogens*, thus emphasizing that it is not providing further criteria for the definition.[10] Further the draft conclusion was slightly restructured to disaggregate elements indicating the general origins and purpose of *jus cogens* norms (to reflect and protect fundamental values) and elements indicating their general scope and effect (universally applicable and hierarchically superior to other rules). As now formulated, draft conclusion 2 provides: "Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law."[11]

Draft conclusion 7 seeks to explain what is meant by the "[i]nternational community of States as a whole." At second reading, draft conclusion 7, paragraph 2, was revised to provide that there must be acceptance and recognition not just by a very large majority of states, but "by a very

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[3] For the text of the draft conclusions and annex, see 2022 Report, *supra* note 1, at 11–16; for the draft conclusions and annex with commentary, see *id*. at 16–89.

[4] *See* International Law Commission, Fifth Report on Peremptory Norms of General International Law (*Jus Cogens*), UN Doc. A/CN.4/747 (Jan. 24, 2022) (prepared by Special Rapporteur Dire Tladi). For discussion of prior work on this topic, see 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, 730–31 (2016) [hereinafter Murphy, *Sixty-Eighth Session*]; Sean D. Murphy, *Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AJIL 970, 988–90 (2017) [hereinafter Murphy, *Sixty-Ninth Session*]; Sean D. Murphy, *Anniversary Commemoration and Work of the International Law Commission's Seventieth Session*, 113 AJIL 90, 100–03 (2019) [hereinafter Murphy, *Seventieth Session*]; Sean D. Murphy, *Peremptory Norms of General International Law (*Jus Cogens*) and Other Topics: The Seventy-First Session of the International Law Commission*, 114 AJIL 68, 68–72 (2020) [hereinafter Murphy, *Seventy-First Session*].

[5] Peremptory Norms of General International Law (*Jus Cogens*): Comments and Observations Received from Governments, UN Doc. A/CN.4/748 (Mar. 9, 2022) [hereinafter Peremptory Norms, Comments and Observations].

[6] *See* Peremptory Norms of General International Law (*Jus Cogens*), Statement of the Chair of the Drafting Committee, Mr. Ki-Gab Park, at 2 (May 17, 2022), https://legal.un.org/ilc/documentation/english/statements/2022_dc_chairman_statement_jc.pdf [hereinafter Peremptory Norms, Statement of the Chair of the Drafting Committee].

[7] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 UNTS 331, 8 ILM 679 (1969) [hereinafter VCLT].

[8] 2022 Report, *supra* note 1, at 12 (draft conclusion 3).

[9] Peremptory Norms, Comments and Observations, *supra* note 5, at 21–26.

[10] *See* Peremptory Norms, Statement of the Chair of the Drafting Committee, *supra* note 6, at 2–3.

[11] 2022 Report, *supra* note 1, at 11 (draft conclusion 2).

large *and representative* majority of States."[12] The commentary indicates that the term representative "requires that the acceptance and recognition be across regions, legal systems and cultures."[13] Yet the commentary does not go further so as to explain whether, for example, a norm must be accepted and recognized as nonderogable across each of the principal regions (Africa, Asia, Europe, the Middle East, North America, and South America), across each of the principal legal systems (e.g., civil, common law, and Islamic law), and across all cultures (presumably not in the sense of each state having its own culture).

A high degree of acceptance and recognition may also be observed in other aspects of the commentary adopted at second reading. For example, the commentary to draft conclusion 14 notes that "if a rule of customary international law was the object of persistent objections from several States, such objections might not be sufficient to preclude the emergence of a rule of customary international law, but might be sufficient to preclude the norm from being recognized as a peremptory norm of general international law (*jus cogens*)."[14] In other words, the standard for recognition of a rule as a *jus cogens* norm may be even higher than that for the identification of a rule of customary international law. Separately, the forms of evidence of such acceptance and recognition were slightly amended in draft conclusion 8, paragraph 2, to make clear that "resolutions adopted by an international organization or at an intergovernmental conference" were pertinent as a form of "conduct of States."[15]

Part Three sets forth a series of draft conclusions indicating that certain rules of international law are void or terminate if in conflict with *jus cogens*. Aware that it is destabilizing to the international legal system for any state to decide unilaterally whether its legal obligations conflict with *jus cogens*, Part Four identifies two guard rails. First, draft conclusion 20 indicates that where there appears to be a conflict between *jus cogens* and another rule of international law, "the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former."[16] Second, if such conflict cannot be avoided, draft conclusion 21 addresses procedural steps whereby the state invoking *jus cogens* as a ground for invalidity or termination gives notice to any affected states, negotiations ensue if any of those states object, and the matter is submitted to the International Court of Justice if no other solution can be reached. While such procedures fit well within a treaty, such as the VCLT,[17] and may well be good practice, it is difficult to maintain that they are obligatory as a matter of customary international law, and governments criticized the first reading text on that basis.[18] In response at second reading, the title of the draft conclusion was changed from "Procedural requirements" to "Recommended procedure" and various verbs were changed from "shall" to "should."[19] The bottom line, however, is a Commission position that states should not unilaterally declare that rules binding upon them are void due to *jus cogens*; any such position should be approached through a process of negotiation and, if necessary, dispute

[12] *Id*. (draft conclusion 7) (emphasis added).

[13] *Id*. at 40, para. (8) (commentary to draft conclusion 7).

[14] *Id*. at 60, para. (12) (commentary to draft conclusion 14).

[15] *Id*. at 13 (draft conclusion 8, para. 2) ("… resolutions adopted by an international organization or at an intergovernmental conference; and *other* conduct of States.") (emphasis added); *see* Peremptory Norms, Statement of the Chair of the Drafting Committee, *supra* note 6, at 11 ("In the end, the Drafting Committee adopted the proposal of the Special Rapporteur to include a more all-encompassing reference to State conduct … .").

[16] 2022 Report, *supra* note 1, at 15 (draft conclusion 20).

[17] *See* VCLT, *supra* note 7, arts. 65–67.

[18] Peremptory Norms, Comments and Observations, *supra* note 5, at 90–98.

[19] 2022 Report, *supra* note 1, at 15–16 (draft conclusion 21).

settlement. Moreover, "the invoking State should not carry out the measure which it has proposed until the dispute is resolved."[20]

Two issues that engendered considerable reactions from governments or within the Commission were addressed solely by the commentary. The first concerned the potential adverse effects of draft conclusion 16—which provides that a binding resolution of an international organization does not create obligations under international law if it conflicts with *jus cogens*—on the authority of the U.N. Security Council. Several states supported draft conclusion 16 and viewed it as appropriate that Security Council resolutions are covered.[21] Several other states, however, regarded the Council as being in a special position, given the agreement by all states to U.N. Charter Chapter VII and article 25, and especially given the hierarchy established by article 103.[22] At second reading the commentary to draft conclusion 16 was augmented with the following text:

> The application of the rule in draft conclusion 16 has to be read together with the interpretative rule set out in draft conclusion 20 and the procedures laid out in draft conclusion 21. While the procedural rules laid out in draft conclusion 21 apply also to other sources of obligations, these are particularly important in relation to resolutions of the United Nations adopted under Chapter VII of the Charter of the United Nations. Draft conclusion 16 should therefore not be read as providing cover for unilateral repudiation of obligations flowing under binding resolutions of the United Nations. Indeed, while the commentary states that Security Council resolutions are covered by draft conclusion 16, the Commission is conscious that it is highly unlikely that a Security Council resolution would, on its face, be in conflict with a peremptory norm of general international law (*jus cogens*). Thus, in the first place, before determining that there is a conflict between a Security Council decision and a peremptory norm of general international law (*jus cogens*), the rule of interpretation contained in draft conclusion 20 should be applied in order to avoid, where possible, such a conflict. Second, prior to adopting any measure on the strength of a belief that a binding Security Council resolution is in conflict with a peremptory norm of general international law (*jus cogens*), a State should follow the procedure set forth in draft conclusion 21.[23]

The second issue concerned draft conclusion 19, which provides in part that "States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under" *jus cogens*. While some states supported this draft conclusion, others viewed it as unclear,[24] as needing further support,[25] or as not reflecting existing law,[26] particularly noting that

[20] *Id*. at 16 (draft conclusion 21, para. 3).

[21] For reactions by states to this draft conclusion, see Peremptory Norms, Comments and Observations, *supra* note 5, at 74–80.

[22] Chapter VII empowers the Council to adopt decisions to address threats to the peace, breaches of the peace and acts of aggression, including economic sanctions and authorizations to use military force. Article 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[23] 2022 Report, *supra* note 1, at 64, para. (5) (commentary to draft conclusion 16) (citations and footnotes omitted).

[24] *See, e.g.*, Peremptory Norms, Comments and Observations, *supra* note 5, at 84 (Colombia).

[25] *See, e.g.*, *id*. at 84 (Australia); *id*. at 87 (Netherlands).

[26] *See, e.g.*, *id*. at 85 (Israel).

the sources cited usually made no reference to *jus cogens*.[27] In all likelihood, the concerns expressed (which were also expressed when comparable provisions appeared in the 2001 draft articles on the responsibility of states for international wrongful acts[28]) relate to an apprehension that states are being told they are obligated to take affirmative, but undefined, steps to "bring to an end" any serious breach of *jus cogens*, including acts of racial discrimination or trafficking in persons. Rather than soften the draft conclusion, the Commission at second reading essentially doubled-down on the proposition, maintaining the text of the draft conclusion unchanged, while adding references to a large number of General Assembly and Human Rights Council resolutions that purportedly "illustrate the duty to cooperate to bring to an end serious breaches" of *jus cogens*,[29] such as General Assembly resolution ES-11/3 suspending the Russian Federation membership from the Human Rights Council in the wake of its invasion of and apparent atrocities in Ukraine.[30] Leaving aside that such resolutions nowhere mention *jus cogens*, the commentary also does not assess the significance of the vote count in such resolutions (for example, ES-11/3 was adopted by a vote of 93-24 with 58 abstentions), and whether voting against or abstaining on such resolutions casts doubt that the obligation in draft conclusion 19 is widely accepted by states, or whether such voting constitutes a violation of the asserted obligation to cooperate. As it happens, the special rapporteur proposed two new paragraphs to this commentary that would have referred in depth to Russia's intervention in Ukraine but, after debate, it was decided by the Commission simply to include references to resolutions concerning that intervention alongside the numerous other resolutions concerning other incidents.[31]

The Commission decided to recommend that the General Assembly take note of the draft conclusions, annex them to a resolution, ensure their widest possible dissemination, and commend them to "the attention of States and to all who may be called upon" to deal with the subject.[32]

II. Protection of the Environment in Relation to Armed Conflicts

The Commission also completed the second reading of the topic on protection of the environment in relation to armed conflicts,[33] based on a third report by the special rapporteur,

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[27] Japan observed that:

> in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice stated that all Member States are under an obligation to cooperate with the United Nations in order to complete decolonization, without referring to *jus cogens*. Similarly, according to the advisory opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall", but there was no explicit reference to *jus cogens*.

Id. at 87 (citation omitted); *see also id*. at 86 (Italy) ("In fact, both advisory opinions grounded the identification of legal consequences for third parties on the *erga omnes* nature of the obligations breached, rather than on the peremptory nature of the corresponding norm and/or the serious violation of those obligations/norms.").

[28] *See, e.g.*, *id*. at 89 (United Kingdom).

[29] 2022 Report, *supra* note 1, at 73–74, para. (9) (commentary to draft conclusion 19).

[30] G.A. Res. ES-11/3 (Apr. 8, 2022) (cited at 2022 Report, *supra* note 1, at 74, n. 251).

[31] *See* International Law Commission, Provisional Summary Record of the 3599th Meeting, UN Doc. A/CN.4/SR.3599 at 7–12 (July 26, 2022); International Law Commission, Provisional Summary Record of the 3600th Meeting, UN Doc. A/CN.4/SR.3600 at 7–10 (July 27, 2022); International Law Commission, Provisional Summary Record of the 3601st Meeting, UN Doc. A/CN.4/SR.3601 at 6–8 (July 27, 2022). These summary records may be accessed at https://legal.un.org/ilc/sessions/73/docs.shtml.

[32] 2022 Report, *supra* note 1, at 11, para. 41.

[33] For the text of the draft principles, see 2022 Report, *supra* note 1, at 92–96; for the draft principles with commentary, see *id*. at 96–187.

Marja Lehto (Finland), [34] and on comments received from governments, international organizations and others regarding the text and commentary adopted at first reading in 2019.[35] The outcome of this topic is a preamble and 27 draft principles with commentary. Among the various sources cited in the commentary to this topic are military manuals,[36] review mechanisms,[37] and treatises[38] developed by the United States for the regulation of its armed forces, as well as U.S. laws, case law, and practice, [39] including that relevant to corporate activity harmful to the environment in conflict areas.[40]

There was no preamble to these draft principles at first reading, but elements for one were proposed by the special rapporteur and then developed in the drafting committee.[41] Among other things, the draft preamble recalls principle 24 of the Rio Declaration on Environment and Development,[42] which provides *inter alia* that states shall "respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."[43] Further, the draft preamble notes the connection between the environmental consequences of armed conflict and other global environmental challenges, such as climate change and biodiversity loss. [44] No doubt when adopting the draft preamble, ILC members had in mind recent events in Ukraine, where armed conflict raised the possibility of radioactive contamination from the dormant Chernobyl nuclear site and from active nuclear power plants, and other forms of environmental harm.[45]

As was the case at the first reading, the draft principles are structured in five parts addressing: introduction (draft principles 1-2); principles of general application (3-11); principles applicable during armed conflict (12-18); principles applicable in situations of occupation

[34] International Law Commission, Third Report on Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/CN.4/750 (Mar. 16, 2022) (prepared by Special Rapporteur Marja Lehto) [hereinafter Third Report on Protection of the Environment in Relation to Armed Conflicts]. For discussion of prior work on these draft principles, see 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, 55–56 (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, 143 (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 Commission*, 109 AJIL 822, 838–41 (2015) [hereinafter Murphy, *Sixty-Seventh Session*]; Murphy, *Sixty-Eighth Session*, *supra* note 4, at 731–32; Murphy, *Sixty-Ninth Session*, *supra* note 4, at 992; Murphy, *Seventieth Session*, *supra* note 4, at 103–04; Murphy, *Seventy-First Session*, *supra* note 4, at 72–75.

[35] *See* Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others, UN Doc. A/CN.4/749 (Jan. 17, 2022).

[36] *See, e.g.*, 2022 Report, *supra* note 1, at 102, n.349; 143, n.642; 147, n.663; 156, n.723; 161, n.750.

[37] *See, e.g.*, *id*. at 103, n.354.

[38] *See, e.g.*, *id*. at 112–14, paras. (3)–(4).

[39] *See, e.g.*, *id*. at 140, n.618 (citing to the *Paquete Habana* case on principles of humanity in time of war).

[40] *See, e.g.*, *id*. at 127, n.519; 133, para. (5); 134, n.574; 181–82, paras. (2)–(3).

[41] Third Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 34, at 104–06, paras. 308–11.

[42] 2022 Report, *supra* note 1, at 92, pmbl. cl. 2.

[43] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum; A/CONF/151/26/Rev.1 (vol. I) and Corr.1), resolution 1, annex I, p. 7, principle 24.

[44] 2022 Report, *supra* note 1, at 92, draft pmbl. cl. 3.

[45] *See, e.g.*, OECD Nuclear Energy Agency, Ukraine: Current status of nuclear power installations, *available at* https://www.oecd-nea.org/jcms/pl_66130/ukraine-current-status-of-nuclear-power-installations (last visited Oct. 28, 2022).

(principles 19-21); and principles applicable after armed conflict (22-27). Relatively modest changes were made from the first reading text, but four bear noting.

First, while draft principle 5, paragraph 1, previously provided that "States should" take appropriate measures, in the event of armed conflict, to protect the environment of indigenous peoples, it now reads that "States, international organizations and other relevant actors shall" take such measures. The oscillation between the use of "shall" and "should" in the draft principles, here and elsewhere, is not explained in the commentary, and appears simply to reflect little more than preferences within the Commission. Thus, the commentary to draft principle 5, paragraph 1, does not provide any indication of why the change was made, nor does it provide any legal support for an international obligation of international organizations or other relevant actors to protect the lands and territories of indigenous peoples in the event of armed conflict.[46] The lack of such support in commentary may be suggestive of an effort to progressively develop the law rather than its codification.

Second, at first reading, draft principle 9 on "State responsibility" synthesized the basic obligation of a state for an internationally wrongful act, albeit in relation to an armed conflict.[47] At second reading, a second paragraph was added saying that the draft principles were without prejudice to the rules on the responsibility of states or of international organizations for internationally wrongful acts.[48] The addition of this second paragraph seems to neutralize any potential significance of the first paragraph, by essentially saying that the reader must revert to the general rules on state responsibility to address such responsibility in this context. Indeed, the commentary explains that the "purpose of the saving clause is to make it clear that the draft principles do not deviate from the rules of State responsibility as codified by the Commission's articles on responsibility of States for internationally wrongful acts."[49] A third paragraph was also added, this time saying that the present draft articles were without prejudice to (a) the rules on the responsibility of non-state armed groups; and (b) the rules on individual criminal responsibility.[50] Here, the commentary notes that these aspects concern a different area of international law, where the law is "less settled."[51]

Third, draft principle 13 on "General protection of the environment during armed conflict" contains a restructured and expanded paragraph 2. That paragraph now reads that, "[s]ubject to applicable international law: (a) care shall be taken to protect the environment against widespread, long-term and severe damage; (b) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited." The opening chapeau "[s]ubject to applicable international law" is meant to acknowledge that there are at issue treaty obligations with differing application (including that some states have not ratified Protocol I and that some who have did so subject to relevant declarations), and differing views regarding whether those treaty obligations have acquired a customary status.[52] That said, subparagraphs (a) and (b) are "inspired" by Protocol I articles 35, paragraph 3, and 55, paragraph 1.[53]

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[46] 2022 Report, *supra* note 1, at 108-10, paras. (1)–(8) (commentary to draft principle 5).
[47] *Id*. at 93 (draft principle 9, para. 1).
[48] *Id*. at 93 (draft principle 9, para. 2).
[49] *Id*. at 124, para. (10) (commentary to draft principle 9).
[50] *Id*. at 93, draft principle 9, para. 3.
[51] *Id*. at 125, para. (12) (commentary to draft principle 9).
[52] *Id*. at 141–43, paras. (6)–(9) (commentary to draft principle 13).
[53] *Id*. at 141, para. (5) (commentary to draft principle 13).

Fourth, the first reading text contained a draft principle that was dropped at second reading, at the suggestion of the special rapporteur. It provided: "Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity."[54] In reviewing the first reading text, several states and the ICRC found the draft principle unclear, vague, redundant, or in potential conflict with other draft principles, and urged its deletion or merger into other principles.[55] The special rapporteur recommended deletion and incorporation into commentary, as appropriate, any useful elements relating to this draft principle.[56] The concept of "military necessity" was also removed from draft principle 14,[57] due to criticisms received from states and the ICRC, which essentially argued that the concept operated at a high level of generality (similar to the principle of humanity), and informs but is not itself a specific rule (as compared with rules on distinction or proportionality).[58]

The Commission decided to recommend that the General Assembly take note of the draft principles, annex them to a resolution, encourage their widest possible dissemination, and commend them "to the attention of States, international organizations and all who may be called upon to deal with the subject."[59]

III. Other Topics Addressed During the Seventy-Third Session

A. Immunity of State Officials from Foreign Criminal Jurisdiction

The topic on immunity of state officials from foreign criminal jurisdiction, which commenced in 2007, remains the longest one on the current program of work of the Commission.[60] No report was submitted at the present session by the special rapporteur, Concepción Escobar Hernández (Spain), but based on prior reports, the Commission completed a first reading of the topic, consisting of 18 draft articles and an annex with commentary.[61]

The principal work in the drafting committee concerned completion of a series of proposals for "[p]rocedural provisions and safeguards," found at draft articles 8 to 18.[62] These detailed draft articles now make up the bulk of the project, both numerically and in terms of length. One overall observation is that the commentary to these draft articles, while explaining the Commission's own

[54] *See* Third Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 34, at 112 (proposal to delete principle 15 as it appeared in the first reading text).

[55] *Id*. at 64–65, paras. 173–77.

[56] *Id*., at 65, para. 178.

[57] Draft principle 14 now reads: "The law of armed conflict, including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection." 2022 Report, *supra* note 1, at 94.

[58] *See* Third Report on Protection of the Environment in Relation to Armed Conflicts, *supra* note 34, at 61, para. 164.

[59] 2022 Report, *supra* note 1, at 91, para. 55.

[60] For discussion of prior work on this topic, see Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AJIL 164, 169–71 (2013); Murphy, *Sixty-Fifth Session*, *supra* note 34, at 41–48; Murphy, *Sixty-Sixth Session*, *supra* note 34, at 139–40; Murphy, *Sixty-Seventh Session*, *supra* note 34, at 842; Murphy, *Sixty-Eighth Session*, *supra* note 4, at 732–42; Murphy, *Sixty-Ninth Session*, *supra* note 4, at 981–88; Murphy, *Seventieth Session*, *supra* note 4, at 106; Murphy, *Seventy-First Session*, *supra* note 4, at 81–82; Sean D. Murphy, *The Provisional Application of Treaties and Other Topics: The Seventy-Second Session of the International Law Commission*, 115 AJIL 671, 677–79 (2021) [hereinafter Murphy, *Seventy-Second Session*].

[61] For the text of the draft conclusions and annex, see 2022 Report, *supra* note 1, at 189–94; for the draft conclusions and annex with commentary, see *id*. at 194–286.

[62] 2022 Report, *supra* note 1, at 191–94.

reasoning as to why they are drafted the way that they are, provides little support from state practice that governments at present actually follow these provisions and safeguards. This may be suggestive that the draft articles as a whole are not codifying settled state practice with *opinio juris*, but instead are proposing new rules that states may wish to adopt, perhaps by means of an international convention.

In any event, the initial draft articles on procedural provisions and safeguards concern the steps to be taken by the competent authorities of a forum state who become aware that an official of another state may be affected by the forum state's criminal jurisdiction, and ways in which the state of the official may thereafter react.[63] The forum state is expected to: examine the question of the official's immunity without delay and before initiating criminal proceedings or taking coercive measures (draft article 9); then notify the state of the official before initiating such proceedings or measures (draft article 10); if the state of the official invokes immunity, the forum state shall immediately inform any of its authorities concerned (draft article 11); if the state of the official waives immunity, which must be express and in writing, that too should be communicated immediately to the relevant forum state authorities (draft article 12); and either state may request information from the other as necessary to decide on such matters (draft article 13). It remains to be seen whether states will react favorably to an obligation not to take any coercive measures against the state official until after notifying the official's state, given that there may exist concerns about flight of the official from the forum state.

Ultimately, the forum state must then determine whether immunity exists (draft article 14), and that determination must take into account certain factors (paragraph 2). Further, if the forum state is invoking draft article 7 (on six specified crimes under international law in respect of which immunity *ratione materiae* shall not apply),[64] then additional factors must also be considered (paragraph 3). The relevant paragraphs read:

> 2. In making a determination about immunity, such competent authorities shall take into account in particular:
>
> (*a*) whether the forum State has made the notification provided for in draft article 10;
>
> (*b*) whether the State of the official has invoked or waived immunity;
>
> (*c*) any other relevant information provided by the authorities of the State of the official;
>
> (*d*) any other relevant information provided by other authorities of the forum State; and
>
> (*e*) any other relevant information from other sources.

[63] The very first draft article (draft article 8) simply clarifies that the procedural provisions and safeguards apply with respect to any exercise of criminal jurisdiction relating to *any* of the earlier draft articles. Among other things, this draft article implicitly makes clear that all the procedural provisions and safeguards apply in situations where draft article 7 is invoked. For discussion, see Murphy, *Seventy-First Session*, *supra* note 4, at 81–82.

[64] 2022 Report, *supra* note 1, at 190–91 (draft article 7). These crimes are as defined by reference to certain treaties listed in the draft annex. *Id*. at 194 (draft annex).

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(*a*) the authorities making the determination shall be at an appropriately high level;

(*b*) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.[65]

Thereafter, the procedural provisions and safeguards address the possibility of transfer of the criminal proceedings from the forum state to the state of the official (draft article 15), *inter alia*, providing that the forum state "shall consider in good faith a request for transfer of the criminal proceedings," but such "transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution."[66] Draft article 16 addresses the fair treatment of the state official and expresses an entitlement of the official to communicate without delay with the nearest appropriate representative of the state of the official (analogous to the right of a foreign national to communicate with a consular official), even if the official is not a national of that state.[67] Draft article 17 provides that the two states shall consult, as appropriate, while draft article 18 contains rules on dispute settlement. After pursuing negotiation or other means for resolving the dispute for a "reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice…" (again, perhaps suggesting that the draft articles are intended to form part of an eventual convention).[68]

In her eighth report on this topic,[69] the special rapporteur had examined the relationship between the immunity of state officials from foreign criminal jurisdiction and international criminal tribunals,[70] and in particular considered the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case.[71] Among other things, the special rapporteur noted that "the assessment made of the judgment from different academic

[65] *Id.* at 192–93 (draft article 14, paras. 2–3).

[66] *Id*. at 193 (draft article 15, para. 2).

[67] *Id*. at 193–94 (draft article 16, para. 3).

[68] *Id*. at 194 (draft article 18, para. 2).

[69] International Law Commission, Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/739 (Feb. 28, 2020) (prepared by Special Rapporteur Concepción Escobar Hernández) [hereinafter Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction].

[70] *Id*., paras. 20–31.

[71] *Id.*; *see also* Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, Judgment of the Appeals Chamber (May 6, 2019).

positions and by some States and the Court itself has not been kind."[72] Ultimately, the Commission adopted a new paragraph 3 to draft article 1, which provides: "The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements."[73] Among other things, the commentary notes that "issues relating to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles, as such issues are governed by a legal regime of their own."[74]

The draft articles were adopted by the Commission on first reading without a vote, as is its normal practice. However, at the time of the adoption, "some members recalled that they had voted against draft article 7 in 2017, setting out their reasons in explanations of vote, and stated that the fact that no vote had taken place in 2022 did not mean that either the law or their legal positions had in any way changed."[75] The members who voted against draft article 7 in 2017 regarded it as not reflecting existing international law (or as desirable law for the future), as it could pose a risk to peaceful relations between states and rested on only a handful of national laws and cases, and no multilateral treaties or other forms of State practice supporting such exceptions, while many treaties, national laws and cases pointed in the opposite direction. They noted that draft article 7 was not being characterized as a proposal for new law in the special rapporteur's report or the statement of the chair of the drafting committee, an approach that might have allowed for consensus.[76] In any event, in 2022 no changes were made to draft article 7 or the associated annex, while only modest changes were made to their respective commentaries.[77]

B. Succession of States in Respect of State Responsibility

[72] Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 69, para. 23.

[73] 2022 Report, *supra* note 1, at 190 (draft article 1, para. 3)

[74] *Id*. at 202, para. (20) (commentary to draft article 1, para. 3).

[75] *Id*. at 231, para. (3) (commentary to draft article 7).

[76] *See* International Law Commission, Provisional Summary Record of the 3338th Meeting, UN Doc. A/CN.4/SR.3378 at 9–13 (July 20, 2017) (summarizing the explanations of vote in opposition to adoption of draft article 7 by Mr. Kolodkin, Mr. Murphy, Mr. Wood, Mr. Huang, Mr. Rajput, Mr. Petrič, and the Chair (Mr. Nolte)); Murphy, *Sixty-Ninth Session*, *supra* note 4, at 984–88; *see also* Sean D. Murphy, *Immunity* Ratione Materiae *of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, 112 AJIL UNBOUND 4 (2018). Several members of the Commission who voted in favor of draft article 7 said they did not regard it as *lex lata*. See Murphy, *Sixty-Ninth Session*, *supra* note 4, at 985, n.108. Draft article 7 also proved controversial when debated by governments in the fall of 2017. *See* Janina Barkholdt & Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017*, KFG Working Paper Ser. No. 14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104.

Other practice since 2017 is sparse, at best conflicting, and dominantly found in Europe. *Compare* Case No. 3 StR 564/19, Federal Court of Justice of Germany (Bundesgerichtshof), Judgment of Jan. 28, 2021 (finding that immunity *ratione materiae* from foreign criminal jurisdiction does not apply to a war crime committed by "foreign low-ranking officials," albeit in circumstances where immunity had not been invoked by either Afghanistan or the soldiers concerned), *with* French Court of Cassation, Criminal Division, Appeal No. 20-80.511, Judgment of Jan. 13, 2021, para. 25 (stating, in a criminal case brought against foreign government officials for alleged torture and other acts, that: "International custom is against allowing state officials, in the absence of contrary international provisions binding on the parties concerned, to be prosecuted for acts falling within this category before the criminal courts of a foreign state.") (author's translation from the French)).

[77] *See* 2022 Report, *supra* note 1, at 231, para. (4) ("This commentary reproduces, with minor updates, the commentary adopted in 2017.").

In 2016, 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. Generally speaking, this topic is analyzing 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.[78] At the present session, the Commission had before it the fifth report of the special rapporteur, which examined the question of a plurality of injured successor states and a plurality of responsible successor states, but it made no proposals in that regard.[79] The report, however, did propose a renumbering and restructuring of previously adopted or proposed draft articles.[80]

In the course of the debate in the Commission on the fifth report, "[s]everal members questioned whether the development of draft articles was the most appropriate outcome, particularly in light of concerns expressed by some States in the Sixth Committee, throughout the course of the Commission's work on the topic, as to the relative paucity of State practice available … ."[81] Ultimately, the Commission decided to instruct the drafting committee to proceed on the basis of the provisions taking the form of "draft guidelines" instead of "draft articles."[82] This change in form, however, was not explained by the Commission in its report; to the extent that draft articles might be recommended to the General Assembly as a basis for a convention, the degree of practice supporting the draft articles is not necessarily important. The retreat to a statement of "guidelines" might signal a lack of confidence by the Commission in the utility of the provisions, which continue to try to mediate between the polar extremes of "automatic succession" and "clean slate."

In any event, the Commission had hoped to complete a first reading of this topic at the present session, especially given that the special rapporteur would not be returning in the next quinquennium. It was unable to do so but did provisionally adopt eleven draft guidelines. An example of such a draft guideline (and of the utility of these provisions) is draft guideline 10 on "Uniting of States," which reads: "When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury."[83] Similarly, draft guideline 10*bis* on incorporation of a state into another state provides: "When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury."[84] Draft guideline 11 on "Dissolution of a State" provides some guidance as to how an agreement should be reached:

> When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should

[78] For discussion of prior work on this topic, see Murphy, *Sixty-Ninth Session*, *supra* note 4, at 990–92; Murphy, *Seventieth Session*, *supra* note 4, at 104–06; Murphy, *Seventy-First Session*, *supra* note 4, at 78–81; *Seventy-Second Session*, *supra* note 60, at 679–81.

[79] *See* International Law Commission, Fifth Report on Succession of States in Respect of State Responsibility, UN Doc. A/CN.4/751, at 8–19, paras. 23–63 (Apr. 1, 2022) (prepared by Special Rapporteur Pavel Šturma).

[80] *Id*. at 29–34, annex III.

[81] 2022 Report, *supra* note 1, at 290, para. 86.

[82] *Id*. at 287, para. 75.

[83] *Id*. at 293 (draft guideline 10).

[84] *Id*. at 293 (draft guideline 10*bis*, para. 1).

take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.[85]

While there was considerable discussion in the drafting committee on how best to address the issue of a state's diplomatic protection of its nationals in the context of a succession of states, draft guideline 15 as provisionally adopted simply says: "The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States."[86]

At its next session, the Commission will need to decide how best to proceed with this topic, with the most likely options being: (1) appointing a new special rapporteur charged with completing the topic as a set of draft guidelines with commentary;[87] (2) establishing a working group charged with preparing a final report on the topic, which would draw upon the prior work;[88] or (3) terminating the topic without the completion of a final product.[89]

C. General Principles of Law

In 2018, the Commission moved the topic of general principles of law onto the current program of work and appointed Marcelo Vázquez-Bermúdez (Ecuador) as special rapporteur.[90] This topic is analyzing the third source of international law, as reflected in ICJ Statute Article 38(1)(c): "the general principles of law recognized by civilized nations."[91] At the seventy-third session, the Commission had before it the third report of the special rapporteur, in which he proposed five new draft conclusions.[92]

In his report, the special rapporteur proposed that the Commission seek to conclude a first reading of the topic at the current session.[93] The drafting committee completed work on all of the special rapporteur's proposals (resulting in a total of eleven draft conclusions), such that, with sufficient time, a first reading might have been possible. However, there was insufficient time to complete work on all of the commentary to these draft conclusions, such that a first reading will likely occur instead at the seventy-fourth session.

The Commission adopted draft conclusion 5, which focused on how to determine whether a general principle of law is common to the various legal systems of the world. It provides:

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

[85] *Id.* at 293 (draft guideline 11).

[86] *Id.* at 294 (draft guideline 15).

[87] For example, in 2021 the Commission completed draft guidelines and a draft annex on the topic of provisional application of treaties.

[88] For example, for the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)," which was commenced in the form of draft articles, the Commission in 2014 instead produced a final report.

[89] For example, the Commission has previously discontinued work on topics such as "Fundamental rights and duties of States," on "Status, privileges and immunities of international organizations, their officials, experts, etc.," on "Juridical régime of historic waters, including historic bays," and on "Shared natural resources (oil and gas)."

[90] For discussion of prior work on this topic, see Murphy, *Seventy-First Session*, *supra* note 4, at 82–84; *Seventy-Second Session*, *supra* note 60, at 681–83.

[91] Statute of the International Court of Justice, Art. 38(1)(c), Apr. 18, 1946.

[92] International Law Commission, Third Report on General Principles of Law, UN Doc. A/CN.4/753 (Apr. 18, 2022) (prepared by Special Rapporteur Marcelo Vázquez-Bermúdez).

[93] *Id*. at 53, para. 148.

> 2. The comparative analysis must be wide and representative, including the different regions of the world.
>
> 3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.[94]

The commentary to paragraph 2 indicates that it "is aimed at clarifying that, while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of sovereign equality of States."[95] Once that determination is made, a second step is required; draft conclusion 6 (as adopted within the drafting committee) provides that a "principle common to the various legal systems of the world may be transposed to the international legal system in so far as it is compatible with that system."[96]

The principal issue addressed at the seventy-third session, however, was whether general principles of law comprise not just those derived from national legal systems, but also those that "may be formed within the international legal system." The Commission decided in draft conclusion 3 that the latter was possible,[97] though the term "may" introduces some ambiguity as to whether such principles exist. The commentary candidly notes that while the existence of such principles "appears to find support in the jurisprudence of courts and tribunals and teachings," some members considered "that Article 38, paragraph 1*(c)*, does not encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law."[98]

Assuming that general principles can be formed within the international legal system, draft conclusion 7 seeks to indicate how they might be identified. It provides:

> 1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.
>
> 2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.[99]

Thus, paragraph 1 indicates a relatively narrow scope for general principles of law that are formed within the international legal system—they must be recognized as "intrinsic" to that system—while paragraph 2 leaves open the door to other possibilities. As to what is meant by "intrinsic," the commentary observes that "the international legal system, like any other legal system, must be able to generate general principles of law that are intrinsic to it, which may reflect and regulate its basic features, and not have only general principles of law borrowed from other legal systems."[100] Yet the Commission was unable to agree on any specific example of such

[94] 2022 Report, *supra* note 1, at 317 (draft conclusion 5).
[95] *Id*. at 320, para. (4) (commentary to draft conclusion 5, para. 2).
[96] *Id*. at 307–08, n.1189 (draft conclusion 6).
[97] *Id*. at 316 (draft conclusion 3, para. (b)).
[98] *Id*. at 318–19 (commentary to draft conclusion 3, para. (b)) (citations omitted).
[99] *Id*. at 317 (draft conclusion 7).
[100] *Id*. at 322, para. (2) (commentary to draft conclusion 7).

general principles, even among members who believed they existed. The most that could be agreed upon in the commentary was that certain examples were "referred to by members of the Commission during the debates," such as the principle of sovereign equality of states, the principle of territorial integrity, the principle of *uti possidetis juris*, and the principle of non-intervention in the internal affairs of another state.[101]

The remaining draft conclusions adopted in the drafting committee (but not yet by the Commission) are on decisions of courts and tribunals (draft conclusion 8); teachings (draft conclusion 9); functions of general principles of law (draft conclusion 10); and the relationship between general principles of law and treaties and customary international law (draft conclusion 11). Of particular interest, draft conclusion 10 says that "[g]eneral principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part," but also "contribute to the coherence of the international law system," such as by serving "to interpret and complement other rules of international law" and "as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules."[102] Draft conclusion 11 states that "[g]eneral principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law," and indeed may exist in parallel with them.[103] Further, any conflict as between such principles and rules "is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law."[104]

D. Sea-Level Rise in Relation to International Law

At the seventy-first session, the Commission placed on its current program of work the topic of sea-level rise in relation to international law, to be addressed in the context of a study group, which is open to all members.[105] The topic was proposed by a group of ILC members who are serving as co-chairs of the study group: Bogdan Aurescu (Romania); Yacouba Cissé (Côte d'Ivoire); Patricia Galvão Teles (Portugal); Nilüfer Oral (Turkey); and Juan José Ruda Santolaria (Peru).

For the present session, it was decided that the study group would focus on issues relating to statehood and protection of persons in relation to sea-level rise. Consequently, two of the co-chairs (Galvão Teles and Ruda Santolaria) prepared a "second issues paper," which served as the basis for the study group's work.[106] While the study group discussed the second issues paper, there was no specific outcome of that discussion.[107] Rather, issues for further work were identified.[108]

The study group is expected to be reconvened during the next quinquennium. To assist in the study group's work, the Commission has requested information from states on their practice, treaties, national laws, and court decisions relating to these topics.[109]

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[101] *Id*. at 322, n.1202.

[102] *Id*. at 308 (draft conclusion 10).

[103] *Id*. at 308 (draft conclusion 11, paras. 1–2).

[104] *Id*. (draft conclusion 11, para. 3).

[105] For discussion of prior consideration of this topic, see Murphy, *Seventieth Session*, *supra* note 4, at 107–08; Murphy, *Seventy-First Session*, *supra* note 4, at 84–85; Murphy, *Seventy-Second Session*, *supra* note 60, at 683–85.

[106] Sea-Level Rise in Relation to International Law: Second Issues Paper by Patricia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law, UN Doc. A/CN.4/752 (Apr. 19, 2022) [hereinafter Second Issues Paper on Sea-Level Rise in Relation to International Law]. For a bibliography related to these issues, see UN Doc. A/CN.4/752/Add.1 (Aug. 3, 2021).

[107] 2022 Report, *supra* note 1, at 325–39, paras. 158–233.

[108] *Id*. at 340–41, paras. 234–236.

[109] *Id*. at 7–8, paras. 25–28.

IV. NEW TOPICS FOR THE AGENDA AND LONG-TERM WORK PROGRAM

During the seventy-third session, the Commission placed three new topics on its agenda and requested information from states on each of them.[110] First, the Commission added a topic on settlement of international disputes to which international organizations are parties, and appointed August Reinisch (Austria) as special rapporteur. The syllabus for this topic, originally adopted in 2016, provided that it covered disputes between an international organization and a state, as well as a dispute between two international organizations.[111] Left uncertain was whether the topic would also address disputes between private persons and international organizations, such as the claims brought by Haitian nationals against the United Nations for the outbreak of cholera in Haiti in 2010 reportedly attributable to the presence of UN peacekeepers.[112] When proposing the addition of the topic to the Commission's current program of work, the Commission's chair recalled paragraph 3 of the syllabus, which stated that "[i]t would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered."[113] The Commission's 2022 report then states that, "[c]onsidering the importance of such disputes for the functioning of international organizations in practice, it was presumed that the Special Rapporteur and the Commission would take such disputes into account."[114]

Second, the Commission added a topic to its agenda on prevention and repression of piracy and armed robbery at sea, and appointed Yacouba Cissé (Côte d'Ivoire) as special rapporteur.[115] The syllabus for this topic, adopted in 2019, indicates that it will address inter alia the definition of piracy, cooperation in its suppression, and the exercise of jurisdiction over the crime of piracy.[116]

Third, the Commission added a topic to its agenda on subsidiary means for the determination of rules of international law, with Charles Chernor Jalloh (Sierra Leone) as special rapporteur.[117] This topic, the syllabus for which was adopted in 2019,[118] may be seen in the context of the Commission's recent treatment of various sources of international law, including customary international law and general principles of law. Consistent with ICJ Statute Article 38(1)(d), this topic will explore "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[119]

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[110] *Id*. at 8–9, paras. 29–31.

[111] *See* Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 387, annex A, para. 2, UN Doc. A/71/10 (2016).

[112] *See* A New Approach to Cholera in Haiti: Report by the Secretary-General, UN Doc. A/71/620* (Nov. 25, 2016); U.N. Press Release, *Secretary-General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease*, UN Doc. SG/SM/18323-GA/11862 (Dec. 1, 2016). For litigation in U.S. court against the United Nations on this issue, see *Georges v. United Nations*, 834 F.3d 88 (2016) (finding the United Nations immune from suit).

[113] 2022 Report, *supra* note 1, at 342, para. 238 (quotations and citation omitted).

[114] *Id.*

[115] *Id.* at 342, para. 239. For previous discussion of this topic, see Murphy, *Seventy-First Session*, *supra* note 4, at 86.

[116] *See* Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, at 370, annex C, para. 27, UN Doc. A/74/10 (2019).

[117] 2022 Report, *supra* note 1, at 342, para. 240. For previous discussion of this topic, see Murphy, *Seventy-Second Session*, *supra* note 60, at 685–86.

[118] *See* Report of the International Law Commission on the Work of Its Seventy-Second Session, UN GAOR, 76th Sess., Supp. No. 10, at 186, annex, UN Doc. A/76/10 (2021) [hereinafter 2021 Report].

[119] Statute of the International Court of Justice, *supra* note 91, Art. 38(1)(d).

The Commission also added to its long-term work programme a new topic on non-legally binding international agreements.[120] The syllabus for this topic, developed by Mathias Forteau (France), notes that "the practice of non-legally binding international agreements has considerably grown and has become more complex and diversified in the last decades; it is therefore the subject of increased attention and of significant concern, in the literature and in State practice."[121] This topic would focus on two types of issues: (1) identifying criteria that distinguish, under international law, non-legally binding agreements from legally binding agreements; and (2) the potential legal effects of non-legally binding agreements, whether direct (such as when applying a principle of good faith) or indirect (such as a form of waiver).[122]

V. Possible Trust Fund to Assist ILC Special Rapporteurs and Study Group Chairs

While members of the Commission are reimbursed for their travel to the ILC's sessions, they receive no salary or other funding for their work. As such, special rapporteurs and study group chairs, particularly those from developing regions, have been limited in their ability to engage in research and interaction with relevant actors, since no funding is provided to them for those purposes.

At prior sessions, the Commission proposed that consideration be given to the establishment of a Trust Fund to support special rapporteurs and related matters.[123] The General Assembly took note of the proposal in 2021 and requested further information.[124] Consequently, the Commission attached to its 2022 report an annex that explains the need for such a trust fund, with an appendix containing proposed terms of reference.[125]

VI. New Quinquennium 2023-2027

Due to the <10>COVID-19<10> pandemic and the ILC's inability to meet in the summer of 2020, the terms of the current members were extended for one year, so as to allow for the completion of five sessions during the present term.[126] Consequently, the quinquennium that was intended to last for five years from 2017 to 2021 actually ended in 2022 with the seventy-third session. At the same time, the election of membership for the next quinquennium proceeded as originally scheduled in November 2021, rather than in late 2022. This meant that, during the seventy-third session in 2022, it was already known which existing members who had stood for reelection would be returning (and which would not), as well as which persons would be joining the Commission in 2023 as new members. That knowledge undoubtedly played a part in the Commission's efforts to complete as much of its work as possible (for example, it was known that two special rapporteurs who had sought reelection did not prevail) and a part in choosing and assigning special rapporteurs for three new topics.

There will be 18 new members in the Commission during the next quinquennium, which is a greater turnover than usual. In its new composition the Commission will regrettably continue

[120] 2022 Report, *supra* note 1, at 344, para. 251.
[121] 2022 Report, *supra* note 1, Annex I, at 353, para. 2.
[122] *Id*. at 356–60.
[123] *See, e.g.*, 2021 Report, *supra* note 118, at 183–84, para. 329.
[124] G.A. Res. 76/111, para. 34 (Dec. 9, 2021).
[125] 2022 Report, *supra* note 1, at 366, annex II.
[126] *See* Murphy, *Effects of the <8>COVID-19<8> Pandemic*, *supra* note 2.

to have only a few female members. Unfortunately, the candidate nominated by the United States was not elected to the Commission, such that there will be no U.S. member (absent a vacancy) on the Commission for the next five years.[127] The lack of a U.S. member also occurred during the ILC quinquennium that lasted from 2007 to 2011.

VII. REFLECTIONS ON THE ILC AS AN INSTITUTION

A decade of service on the ILC prompts a few reflections on its significance as an institution and on its output. While many have noted that the Commission is less oriented toward adoption of instruments intended to serve as treaties, the Commission is not entirely out of the treaty business. The draft articles on the protection of persons in the event of disasters (completed in 2016) is now the subject of a process that may lead to the negotiation of a convention,[128] and the same may soon occur with respect to the draft articles on prevention and punishment of crimes against humanity (2019). As previously noted, the draft articles on immunity of state officials from foreign criminal jurisdiction, when completed at second reading, seem best considered as a proposal for a new convention. Thus, the ILC remains a forum where nongovernmental, globally-representative experts are able to craft proto-conventions in a relatively apolitical environment—a valuable option given the considerable difficulties at present for the successful conclusion of multilateral treaties.[129]

Having said that, and given the difficulties in treaty adoption, the Commission today sees its relevance as best served mostly by producing instruments that are not intended to serve as treaties. While that instinct is understandable, it means that many recent ILC instruments, cast as "conclusions," "guidelines," "principles," or in some other way, ultimately have no clear imprimatur of acceptance or rejection by states; instead, one must assess closely the Commission's commentary to discern whether a stated rule is well-grounded in practice and case law, as well as assess carefully the reactions by states in the Sixth Committee (which unfortunately is often limited, unclear or conflicting). The risk for the Commission is that, if it regularly advances rules that are not *lex lata*, while at the same time not expressly identifying them as *lex ferenda*, the ILC may be perceived as now in the business of issuing *ipse dixits* (i.e., the law is what I say it is), which over time will undermine its authority.

As for the topics pursued by the ILC, it is unfortunate that the Commission receives little direction from within the General Assembly on topic selection, and rarely receives proposals from individual states or international organizations; therefore, the Commission itself identifies topics believed worthy of study. With an eye to the existence of many institutions in specialized areas that are better equipped to develop complex instruments in those areas (e.g., trade, intellectual property, environmental, or health), and to the fact that many issues may be best pursued at a regional or bilateral level,[130] ILC topic selection has largely trod three paths in recent years.

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[127] For information on the 2021 election, see 2021 Election of the International Law Commission (updated Nov. 12, 2021), *at* https://legal.un.org/ilc/elections/2021election_outcome.shtml.

[128] G.A. Res. 76/119, para. 4 (Dec. 9, 2021) (deciding to examine the draft articles and the ILC's recommendation of the elaboration of a convention within the framework if a working group of the Sixth Committee).

[129] Even so, some efforts in this regard will encounter insurmountable political resistance, as may be the case for the Commission's draft articles on the expulsion of aliens (2014).

[130] An example of the ILC failing to recognize a topic as best suited to regional or bilateral solutions may be its topic on the obligation to extradite or prosecute (*aut dedere aut judicare*), which began as draft articles guided by a special rapporteur, but had to be transformed into a report of a working group (2014).

First, the Commission has worked on topics that address the very nature of international law, such as draft conclusions on identification of customary international law (2018) and on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (2022). Its current work on general principles of law and on subsidiary means for the determination of rules of international law may be seen in this light, as well as possible future work on non-legally binding international agreements. Second, the Commission has revisited its prior work with a view to providing deeper insights, such as its draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018) or the guide to provisional application of treaties (2021) (both a revisiting of its work on the law of treaties that led to the VCLT), as well as the final report of the study group on the most-favoured nation clause (2015) (a revisiting of its 1978 draft articles on this topic). The new topic on prevention and repression of piracy and armed robbery at sea revisits an aspect of the Commission's seminal work on the law of the sea. Third, the Commission has pursued topics that cut across subject matter areas so as to promote systemic integration, such as its draft guidelines on the protection of the atmosphere (2021) or draft principles on protection of the environment in relation to armed conflicts (2022). Such work might be seen as in the spirit of the oft-cited conclusions and report on the fragmentation of international law (2006).[131]

All these topics have garnered considerable attention by states, international organizations and others, such that the Commission's continuing contribution to the understanding and development of international law is self-evident. One might even regard the Commission "as a guardian of the systemic nature of international law," serving as a central organ for strengthening the rule of law in international affairs.[132] Whether it can maintain that status likely turns on the degree to which the Commission stays attuned to the practice and desires of states and eschews any grander vision of assuming the mantle of legislator of international law.

[131] *See* Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the International Law Commission on the Work of its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 177, para. 251, UN Doc. A/61/10 (2006); Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, UN Doc. A/CN.4/L.682 and Add.1* (Apr. 13, 2006).

[132] *See* Omri Sender & Michael Wood, *The Work of the International Law Commission between 1997 and 2022: A Positive Assessment*, in MAX PLANCK YRBK. UN L. ONLINE (Sept. 22, 2022), https://doi.org/10.1163/18757413_02501012.