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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON MATTERS RELATED TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-THIRD SESSION

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REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-THIRD SESSION (18 April - 3 June and 4 July - 5 August 2022)

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I. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-THIRD SESSION

A. Background

1. AALCO is required by its Statute to examine subjects that are under consideration of the International Law Commission (ILC or Commission) and to make recommendations to the ILC based on viewpoints and inputs of the Member States on such agenda items. Fulfillment of this mandate over the years has helped AALCO Member States to contribute to the codification and progressive development of international law and helped foster closer relationship between the two bodies. Article 1(d) of the Statutes of AALCO mandates the AALCO Secretariat to consider the matters relating to the work of the ILC at its annual sessions. As such, AALCO has been considering those topics ever since its inception in 1956. It has now become customary to invite Members of the ILC to address the Annual Session of AALCO and to report the progress of work in the Commission, while the Secretary-General of AALCO addresses the ILC Session conveying the views of AALCO and its Member States. ILC considers this activity significant as through this process, it receives the views from the perspective of developing countries.

2. AALCO's report on the ILC for a given Annual Session covers (i) the work of the Commission on the substantive topics that are placed on its agenda at its most recent session, (ii) deliberations on the topic at the previous Annual Session of AALCO, (iii) a summary of the views expressed by the AALCO Member States at the Sixth Committee of the UN General Assembly, and (iv) the comments and observations of the AALCO Secretariat. However, as the seventy-seventh session of the Sixth Committee is scheduled to meet only from 3 October to 18 November 2022 *inter alia* to discuss the work of the ILC at its seventy-third session, this report covers items (i), (ii) and (iv) only.

3. The seventy-third Session (2022) of the Commission was held from 18 April to 3 June and 4 July to 5 August 2022, and the advance version of the report[1] to the UN General Assembly was made available in September 2022 on the official website of the Commission. With a view to updating the Member States on the most recent work of the Commission, and to facilitate deliberations thereupon, the Secretariat considered it appropriate to place the same before the Member States at the Sixtieth Annual Session (2022) of AALCO.

4. The document AALCO/60/NEW DELHI (HEADQUARTERS)/2022/SD/S1 reports on the work of the Commission on the following substantive topics that were placed on the agenda for its Seventy-Third Session (2022): (1) Peremptory norms of general international law (*jus cogens*); (2) Protection of the environment in relation to armed conflicts; (3) Immunity of State Officials from Foreign Criminal Jurisdiction; (4) Succession of States in respect of State responsibility; (5) General principles of law; and (6) Sea-level rise in relation to international law.

B. Deliberations at the Fifty-Ninth Annual Session of AALCO (Hong Kong SAR, the People's Republic of China, 2022)

5. **Mr. Sun Guoshun, Deputy Secretary-General of AALCO,** gave a brief account of the topics that had been deliberated at the Seventy-Second Session of the Commission in 2021: (1) Protection of the Atmosphere, (2) Provisional Application of Treaties, (3) Immunity of

[1] <https://legal.un.org/docs/?path=../ilc/reports/2022/english/a_77_10_advance.pdf&lang=E>

State officials from foreign criminal jurisdiction, (4) Succession of States in respect of State responsibility, (5) General Principles of Law, (6) Sea-level rise in relation to international law. He urged the Member States to actively participate in the deliberations and in doing so contribute to the codification and progressive development of international law from an Afro-Asian perspective.

6. **The delegate of the People's Republic of China**, while commenting on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", expressed its concern that draft article 7 was not a codification of customary international law, and lacked support from State practice. China hoped that the Commission would actively respond to relevant opinions, re-examine draft article 7 and its commentary, and come up with a correct conclusion solidly grounded on general State practice and *opinio juris*.

7. With respect to the topic "Sea-level Rise in Relation to International Law", in terms of working procedure, China recommended that the Study Group should carefully consider the suggestions of some Group members, fully reflecting the positions and concerns of countries, especially relevant small and medium-sized countries. Further, as regards the authorization of the Study Group, in the discussion of the Sixth Committee, China reminded that some countries have clearly requested that the Commission should not involve the status of islands and reefs. However, the report by the Co-Chairs not only involves the identification of the status of islands and reefs, but also includes the sovereignty issue whether low-tide elevations can be claimed as territories. China believes that the Study Group should accurately act within its mandate.

8. With respect to the topic "General Principles of Law", the draft conclusion 5, i.e., "[T]o determine the existence of a principle common to the principal legal systems of the world, a wide and representative comparative analysis of national legal systems is required", China agreed with this principle and believes that it is necessary to satisfy the requirement of paragraph 1 (c) of Article 38 of the Statute of the International Court of Justice, and fully reflected the general consensus of the international community including developing countries. Therefore, it was suggested that the Commission further emphasizes in the commentary that the legal principles recognized only by a small number of countries or groups of countries do not constitute the above-mentioned "common principles".

9. **The delegate of the Social Republic of Viet Nam,** commenting on the topic "Succession of States in respect of State Responsibility", took the view that the principle of non-succession remains a predominantly applicable principle in which certain exceptions in particular circumstances including where the successor agrees to share the responsibility incurred by the predecessor state. Therefore, the draft articles should remain of subsidiary nature and priority should be given to agreements between the States' concerned.

10. On the topic "General Principles of Law", Viet Nam proposed to the special rapporteur to study further the terminology "universally recognized principle of law" which was reflected in several documents including by the Association of South East Asian Nations and consistency with the concept of universality of general principles and generality of such a principle.

11. **The delegate of the United Republic of Tanzania** reiterated his country's request to other Member States of AALCO to call upon the International Law Commission to continue advancing the wishes of the Organization in reforming the International Criminal Court.

12. **The delegate of the Republic of India** delegation, while commenting on the topic "General Principles of Law", opined that general principles of law, should not be described as a subsidiary source or a secondary source. As regards the use of the term "civilized nations", India agreed with the majority view that it is inappropriate and outdated. Further, India agreed with the two-step method for the identification of general principles of law derived from national legal systems.

13. Commenting on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", India reiterated its position that the topic represents complexities and the controversial nature of some of its fundamental aspects without the benefit of significant state practice. Since the topic is politically sensitive for some States and therefore diligence, prudence and caution needed to decide whether the Commission should focus on the codification aspect or progressive development of international law. This would be clear when the Commission would be able to show consistent state practice and treaty practice to support the exception supported in draft article 7. The delegate highlighted that the status of and the nature of the duty being performed by person claiming immunity is factor of core importance at the time of the commission of the offence. There could be a situation where certain persons though belonging to the category of officials granted immunity by domestic law of the country for acts done during the course of official duty a State official may undertake a certain contractual assignment other than and in addition to the original official duty. In such situations factors such as the status of such official at the time of the commission of the offence, nature of the functions, the gravity of the offence, position of international law concerning immunity, victims interest, and totality of circumstances should be taken into account in determining immunity. In conclusion, this delegation wished to underscore that these provisions should not be viewed as codifying existing international law in any manner.

14. **The delegate of the Islamic Republic of Iran**, while commenting on the topic "Protection of Atmosphere", concurred with the approach of the Special Rapporteur in recognition of the atmosphere as a limited "natural resource" which is in line with general principles of international law, in particular, the principle of sovereign equality of States. Similarly, Iran was of the view that an equitable utilization could not be realized without affording due consideration to the benefit of the international community as a whole, especially developing countries. Iran also concurred with the Commission for replacing "pressing concern of international community" with "common concern of humankind" in the fourth preambular paragraph.

15. On the topic "Provisional Application of Treaties", Iran emphasized that article 25 of the Vienna Convention on the Law of Treaties on provisional application of treaty merely offered States the possibility of provisional application without the imposition of any obligation. As a result, the provisional application would not serve as a basis for restricting States' rights with regard to their future conduct in relation to the treaty that might be provisionally applied. Regarding guideline 6, Iran accepted the wording adopted by the Commission. However, they were of the view that the provisional application of a treaty produces different legal effects from that of accession of such a treaty.

16. Turning to the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", Iran commented on the challenges emanated from draft article 7 concerning the immunity *ratione materiae*. It expressed its disappointment with the manner in which draft article 7 has been provisionally drafted, and believed that this draft article was still a central issue for the

Commission. They were of the view that draft article 7 is without prejudice in relation to the immunity *ratione personae*.

17. On the topic "Sea-level rise in relation to International Law", Iran agreed with the approach of the paper that the maritime zones designated by States cannot be assimilated into the established territorial boundaries. The coastal States, by determination of their maritime zones, entertain from sovereign rights that are granted through customary international law. Inevitably, sea-level rise might lead to changes in baselines and, consequently, outer limits of maritime zones. Nonetheless, they were of the view that any change in lines should be based on principles of equity and fairness.

18. Regarding the topic of "General Principles of Law", Iran concurred with the formulation proposed in draft conclusions 4, 5, and 6. This formulation can help the Commission to identify the general principles of law in accordance with Article 38(1)(c) of the ICJ Statute. Iran also reiterated its concern over the draft conclusion 3(b) concerning the inclusion of "general principles formed within the international law" in these draft conclusions.

19. **The delegate of Japan,** commenting on the topic "Sea-level rise in relation to International Law", stated that his country looks forward to the Study Group furthering in-depth discussion on the identified topics on a priority basis, and emphasized that Japan is determined to engage in this serious issue and is committed to working closely with relevant countries.

20. **The delegate of the Philippines**, while commenting on "the Provisional Application of Treaties", stated that the Philippines considers the possibility of a rule of construction that a treaty shall not be deemed subject to provisional application unless the text of the treaty or other instrument expressly and categorically provides it. This would be consistent with its practice and takes into account realities of republican states where the executive negotiates treaties but shares foreign policy powers with other bodies, so provisional application which derogates from the sharing should not be presumed.

21. On the "Succession of States in respect of State Responsibility", the Philippines finds that there is insufficient state practice to justify a codification of this topic at the moment. On "The General Principles of Law", the Philippines believes that the ILC should first determine if there exists sufficient state practice to consider as general principles of law "those formed within the international legal system" even though the *travaux preparatoires* of the ICJ Statute do not preclude this, given that general principles of law traditionally derive from municipal or domestic law, further study by the Commission on this matter may be more prudent.

22. **The delegate of the Republic of Indonesia**, speaking on the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", reiterated its position that there should be no immunity for grave international crimes. However, due to complexity and sensitivity of this topic such as on 'definitions', 'dispute settlement' and draft article 18 relating to 'relationship with internationalized tribunal' or 'relationship to specialized treaty regimes', more extensive and in-depth study of the draft articles is necessary.

23. With regard to "the Protection of the Atmosphere", Indonesia emphasized the importance of several guidelines contained in the draft including guidelines 3, 4, and 8 concerning the obligation to protect the atmosphere, the obligation to undertake environmental impact assessment and international cooperation.

24. With regard to the topic of "Sea-level Rise in relation to International Law", Indonesia concurred that the principles of certainty, security and predictability and the preservation of the balance of rights and obligations should be maintained. The delegation therefore was of the view that change in sea level should not impact existing maritime boundary agreements and the law of treaties shall prevail. In this regard, charts or lists of geographical coordinates of baselines that have been deposited with the Secretary-General pursuant to Article 16 (2) and 47 (9) of UNCLOS shall be respected.

25. **The delegate of the Republic of Korea, speaking on "**Protection of the Atmosphere", noted that the draft guidelines clearly distinguish between elaborations of existing international law and recommendations aimed at facilitating and promoting future-oriented cooperation. This feature of the draft guidelines is illustrated by draft guideline 10, which refers to "obligations under international law" in paragraph 1, and "recommendations" in paragraph 2 as separate concepts.

26. Regarding the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", the Republic of Korea expressed its gratitude to the ILC for finishing in its plenary session discussions on the Special Rapporteur's 8th report and provisionally adopting six draft articles. The delegate emphasized that it was important for the Commission to provide appropriate outcomes to meet states' concerns and mediate divergent opinions within the Commission about this topic before completing its first reading.

27. The Republic of Korea also believes that regarding the procedural aspects of immunity of State officials, it is imperative that the Commission clarify, at an appropriate time, key terms used in the draft articles such as "criminal jurisdiction" and "criminal proceedings", taking into account the diversity in criminal procedural systems that exist in States. Even though the Commentary to draft article 8 does point to "governmental, police, investigative and prosecutorial acts" as having the possibility of falling into the scope of the exercise of "criminal jurisdiction" under the aforementioned article, the Korean Government sees benefit in the Commission identifying the threshold by which a particular governmental action could be construed as an "exercise of criminal jurisdiction".

28. With regard to the topic of "Succession of states in respect of State responsibility", the delegate reiterated the view that an agreement between the parties concerned should be considered in priority when dealing with this issue. The delegate recalled that, in the Sixth Committee of the 76th Session of the United Nations General Assembly, many countries expressed doubt as to whether there is sufficient State practice to ascertain universal rules regarding this topic, and pointed out that draft article 1(2) also puts emphasis on the subsidiary nature of the draft articles.

29. Turning to the topic "General Principles of Law", the delegate commented that the efforts of the ILC to replace the expression "civilized nations", as stipulated in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, with "community of nations" as contained in the International Covenant on Civil and Political Rights was commendable. Also, with respect to the two types of general principles of law addressed in the Special Rapporteur's second report, namely the one derived from national legal systems and the other formed within the international legal system, the delegation was of the view that the meaning and contents of the latter are rather unclear and suggested the Commission to further examine and study on that issue more in-depth.

30. **The delegate of the Republic of Kenya,** speaking on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", emphasized that the discourse on procedural safeguards of the forum State and the State of the official and the exchange of information and co-operation in legal assistance between them should be carefully examined so as to formulate workable solutions for settlement of disputes concerning state officials in foreign jurisdictions.

C. AALCO Secretariat's Suggestions on the Topics to be Deliberated at the Sixtieth Annual Session

31. The seventy-third session of the ILC considered the following topics:

(1) Peremptory norms of general international law (*jus cogens*);
(2) Protection of the environment in relation to armed conflicts;
(3) Immunity of State Officials from Foreign Criminal Jurisdiction;
(4) Succession of States in respect of State responsibility;
(5) General principles of law; and
(6) Sea-level rise in relation to international law.

32. The Secretariat suggests that the Member States may make statements on the work of the Commission in the aforementioned topics in the Sixtieth Annual Session of AALCO for which reference could be made under each specific topic.

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

A. Background

1. The topic "peremptory norms of general international law (*jus cogens*)" was first proposed in the annex[2] to the report of the Commission on its sixty-sixth Session (2014), following which it was included in the long-term programme of work. At its sixty-seventh session (2015), the Commission took the decision of including the topic in its programme of work and appointed Mr. Dire Tladi as the Special Rapporteur for the topic. Subsequently, the General Assembly (UNGA) in its resolution 70/236 of 23 December 2015,[3] took note of the decision of the Commission to include the topic in its programme of work.

2. At its sixty-eighth (2016) and sixty-ninth (2017) sessions, the Commission had before it the first[4] and second[5] reports of the Special Rapporteur. Following the debates in the Commission on the topic and statements and observations by States in the Sixth Committee of the UNGA, the Drafting Committee considered 9 draft conclusions on the topic. Draft conclusions 1 and 2(3) were provisionally adopted by the Drafting Committee at the sixty-eighth (2016) session[6] of the Commission whereas draft conclusions 1, 2 [3(2)], 3 [3(1)], 4, 5, 6 and 7 were adopted at the sixty-ninth (2017) session[7] of the Commission. Further, in accordance with a recommendation of the Special Rapporteur[8] at the sixty-ninth (2017) session of the Commission, the name of the topic was changed from '*Jus cogens*' to its present form *i.e.* 'Peremptory norms of general international law (*jus cogens*)'.

3. At the seventieth session (2018) of the Commission, the third report of the Special Rapporteur[9] was submitted for consideration dealing with the consequences and legal effects of peremptory norms of general international law (*jus cogens*). While the first report on the topic laid down the scope and the nature of *jus cogens* and the second report discussed its criteria for the identification, the third report dealt with the consequences of *jus cogens* norms, and proposed 13 draft conclusions numbered as 10 to 23.

4. At the seventieth session (2018), the Commission referred these draft conclusions to the Drafting Committee with the understanding that the comments and observations made at the plenary sessions would be reflected in the work of the Committee. Particularly in relation to draft conclusions 22 and 23 relating to the consequences of certain *jus cogens* norms it was decided that they be dealt with by including a single 'without prejudice clause', omitting employing the word immunity which would be clarified in the commentary.

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[2] ILC, 'Report of the International Law Commission on the Work of its 66th Session' 274 (5 May- 6 June and 7 July- 8 August 2014) UN Doc A/66/10.
[3] UNGA Res 70/236 (23 December 2015) UN Doc A/RES/70/236.
[4] ILC, 'First Report on *jus cogens* by Dire Tladi, Special Rapporteur' (8 March 2016) UN Doc A/CN.4/693.
[5] ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' (16 March 2017) UN Doc A/CN.4/706.
[6] ILC, 'Statement of the Chairman of the Drafting Committee' (9 August 2016) available at: <http://legal.un.org /docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 August 2022).
[7] ILC, 'Statement of the Chairman of the Drafting Committee' (26 July 2017) available at: <http://legal.un.org/ docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E> (accessed 9 August 2022).
[8] See, ILC, 'Second Report on *jus cogens* by Dire Tladi, Special Rapporteur' para. 90 (16 March 2017) UN Doc A/CN.4/706.
[9] ILC, 'Third Report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' (12 February 2019) UN Doc. A/CN.4/714.

5. Draft conclusions 10 to 14 were provisionally adopted by the Drafting Committee and placed before the Commission at its seventieth session (2018) in the form of an interim report for information purposes only.

6. At its seventy-first session (2019), the Commission considered the fourth report on peremptory norms of general international (*jus cogens*) of the Special Rapporteur.[10] The fourth report addressed two key issues, firstly the question of regional *jus cogens* norms and secondly the question of desirability of an illustrative list as well as its contents. While no proposal was made in relation to the question of regional *jus cogens* norms, draft conclusion 24 containing an illustrative, non-exhaustive list of eight *jus cogens* norms was proposed by the Special Rapporteur in his fourth report.

7. Accordingly, the Commission referred draft conclusion 24 to the drafting committee with comments that the list would be contained in an annex to the draft conclusions and shall be based upon those *jus cogens* norms that have been identified by the Commission in its previous work on other topics over the years.

8. The seventy-first session (2019) also witnessed the presentation of the statement and report of the Chairman of the Drafting Committee that recommended the adoption on first reading of the 23 draft conclusions on the topic, as well as the annex containing the afore-mentioned illustrative list. Further, the commentaries to the draft conclusions were considered by the Commission at the seventy-first session.

9. While meetings of the Commissions could not be convened in the year 2020 due to the COVID-19 pandemic, and the topic was not placed on the agenda for the seventy-second session of the Commission held in 2021, it provided considerable time to the governments of the UN Member States to formulate their comments and observations on the topic. The fifth and final report of the Special Rapporteur[11] as well as the comments and observations of the governments of UN Member States[12] were placed for the consideration of the Commission at its seventy-third session held from 18 April to 3 June and from 4 July to 5 August 2022.

10. In his fifth report, the Special Rapporteur examined the comments and observations on the draft conclusions including the annex, received from the governments of the UN Member States. The report made proposals for the revision of the draft conclusions at the second reading reflecting the comments and observations and also proposed a recommendation by the Commission to the UNGA.

B. The Fifth Report of the Special Rapporteur

11. The fifth report as discussed primarily focussed on making proposals for the modification of the draft conclusions on the basis of the comments made by States. In all, at the time of the finalization of the fifth report, 23 written observations had been received in addition to the 52 comments that had been made by States in the Sixth Committee of the UNGA at its seventy-fourth session (2019). While certain States had made comments before the

[10] ILC, 'Fourth Report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' (31 January 20190 UN Doc. A/CN.4/727.
[11] ILC, 'Fifth Report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur' (24 January 2022) UN Doc. A/CN.4/747.
[12] ILC, 'Peremptory norms of general international law: comments and observations of governments' (9 March 2022) UN Doc. A/CN.4/748.

adoption of the full set of draft conclusions by the Drafting Committee, those comments did not have the benefit of the commentaries. Therefore, in all 57 States had commented on the draft conclusions and if the positions expressed by Sierra Leone (on behalf of the African group of States) and Norway (on behalf of the Nordic countries) were to be considered the total number of States who had expressed their views on the set of draft conclusions stood at 113. With a view to avoiding duplication those States that had submitted both written and oral observations, only written observations were considered by the Special Rapporteur in his report.

12. The fifth report of the Special Rapporteur was divided into six chapters each dealing with a different aspect addressed in the report. Chapter I comprised of an introduction providing a brief procedural history of the topic at the Commission while Chapter II laid down the methodology followed in the report reflecting its purpose and approach. Chapter III summarised the relevant comments of the States and recommended modifications to the draft conclusions as adopted at the first reading on the basis of those comments and written observations. While general comments relating to the work on the topic as a whole were dealt with first, specific comments on particular draft conclusions were dealt with separately. Chapter IV of the report provided a marked-up version of the draft conclusions while Chapter V contained a clean version that incorporated the suggested modifications of the Special Rapporteur.

13. Based on his assessment of the comments and observations of the States, the Special Rapporteur deemed it fit to recommend modifications to the following six draft conclusions: draft conclusions 5, 6, 7, 14, 21 and 22.

Draft conclusions incorporating the suggested changes of the Special Rapporteur in the fifth report on peremptory norms of general international law (*jus cogens*).

Part One
Introduction

Draft conclusion 1
Scope
The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (jus cogens).

Draft conclusion 2
Definition of a peremptory norm of general international law (jus cogens)
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.

Draft conclusion 3
General nature of peremptory norms of general international law (jus cogens)
Peremptory norms of general international law (jus cogens) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Part Two
Identification of peremptory norms of general international law (jus cogens)

Draft conclusion 4
Criteria for the identification of a peremptory norm of general international law (jus cogens)

To identify a peremptory norm of general international law (jus cogens), it is necessary to establish that the norm in question meets the following criteria:

(a) it is a norm of general international law; and

(b) it is 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.

Draft conclusion 5
Sources for peremptory norms of general international law (jus cogens)

1. Customary international law is the most common source for peremptory norms of general international law (jus cogens).

2. Treaty provisions and general principles of law may also serve as sources for peremptory norms of general international law (jus cogens).

Draft conclusion 6
Acceptance and recognition

1. The requirement of "acceptance and recognition" as a criterion for identifying a peremptory norm of general international law (jus cogens) is distinct from acceptance and recognition as a norm of general international law.

2. To identify a norm as a peremptory norm of general international law (jus cogens), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Draft conclusion 7
International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (jus cogens).

2. Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (jus cogens); acceptance and recognition by all States is not required.

3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

Draft conclusion 8
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (jus cogens) may take a wide range of forms.

2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

Draft conclusion 9
Subsidiary means for the determination of the peremptory character of norms of general international law
1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law.
2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

Part Three
Legal consequences of peremptory norms of general international law (jus cogens)

Draft conclusion 10
Treaties conflicting with a peremptory norm of general international law (jus cogens)
1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (jus cogens). The provisions of such a treaty have no legal force.
2. If a new peremptory norm of general international law (jus cogens) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Draft conclusion 11
Separability of treaty provisions conflicting with a peremptory norm of general international law (jus cogens)
1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (jus cogens) is void in whole, and no separation of the provisions of the treaty is permitted.
2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (jus cogens) terminates in whole, unless:
(a) the provisions that are in conflict with a peremptory norm of general international law (jus cogens) are separable from the remainder of the treaty with regard to their application;
(b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of any party to be bound by the treaty as a whole; and
(c) continued performance of the remainder of the treaty would not be unjust.

Draft conclusion 12
Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (jus cogens)
1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (jus cogens) at the time of the treaty's conclusion have a legal obligation to:
(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (jus cogens); and
(b) bring their mutual relations into conformity with the peremptory norm of general international law (jus cogens).
2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (jus cogens) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those

rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (jus cogens).

Draft conclusion 13
Absence of effect of reservations to treaties on peremptory norms of general international law (jus cogens)
1. A reservation to a treaty provision that reflects a peremptory norm of general international law (jus cogens) does not affect the binding nature of that norm, which shall continue to apply as such.
2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (jus cogens).

Draft conclusion 14
Rules of customary international law conflicting with a peremptory norm of general international law (jus cogens)
1. A rule of customary international law does not come into existence if it would come into conflict with an existing peremptory norm of general international law (jus cogens). This is without prejudice to the possible modification of a peremptory norm of general international law (jus cogens) by a subsequent norm of general international law having the same character.
2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (jus cogens).
3. The persistent objector rule does not apply to peremptory norms of general international law (jus cogens).

Draft conclusion 15
Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (jus cogens)
1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (jus cogens) does not create such an obligation.
2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (jus cogens).

Draft conclusion 16
Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (jus cogens)
A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (jus cogens).

Draft conclusion 17

Peremptory norms of general international law (jus cogens) as obligations owed to the international community as a whole (obligations erga omnes)

1. Peremptory norms of general international law (jus cogens) give rise to obligations owed to the international community as a whole (obligations erga omnes), in which all States have a legal interest.

2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (jus cogens), in accordance with the rules on the responsibility of States for internationally wrongful acts.

Draft conclusion 18

Peremptory norms of general international law (jus cogens) and circumstances precluding wrongfulness

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (jus cogens).

Draft conclusion 19

Particular consequences of serious breaches of peremptory norms of general international law (jus cogens)

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens).

2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (jus cogens) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.

4. This draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens) may entail under international law.

Draft conclusion 20

Interpretation and application consistent with peremptory norms of general international law (jus cogens)

Where it appears that there may be a conflict between a peremptory norm of general international law (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.

Part Four

General provisions

Draft conclusion 21

Without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail under international law.

Draft conclusion 22
Recommended procedure

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

Draft conclusion 23
Non-exhaustive list

Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;

(b) The prohibition of genocide;

(c) The prohibition of crimes against humanity;

(d) The basic rules of international humanitarian law;

(e) The prohibition of racial discrimination and apartheid;

(f) The prohibition of slavery;

(g) The prohibition of torture;

(h) The right of self-determination.

C. Introduction by the Special Rapporteur of the fifth report on peremptory norms of general international law (*jus cogens*).

14. At its 3564th Meeting on 19 April 2022, the Special Rapporteur introduced his fifth report on the topic that primarily dealt with recommending modifications to the draft conclusions based on the comments and observations made by States as well as providing a summary of the general as well as the specific observations made by States either as oral or written observations.[13]

15. As regards the general comments and observations, the Special Rapporteur stated that 11 States had expressed the concern that the draft conclusions were not based on practice, out of which 6 had lamented the paucity of State practice in this regard; while only 5 States took the view that the Special Rapporteur had failed to consider existing practice.

16. Responding to the comments the Special Rapporteur re-assured the Commission that the conclusions were in fact supported by the requisite amount of practice including decisions of the international courts and tribunals. Two States have taken the view that the Commission's work was unsubstantiated due to excessive reliance on the decisions of the ICJ responding to which the Special Rapporteur recalled that the ICJ's decisions had served as a basis for the Commission's work on many topics and not only was that desirable but also it would be a matter of concern if the Commission did not accord great weight to it.

17. With respect to the specific draft conclusions while a number of comments were made in relation to them, the Special Rapporteur recommended modifications to only six draft conclusions.

18. In relation to draft conclusion 5, States had expressed doubts about the Commission choice of words 'basis' and 'bases' as opposed to 'source' and 'sources', however after much deliberation the Drafting Committee was of the view that in order distinguish the same from Article 38 of the Statute of the ICJ the word 'basis' had been preferred. The Special Rapporteur agreed with the States and recommended the substitution of 'bases' with 'sources.'

19. On the basis of the suggestion by one State that the phrase 'international community as a whole' included in draft conclusion 6 to reflect the high standard of acceptance of the norms, the Special Rapporteur agreed with the same however adding it was done with caution and reluctance as it had already been laid down as a criterion in draft conclusion 4.

20. Similarly, with a view to expressing the requirement of representativeness in practice of a *jus cogens* norm, the Special Rapporteur agreed with the recommendation made by several States that the phrase 'a very large majority' occurring in draft conclusion 7 be replaced by 'a very large and representative majority.'

21. Further, with a view to expressing the position of the non-existence of a rule of customary international law that would conflict with a *jus cogens* norm certain linguistic changes were suggested to draft conclusion 14. The Special Rapporteur acknowledged the

[13] ILC, 'Report of the International Law Commission on the Work of its Seventy-Third Session' 274 (8 April- 3 June and 4 July- 5 August 2022) (Advance version) UN Doc A/77/10.

work of Prof. Kyoji Kawasaki in formulating the problem regarding interplay of customary rules and *jus cogens* norms, as opposed to treaty rules and *jus cogens* norms.[14]

22. In relation to draft conclusion 21, the Special Rapporteur informed the meeting that it had received a significant number of comments from States most of which were critical. In their comments States had expressed criticisms which in the view of the Special Rapporteur pulled in opposite directions. While one group of States stated that the draft conclusion undermined the Vienna Convention on the Law of Treaties (1969), others felt that it had the effect of imposing the Convention's rules on States that were not a party to it. In order to address this concern the Special Rapporteur suggested to add a saving clause stating that the Convention's rules would remain for those who were bound by it. Further, the draft conclusion was suggested to be renamed to 'Recommended procedure' and was placed in part four dealing with general provisions. Further, no drafting modifications were recommended for draft conclusion 22 which was re-numbed as draft conclusion 21.

D. Consideration of the Topic at the Seventy-Third Session (2022)

23. At its seventy-third session, the Commission had before it the fifth report of the Special Rapporteur as well as the comments and observations of States on the draft conclusions adopted by the Commission at first reading.

24. At its 3564th meeting, the Special Rapporteur introduced his fifth report and presented the rationale for the modifications recommended to the draft conclusions on the basis of the comments and observation received from States. Thereafter, the Commission considered the fifth report at its 3564 to 2570th meetings from 19 to 27 April 2022.

25. A number of issues were raised in the deliberations among the Members of the Commission ranging from linguistic changes to the draft conclusions in order to convey the meaning of the conclusions more accurately, to suggestions to delete and expand the draft conclusions. The members of the Commission were appreciative of the work on the topic; however, some of them lamented that the Commission did not have requisite time to consider some aspects of the topic which the Special Rapporteur had touched upon in his reports.

26. At its 3570th meeting held on 27 April 2022, the Commission decided to refer draft conclusions 1 to 23 together with the annex as contained in the fifth report of the Special Rapporteur to the Drafting Committee to consider the modifications suggested by the Special Rapporteur and prepare its report on the same.

27. At its 3582nd meeting held on 17 May 2022, the Chairman of the Drafting Committee presented the report of the Drafting Committee to the Commission for its consideration. The report addressed the recommended modification provided in the fifth report of the Special Rapporteur and provided insights on the deliberations on whether to accept those recommendations in the Drafting Committee.

28. In relation to the draft conclusion 5, the Special Rapporteur had recommended the substitution of the terms 'bases' and 'basis' by 'sources' and 'source' however the same was

[14] ILC, 'Summary record of the 3564th Meeting of the Commission held on 19 April 2022' (16 June 2022) UN Doc. A/CN.4/SR.3564.

abandoned by him in the drafting committee, and hence the draft conclusion was retained as it was during at the time of the first reading.

29. Regarding draft conclusion 6, the Drafting Committee accepted the suggestion of the Special Rapporteur to include the term 'international community as a whole' and added that the term captured the broader requirement which is above and beyond what is required in the context of dispute settlement. Further in order to confirm that the acceptance and recognition of a norm as one with a peremptory character was different from acceptance and recognition of a norm as one of general international law, the Committee replaced the term 'requirement' with 'criterion' and provided and explicit reference to draft conclusion 4 (b) which dealt with the criterion for identification of *jus cogens* norms.

30. With a view to emphasizing the representative character of State practice required for a *jus cogens* norm, the Special Rapporteur had suggested the inclusion of the term 'representative' to qualify the term 'a very large majority of States' in paragraph 2 of draft conclusion 7. However, in the Drafting Committee it was felt that the same may not be accepted in order to avoid confusion as the phrase had been used in a different context in the conclusions on customary international law.

31. With respect to draft conclusion 14, the Special Rapporteur had suggested certain linguistic changes in order to convey the meaning of the text correctly avoiding conflation of the effect of *jus cogens* norms on treaty rules and customary international law. The proposal of the Special Rapporteur was accepted, and the text was accordingly modified.

32. With a view to avoiding alteration of the consensus achieved for States bound by the Vienna Convention in Law of Treaties (1969), the fifth report had suggested the amendment of the title of draft conclusion 21 to 'Recommended procedure.' The Drafting Committee accepted the suggestion of the Special Rapporteur in this regard and only minor refinement was suggested leaving the text broadly the same as the version adopted at the first reading.

33. Thereafter, the Commissioned adopted as a whole, on second reading, the texts of the draft conclusions and draft annex on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

34. The commentaries to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) were adopted on second reading at 3595th to 3601st meetings of the Commission held from 22 to 27 July 2022.

Text of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)

Identification and legal consequences of peremptory norms of general international law (*jus cogens*)

Part One
Introduction

Draft conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Draft conclusion 2
Nature of peremptory norms of general international law (*jus cogens*)
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.

Draft conclusion 3
Definition of a peremptory norm of general international law (*jus cogens*)
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.

Part Two
Identification of peremptory norms of general international law (*jus cogens*)

Draft conclusion 4
Criteria for the identification of a peremptory norm of general international law (*jus cogens*)
To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:
(*a*) it is a norm of general international law; and
(*b*) it is 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.

Draft conclusion 5
Bases for peremptory norms of general international law (*jus cogens*)
1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Draft conclusion 6
Acceptance and recognition
1. The criterion of acceptance and recognition referred to in draft conclusion 4, subparagraph (*b*), is distinct from acceptance and recognition as a norm of general international law.
2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Draft conclusion 7
International community of States as a whole
1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

2. Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.

3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

Draft conclusion 8
Evidence of acceptance and recognition

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

Draft conclusion 9
Subsidiary means for the determination of the peremptory character of norms of general international law

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law. Regard may also be had, as appropriate, to decisions of national courts.
2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

Part Three
Legal consequences of peremptory norms of general international law (*jus cogens*)

Draft conclusion 10
Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Draft conclusion 11
Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

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

(*a*) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;
(*b*) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and
(*c*) continued performance of the remainder of the treaty would not be unjust.

Draft conclusion 12
Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (jus cogens)
1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (jus cogens) at the time of the treaty's conclusion have a legal obligation to:
(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (jus cogens); and
(b) bring their mutual relations into conformity with the peremptory norm of general international law (jus cogens).
2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (jus cogens) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (jus cogens).

Draft conclusion 13
Absence of effect of reservations to treaties on peremptory norms of general international law (jus cogens)
1. A reservation to a treaty provision that reflects a peremptory norm of general international law (jus cogens) does not affect the binding nature of that norm, which shall continue to apply as such.
2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (jus cogens).

Draft conclusion 14
Rules of customary international law conflicting with a peremptory norm of general international law (jus cogens)
1. A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (jus cogens).
This is without prejudice to the possible modification of a peremptory norm of general international law (jus cogens) by a subsequent norm of general international law having the same character.
2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (jus cogens).
3. The persistent objector rule does not apply to peremptory norms of general international law (jus cogens).

Draft conclusion 15

Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (jus cogens)

1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (jus cogens) does not create such an obligation.
2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (jus cogens).

Draft conclusion 16

Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (jus cogens)

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 17

Peremptory norms of general international law (jus cogens) as obligations owed to the international community as a whole (obligations erga omnes)

1. Peremptory norms of general international law (jus cogens) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.
2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

Draft conclusion 18

Peremptory norms of general international law (jus cogens) and circumstances precluding wrongfulness

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

Draft conclusion 19

Particular consequences of serious breaches of peremptory norms of general international law (jus cogens)

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens).
2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation.
3. A breach of an obligation arising under a peremptory norm of general international law (jus cogens) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.
4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens) may entail under international law.

Part Four
General provisions

Draft conclusion 20
Interpretation and application consistent with peremptory norms of general international law (jus cogens)
Where it appears that there may be a conflict between a peremptory norm of general international law (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.

Draft conclusion 21
Recommended procedure
1. A State which invokes a peremptory norm of general international law (jus cogens) as a ground for the invalidity or termination of a rule of international law should do so by notifying other States concerned of its claim. The notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.
2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, will not be less than three months, the invoking State may carry out the measure which it has proposed.
3. If, however, any State concerned raises an objection, the States concerned should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. If no solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.
4. This draft conclusion is without prejudice to the procedures set forth in the Vienna Convention on the Law of Treaties, to the relevant rules concerning the jurisdiction of the International Court of Justice, or to other applicable dispute settlement provisions agreed by the States concerned.

Draft conclusion 22
Without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail
The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail under international law.

Draft conclusion 23
Non-exhaustive list
Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex
(a) The prohibition of aggression;
(b) the prohibition of genocide;
(c) the prohibition of crimes against humanity;
(d) the basic rules of international humanitarian law;
(e) the prohibition of racial discrimination and apartheid;
(f) the prohibition of slavery;

(g) the prohibition of torture;
(h) the right of self-determination.

E. Observations and Comments of the AALCO Secretariat

35. As the work of the Commission on the topic 'peremptory norms of general international law (*jus cogens*) draws to an end with the adoption of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) at the second reading, the work of the Commission over a period of more than seven years merits certain observations and comments by the AALCO Secretariat.

36. The AALCO Member States have deeply engaged with the topic at the previous annual sessions and have taken an active part in the deliberations providing their considered views on the topic. The Member States have supported and appreciated the work of the Commission particularly the work done by the Special Rapporteur for his excellent reports and diligent presentation of diverse and voluminous State practice in support of his draft conclusions.

37. As is the case with most topics under consideration by the Commission, the final work product involves elements of both codification as well as progressive development. While some States have been critical of the work of the Commission on the topic, expressing doubts about the existence of sufficient State practice to support the draft conclusions adopted by the Commission, the AALCO Member States have by and large been supportive. Several AALCO Member States have generally expressed agreement with the view of the Special Rapporteur that the draft conclusions were supported by sufficient State practice which finds its base in the decisions of international courts and tribunals, primary among them being the ICJ, as well as decisions of the highest municipal courts in various States.

38. The draft conclusions broadly aim to provide guidance on two issues namely the identification of *jus cogens* norms and their legal consequences. While the criteria for their identification have received broad support from States, the legal consequences have witnessed some concerns being voiced by a number of States. Two key issues stand out in this regard, namely the issue of invalidity of resolutions of international organizations that conflict with *jus cogens* norms and the issue of legal consequences of specific *jus cogens* norms particularly international crimes as is evident from the commentary (adopted on second reading at the present session) and draft conclusions suggested in the third report of the Special Rapporteur.

39. Regarding the issue of invalidity of the resolutions of international organizations that conflict with *jus cogens* norms, some States have expressed that concerns about this assertion contained in draft conclusion 16 on the basis that the same was not supported by State practice. However as is evident from the commentary as well as the detailed third report on the topic, the Special Rapporteur has relied, as the basis for this assertion, on judicial decisions of various courts and tribunals noting that even UN Security Council resolutions would be rendered void if in conflict with *jus cogens* norms, although this might be rarely the case.

40. Most AALCO Member States with the exception of a few have by and large rendered their support for draft conclusion 16, however legitimate concerns still remain regarding the unilateral invocation of *jus cogens* norms in order to avoid obligations under UN Security Council resolutions. Further the recommended procedure provided in draft conclusion 21 concerning notification and binding dispute settlement does not seem to offer a concrete solution to this particularly due to the consensual basis for dispute settlement in international

law. However, the particular draft conclusion finds robust support in scholarship, and more importantly in the decisions of courts and tribunals that have ruled on specific situations where the issue has arisen in controversy. The draft conclusion also flows from an axiomatic understanding of the *jus cogens* norms being fundamental values and a higher form of law to be obeyed by all the members of the international community. The AALCO Secretariat looks forward towards this being addressed by the Member States in their statements, true to their Bandung spirit of cooperation and mutual respect towards each other and in furtherance of the long standing tradition of cooperation with the Commission.

41. One of the most controversial issues brought up during the deliberation on the topic was the issue of consequences of international *jus cogens* crimes on immunity, dealt with as a consequence of specific *jus cogens* in conclusion 22. The AALCO Secretariat recalls that the Special Rapporteur had initially submitted a drastically different draft conclusion 23 that dealt with the contested concept of irrelevance of immunity *ratione materiae* to *jus cogens* crimes.

42. The provision also attracted the most debate among the members of the Commission as well as States in the Sixth Committee of the UN General Assembly who were divided on the issue raised in this draft conclusion. While the Special Rapporteur adopted an altered view in response to the criticism by choosing to deal with the issue through a "without prejudice" clause, the issue remains as a pertinent open question of international law. The issue is bound to appear again in the Commission as well as other forums such as national and international courts and tribunals. The issue undoubtedly merits consideration by the AALCO Member States who are encouraged to reflect upon prevalent State practice and policy in their comments so that certainty and coherence can be found which is a primary goal for efforts towards a coordinated exercise in codification of international law.

43. Furthermore, there has been much debate about the word 'consequences' in this context, which seems to rise some concerns. Since the word is usually employed in connection with violation of laws, it is not the case in the present context. It could be better to replace the word 'consequence' with 'implication' that would be another matter that could merit consideration by the AALCO Member States.

III. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. Background

1. The significance of the topic "Protection of the environment in relation to armed conflicts" was accentuated in the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, wherein it was noted, citing the UN General Assembly resolution 47/37 of 25 November 1992 on the "Protection of the Environment in Times of Armed Conflict",[15] that environmental considerations ought to be taken into account "when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[16] Thereafter, at its sixty-fifth session in 2013, the Commission decided to include the topic in its programme of work, and Ms. Marie G. Jacobsson was appointed as Special Rapporteur.

2. Three reports were received and considered by the Commission from its sixty-sixth session (2014) to its sixty-eighth session (2016).[17] On the basis of the draft principles proposed by the Special Rapporteur in these three reports, the Commission provisionally adopted sixteen draft principles.[18]

3. At its sixty-ninth session (2017), the Commission established a Working Group, chaired by Mr. Marcelo Vázquez-Bermúdez, to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer a member of the Commission. Following an oral report by the Chair of the Working Group, which recommended to the Commission the appointment of a new Special Rapporteur to assist with the successful completion of its work on the topic, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.[19]

4. At its seventieth (2018) session, the Commission received and considered the first report of the Special Rapporteur[20] and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.

5. At its seventy-first session (2019), the Commission provisionally adopted draft principles 19, 20 and 21, and considered the second report of the Special Rapporteur.[21] Also at its seventy-first session (2019), the Commission adopted, on first reading, the entire set of draft principles on protection of the environment in relation to armed conflicts, which comprised 28 draft principles, together with commentaries thereto.[22] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-General, to Governments, international organizations and others for comments and observations.[23] The

[15] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226, 242.
[16] *Ibid.*
[17] Documents A/CN.4/674 and Corr.1 (preliminary report), A/CN.4/685 (second report) and A/CN.4/700 (third report).
[18] Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 59-61.
[19] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 260, 262.
[20] Document A/CN.4/720.
[21] Document A/CN.4/728.
[22] Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 62–67
[23] *Ibid.*, para 68.

topic was not there in the programme of work of the Commission at its seventy-second session (2021).

6. At its seventy-third session (2022), at its 3571st to 3578th meetings, from 28 April to 10 May 2022, the Commission considered the third report of the Special Rapporteur[24] and instructed the Drafting Committee to commence the second reading of the entire set of draft principles, together with a draft preamble, on the basis of the proposals by the Special Rapporteur, taking into account the comments and observations of Governments, international organizations and others,[25] as well as the debate in plenary on the Special Rapporteur's report.

7. The Commission considered the report of the Drafting Committee[26] at its 3584th meeting, held on 27 May 2022, and adopted the entire set of draft principles, together with a preamble, on protection of the environment in relation to armed conflicts on second reading. At its 3602nd to 3606th meetings, from 28 July to 2 August 2022, the Commission adopted the commentaries to the draft principles and the preamble. In accordance with its statute, the Commission has submitted the draft principles, together with the preamble, to the General Assembly, with its recommendations enumerated hereafter in part D.

B. The Third Report of the Special Rapporteur

8. The primary purpose of the third report was to review the main comments and observations that have been made by States,[27] international organizations and others on the draft principles and commentaries adopted on first reading, both in the 2019 debate in the Sixth Committee and in the written comments received since then. Occasionally, observations made in the earlier debates in the Sixth Committee that appeared to remain pertinent to the second reading text were also mentioned.

9. The report in Chapter II contained a description of the aforementioned comments and observations received from States, international organizations and others, and the suggestions made by the Special Rapporteur in response. Proposals for possible additional draft principles and a possible preamble to the draft principles were contained in Chapter III. Chapter IV of the report contained a proposal of the Special Rapporteur concerning the final form of the Commission's work on the topic and a draft recommendation to the General Assembly. As a matter of convenience, the draft principles adopted by the Commission on first reading, with the changes recommended by the Special Rapporteur, were reproduced in Annex I.

10. The draft principles are unique in espousing a comprehensive approach to protection of the environment in relation to armed conflicts. The draft principles cover the entire conflict cycle by following a temporal approach, as provided for in draft principle 1.

11. Although the draft principles are primarily addressed to States, they do bring within their ambit other actors in international affairs, such as international organizations (principles 6-8, 23-25), and other relevant actors (principle 8), such as non-state actors. Furthermore, draft principles 10 and 11 aspire to regulate corporate environmental conduct in areas affected by

[24] A/CN.4/750.
[25] A/CN.4/749.
[26] A/CN.4/L.968.
[27] Till the date of the submission of the third report (7 February 2022), written comments in response to the Commission's request had been received from 19 States [representing 23 States, as Sweden commented on behalf of the five Nordic countries], including 3 AALCO Member States: Cyprus, Japan and Lebanon.

armed conflict. Given that the ILC chose to adopt a non-differentiation approach between international armed conflicts (IACs) and non-international armed conflicts (NIACs), the environment-related conduct of non-state armed groups also comes within the purview of the draft principles, especially with respect to the *in bello* phase (Part three).

12. Another noteworthy element of the draft principles is the fact that their text draws insights from various fields of international law. For example, draft principle 5 draws its wording from the UN Declaration on the Rights of Indigenous Peoples; draft principle 9 may be seen as an adjustment of the law of State responsibility to the peculiarities of environmental harm in relation to armed conflict; draft principle 21 transposes the international environmental law no-harm principle to situations of occupation; and international human rights law has inspired the wording of preambular paragraph 4 and draft principle 19(2), which applies in situations of occupation.

13. The deletion of the epithet "natural" before the term "environment" has been a longstanding issue throughout the ILC's work on the topic. The underlying concern was, on the one hand, to ensure the consistent use of the same term "environment" throughout the text of the draft principles, and, on the other hand, to justify the departure from the established terminology used in relevant law of armed conflict treaties. In the end, the Drafting Committee agreed on its deletion "on the understanding that, by deleting this word, the Commission did not intend to alter the scope of the existing conventional and customary international humanitarian law, nor was the Commission attempting to expand the scope of what is meant by 'natural environment' in international humanitarian law".[28] This understanding has been reflected in the associated commentaries.

C. Consideration of the Topic at the Seventy-Third Session (2022)

14. At its seventy-third session, the text of the draft principles and commentaries thereto were adopted by the Commission on second reading. As is always the case with the Commission's outputs, the draft principles are to be read together with the commentaries.

15. After the preamble, the draft principles are divided into five parts, including Part One entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part Two deals with the protection of the environment before the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for more than one temporal phase: before, during or after an armed conflict. Part Three pertains to the protection of the environment during armed conflict, and Part Four pertains to the protection of the environment in situations of occupation. Part Five contains draft principles relative to the protection of the environment after an armed conflict.

16. The provisions have been cast as draft "principles". The Commission has previously chosen to formulate the output of its work as draft principles, both for provisions that set forth principles of international law and for non-binding declarations of principles intended to contribute to the progressive development of international law and provide appropriate guidance to States. The present set of draft principles contains provisions of different normative value, including those that reflect customary international law, and those containing recommendations for its progressive development.

[28] Statement of the Chairperson of the Drafting Committee, Mr. Ki Gab Park, 27 May 2022, at <https://legal.un.org/ilc/documentation/english/statements/2022_dc_chairman_statement_peac.pdf>

17. The draft principles were prepared bearing in mind that the law of armed conflict, where applicable, is *lex specialis* but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable. Such rules may generally complement and inform the application of the law of armed conflict. Additionally, the fact that the law of armed conflict (*jus in bello*) and the law on the use of force (*jus ad bellum*) may apply at the same time does not affect their distinct nature.

Text of the draft principles on protection of the environment in relation to armed conflicts

The text of the draft principles adopted by the Commission, on second reading, at its seventy-third session is reproduced below.

Protection of the environment in relation to armed conflicts
Preamble

…

Recalling the urgent need and common objectives to reinforce and advance the conservation, restoration and sustainable use of the environment for present and future generations,

Recalling also that Principle 24 of the Rio Declaration on Environment and Development 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,

Recognizing that environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss,

Aware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights,

Emphasizing that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,

Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation,

Considering that effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict,

…

Part One

Introduction
Principle 1
Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.

Principle 2
Purpose
The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment.

Part Two

Principles of general application
Principle 3
Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts.
2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflicts.

Principle 4
Designation of protected zones
States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance.

Principle 5
Protection of the environment of indigenous peoples
1. States, international organizations and other relevant actors shall take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use.
2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Principle 6
Agreements concerning the presence of military forces
States and international organizations should, as appropriate, include provisions on environmental protection in relation to armed conflict in agreements concerning the presence of military forces. Such provisions should address measures to prevent, mitigate and remediate harm to the environment.

Principle 7
Peace operations
States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.

Principle 8
Human displacement
States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict are located, or through which they transit, while providing relief and assistance for such persons and local communities.

Principle 9
State responsibility
1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
2. The present draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts.
3. The present draft principles are also without prejudice to:
(a) the rules on the responsibility of non-State armed groups;
(b) the rules on individual criminal responsibility.

Principle 10
Due diligence by business enterprises
States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

Principle 11
Liability of business enterprises
States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its de facto control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three

Principles applicable during armed conflict

Principle 12
Martens Clause with respect to the protection of the environment in relation to armed conflicts
In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Principle 13
General protection of the environment during armed conflict
1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Subject to applicable international law:
(a) care shall be taken to protect the environment against widespread, longterm 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.
(3) No part of the environment may be attacked, unless it has become a military objective.

Principle 14
Application of the law of armed conflict to the environment
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.

Principle 15
Prohibition of reprisals
Attacks against the environment by way of reprisals are prohibited.

Principle 16
Prohibition of pillage
Pillage of natural resources is prohibited.

Principle 17
Environmental modification techniques
In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Principle 18
Protected zones
An area of environmental importance, including where that area is of cultural importance, designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. Such protected zone shall benefit from any additional agreed protections.

Part Four

Principles applicable in situations of occupation

Principle 19
General environmental obligations of an Occupying Power
1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory, including harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Principle 20
Sustainable use of natural resources
To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment.

Principle 21
Prevention of transboundary harm
An Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.

Part Five

Principles applicable after armed conflict

Principle 22
Peace processes
1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged as a result of the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 23
Sharing and granting access to information
1. To facilitate measures to remediate harm to the environment resulting from an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under applicable international law.
2. Nothing in paragraph 1 affects the right to invoke the grounds for refusal to share or grant access to information provided for in applicable international law. Nevertheless, States and international organizations shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Principle 24
Post-armed conflict environmental assessments and remedial measures
Relevant actors, including States and international organizations, should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

Principle 25
Relief and assistance
When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and

may consider establishing special compensation funds or providing other forms of relief or assistance.

Principle 26
Remnants of war

1. Parties to an armed conflict shall seek, as soon as possible, to remove or render harmless toxic or other hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.
2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic or other hazardous remnants of war.
3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Principle 27
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

D. Present Status of the Topic and Future Work of the Commission

18. At its 3606th meeting, on 2 August 2022, the Commission decided, in conformity with Article 23 of its statute, to recommend that the General Assembly:

(a) take note of the draft principles on protection of the environment in relation to armed conflicts in a resolution, to annex the principles to the resolution, and to encourage their widest possible dissemination;
(b) commend the draft principles, together with the commentaries thereto, to the attention of States and international organizations and all who may be called upon to deal with the subject.

E. Comments and Observations of the AALCO Secretariat

19. The comprehensive set of the draft principles could be situated alongside a host of initiatives undertaken by various international actors such as the 2020 International Committee of the Red Cross (ICRC) Guidelines on the Protection of the Natural Environment in Armed Conflict, the adoption of two relevant resolutions by the UN Environment Assembly in 2016 and 2017,[29] the 2019 Geneva List of Principles on the Protection of Water Infrastructure, and the victim assistance principles for those affected by toxic remnants of war. These initiatives not only showcase the increased awareness of the international community for the protection of the environment in relation to armed conflict related issues, but also strengthen and complement the existing normative terrain of the draft principles. In view of these, and particularly in view of the draft principles, the Member States of AALCO are requested to consider the following suggested questions for their intervention:

[29] UNEP/EA.2/Res.15 and UNEP/EA.3/Res.1.

- To what extent could the non-binding declarations of principles contribute to the progressive development of international law, as intended?

- What possible role do the Member States expect international organizations, and intergovernmental organizations like AALCO to play in the dissemination and implementation of the draft principles?

IV. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Background

1. The International Law Commission in 2007 decided to include the topic "Immunity of State Officials from foreign criminal jurisdiction" in its programme of work at its fifty-ninth session[30]. Mr. Roman A. Kolodkin of Russia was appointed as Special Rapporteur for the topic. At this session, the Commission requested the Secretariat to prepare a background study on the topic and the same was made available to the Commission at its sixtieth session in 2008. Mr. Kolodkin, the Special Rapporteur submitted three reports, the preliminary report of which was considered by the Commission at its sixtieth session in 2008 and the second and third reports were considered at the sixty-third session held in 2011. The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[31]

2. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission. The preliminary report of the Special Rapporteur was received and considered by the Commission at the sixty-fourth session (2012).[32]

3. The second report of the Special Rapporteur was considered during the sixty-fifth session (2013). The third and fourth reports of the Special Rapporteur were considered during the sixty-sixth session (2014) and sixty-seventh session (2015) respectively. The fifth report was considered during the sixty-eighth (2016) and sixty-ninth sessions (2107).[33]

4. The sixth and seventh reports were considered by the Commission during the seventieth (2018) and seventy-first session (2019). The eighth report was considered during the seventy-second session (2021).[34]

5. On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth and seventh reports, the Commission provisionally adopted 12 draft articles and commentaries thereto. Draft article 2 on definitions is currently under development.[35]

B. Consideration of the Topic at the Seventy-Third Session (2022)

6. There was no new report of the Special Rapporteur for the consideration of the Commission at the seventy-third session (2022). However, the Drafting Committee continued

[30] In Paragraph 7 of Resolution 62/66 of December 6, 2007, the General Assembly noted the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session in 2006.
[31] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 187.
[32] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 187.
[33] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 187.
[34] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 187.
[35]Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 187.

with its consideration of the remaining articles referred to it by the Commission, as contained in the second, seventh and eighth reports of the Special Rapporteur.[36]

7. At its 3586th meeting on 3 June 2022, the Commission received and considered the report of the Drafting Committee, and adopted 18 draft articles on immunity of State officials from foreign criminal jurisdiction and a draft annex on first reading.[37]

8. At its 3604th to 3609th meetings, from 29 July to 3 August 2022, the Commission adopted the commentaries to the draft articles. At its 3609th meeting, on 3 August 2022, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.[38]

9. At its 3609th meeting, on 3 August 2022, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Ms. Concepción Escobar Hernández, which was instrumental in aiding the Commission to bring to a successful conclusion its first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Mr. Roman A. Kolodkin, to the work on the topic.[39]

Text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading[40]

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.
3. 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.

Article 2

[36] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 188.
[37] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 188.
[38] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 188.
[39] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 188.
[40] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 18 August 2022, 188-193.

Definitions

For the purposes of the present draft articles:
(a) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part Two
Immunity *ratione personae*

Article 3
Persons enjoying immunity *ratione personae*
Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*
1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity ratione personae is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Part Three
Immunity *ratione materiae*

Article 5
Persons enjoying immunity ratione materiae
State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6
Scope of immunity *ratione materiae*
1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply
1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
(a) crime of genocide;

(b) crimes against humanity;
(c) war crimes;
(d) crime of apartheid;
(e) torture;
(f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Part Four
Procedural provisions and safeguards

Article 8
Application of Part Four
The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

Article 9
Examination of immunity by the forum State
1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
(a) before initiating criminal proceedings;
(b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 10
Notification to the State of the official
1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Article 11
Invocation of immunity
1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Article 12
Waiver of immunity
1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.
2. Waiver of immunity must always be express and in writing.
3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.
5. Waiver of immunity is irrevocable.

Article 13
Requests for information
1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.
2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.
3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The requested State shall consider any request for information in good faith.

Article 14
Determination of immunity
1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.
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.
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.

4. The competent authorities of the forum State shall always determine immunity:
(a) before initiating criminal proceedings;
(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This sub-paragraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

Article 15
Transfer of the criminal proceedings
1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.
2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. 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.
3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.
5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Article 16
Fair treatment of the State official
1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.
2. Any such official who is in prison, custody or detention in the forum State shall be entitled:
(a) to communicate without delay with the nearest appropriate representative of the State of the official;
(b) to be visited by a representative of that State; and
(c) to be informed without delay of his or her rights under this paragraph.
3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.
Article 17
Consultations
The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Article 18
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within 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, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

Annex
List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

• Rome Statute of the International Criminal Court, 17 July 1998, article 6;

• Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

• Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

• Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of apartheid

• International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture

• Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

Enforced disappearance

• International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

Summary of commentaries adopted by Commission at the seventy-third session (2023)

General Commentary[41]

10. The draft articles adopted by the Commission are to be read together with the commentaries. They seek to define the general legal regime applicable to such immunities and have the following broad features

(a) it is limited to immunity from criminal jurisdiction;

(b) it is limited to foreign criminal jurisdiction and does not affect the legal regime applicable before international criminal courts; and

(c) it covers all State officials regardless of their position or the specific functions they perform for the State, with the sole exception of those State officials covered by special regimes.

11. The principle of sovereign equality of States has been strongly taken into account by the Commission while adopting the draft articles. The Commission is of the view that the

[41] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 194.

immunities accorded to State officials are not granted for their personal benefit, but to protect the rights and interests of the State concerned. A distinction between immunity *ratione personae* and immunity *ratione materiae* has been made by the Commission in its work on the topic.

Draft Article 1[42]

12. The aim of paragraph 1 of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single draft article the dual perspective, positive and negative, that determines the scope of the said article. To this extent, the following three elements are incorporated:
(a) who are the persons enjoying immunity? (State officials);
(b) what type of jurisdiction is affected by immunity? (criminal jurisdiction); and
(c) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).

13. Paragraph 2 of draft article 1 refers to cases in which there are special rules of international law relating to immunity from foreign criminal jurisdiction. This category of special rules includes the regime of privileges and immunities granted under international law to diplomatic agents and to consular officials as well as privileges and immunities enjoyed by persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.

14. Paragraph 3 of draft article 1 addresses the relationship between the present draft articles and the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements. Aspects pertaining to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles as such issues are governed by an independent legal regime.

Draft Article 2[43]

15. The purpose of draft article 2, subparagraph (a), is to define "State Officials". The definition is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*.

16. The purpose of draft article 2, subparagraph (b) is to define the concept of an "act performed in an official capacity" for the purposes of the present draft articles. The Commission is of the view that for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. The "single act, dual responsibility" model (also called the double attribution model) has been accepted by the Commission. Under this model, a single act can lead to both the responsibility of the State and the individual responsible for the act, especially so in criminal matters.

[42] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 197.
[43] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 203.

Draft Article 3[44]

17. Draft article 3 highlights the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. The reason for the same is as follows:

a. As per international law, those three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.

b. Persons holding those three offices should be able to discharge their functions unhindered as per the principle of sovereign equality.

Draft Article 4[45]

18. Draft article 4 is concerned with the scope of immunity *ratione personae* from both the temporal and material dimensions. With regard to the temporal scope of immunity ratione personae, the Commission has used "only" to highlight that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. On ceasing to hold the post, the individual loses immunity *ratione personae.*

Draft Article 5[46]

19. Draft article 5 seeks to define immunity *ratione materiae* with the aim of identifying the subjective scope of this category of immunity from foreign criminal jurisdiction in draft article 6. Immunity *ratione materiae* is applicable to all State officials, current or former, including those who previously enjoyed immunity *ratione personae* as a Head of State, Head of Government or Minister for Foreign Affairs but are no longer in office.

Draft Article 6[47]

20. Draft article 6 covers the material and temporal elements of immunity *ratione materiae* from foreign criminal jurisdiction. Materially, acts performed in an official capacity are central to this category of immunity as per paragraph 1 of draft article 6. Acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts. Temporally as per paragraph 2, immunity *ratione materiae* has a permanent character which continues to subsist even after the concerned official has demitted office.

[44] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 213.
[45] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 221.
[46] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 225.
[47] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 226.

Draft Article 7[48]

21. Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the draft articles. These crimes are:

a) crime of genocide;
b) crimes against humanity;
c) war crimes;
d) crime of apartheid;
e) torture;
f) enforced disappearance

22. Draft article 7 applies to immunity from jurisdiction *ratione materiae* and not to immunity *ratione personae.* However, this does not mean that Heads of State, Heads of Government and Ministers for Foreign Affairs will be exempt from the application of draft article 7 because those listed crimes are regarded as violating peremptory rules of international law.

Draft Article 8[49]

23. Draft article 8 states that procedural provisions and safeguards shall apply in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles. It is without prejudice to any additional procedural guarantees and safeguards and applies to draft article 7 just as it does to any other draft article on this topic. The expression "exercise of criminal jurisdiction" is to be understood and interpreted broadly.

Draft Article 9[50]

24. Draft article 9 highlights the obligation of the forum State to examine the question of immunity from criminal jurisdiction when the authorities of the State seek to exercise or do exercise criminal jurisdiction over an official of another State. "Examination" of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies and is different from "determination of immunity" contained in draft article 14. The forum State is required to "examine" the question of immunity as soon as they "become aware that an official of another State may be affected by the exercise of its criminal jurisdiction".

[48] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 229.
[49] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 242.
[50] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 244.

Draft Article 10[51]

25. Draft article 10 pertains to the notification that the forum State must provide to another State that the former intends to exercise criminal jurisdiction over a State official of the latter. Since immunity from foreign criminal jurisdiction is granted to State officials for the benefit of the State, it is for the State, not the official, to decide on the invocation and waiver of immunity, and it is also for the State of the official to decide on the means by which immunity may be claimed for a State official. All of this is presupposed on the need to make the authorities of the State of the official aware of the intention of exercising criminal jurisdiction over such official in the first place. The notification should include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

Draft Article 11[52]

26. Draft article 11 deals with the issue of invocation of immunity. Invocation of immunity is to be exercised by the State of the Official and they need to inform the forum State regarding the same. Procedural aspects pertaining to timing, means of communication of the invocation of immunity and content are also provided in draft article 11.

Draft Article 12[53]

27. Draft article 12 is concerned with waiver of immunity. It approaches the issue from two perspectives. Firstly, the recognition of the right of the State of the official to waive immunity and secondly, the procedural aspects pertaining to the waiver including the means of communication. The need to inform the competent authorities of the forum State in the event that immunity is waived is also provided. The waiver of immunity by the State of the official is a formal act whereby the State of the official waives its right to claim immunity, thus removing this obstacle to the exercise of jurisdiction by the courts of the forum State. Waiver of immunity is irrevocable.

Draft Article 13[54]

28. Draft article 13 provides that both the forum State and the State of the official may request information from each other. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision concerning immunity.

[51] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 247.
[52] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 252.
[53] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 255.
[54] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 261.

Draft Article 14[55]

29. Draft article 14 concerns the determination of immunity. Determination refers to the decision on whether or not immunity applies in a particular case or not. Determination is the final stage of a process in which the competent authorities of the forum State make an assessment of the various elements and circumstances of a particular case. It needs to be distinguished from the "examination" of immunity provided in draft article 9, which refers only to the initial consideration of immunity.

Draft Article 15[56]

30. Draft article 15 provides for the possibility of transferring criminal proceedings to the State of the official and regulates the conditions under which such a transfer may occur, as well as its effects. The transfer of criminal proceedings is one of the mechanisms for cooperation and mutual legal assistance in criminal matters. Draft article 15 refers to the transfer of criminal proceedings from the forum State to the State of the official, as it seeks to act as a procedural safeguard operating between the States directly concerned. Proceedings may also be transferred to a third State or to an international criminal court and the same should be carried out in accordance with applicable international rules. In such cases, draft article 15 shall not apply as it pertains only to transfer of criminal proceedings between the forum State and the State of the official within the context of the draft articles.

Draft Article 16[57]

31. Draft article 16 recognizes the right of an official of another State to be treated fairly by the authorities of the forum State that are exercising or have exercised jurisdiction over that official. The right provided in draft article 16 is an additional safeguard to the procedural safeguards provided in draft articles 9 to 15 and is of an individual nature.

Draft Article 17[58]

32. Draft article 17 concerns consultations between the forum State and the State of the official. Consultations are a mechanism that is commonly used for various purposes in international relations. Consultations are mainly held to obtain information on matters of common interest and to solicit views of another State and to identify ways of avoiding a dispute between two States or to facilitate a solution to a dispute that has already arisen.

[55] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 264.
[56] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 271.
[57] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 276.
[58] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 279.

Draft Article 18[59]

33. Draft article 18 obliges States to resort only to negotiation or other peaceful means of dispute settlement in the event of a dispute concerning the interpretation or application of the present draft articles.

Annex[60]

34. The commentary to the annex highlights that the crimes under international law in paragraph 1 are to be understood according to their definition under international law. The list has no effect whatsoever on the customary nature of these crimes or on any specific obligations that the treaties included in the list may impose on the States parties thereto.

C. Present status of the topic and future work[61]

35. At its 3586th meeting on 3 June 2022, the Commission received and considered the report of the Drafting Committee, and adopted 18 draft articles on immunity of State officials from foreign criminal jurisdiction and a draft annex on first reading. At its 3604th to 3609th meetings, from 29 July to 3 August 2022, the Commission adopted the commentaries to the draft articles. At its 3609th meeting, on 3 August 2022, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through UN Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.

D. Observations and Comments of the AALCO Secretariat

36. The AALCO Secretariat encourages Member States to deeply engage with the ILC on the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction' and urges them to respond with necessary comments and observations as may be requested by the ILC. The Secretariat is of the view that this topic (like other topics on the agenda of the ILC) is of utmost importance for AALCO Member States and has deeply seated implications for the codification and progressive development of international law. In this backdrop, the Secretariat places on record its deep appreciation to its Member States for their continuing and noteworthy efforts in this regard.

37. The AALCO Secretariat is of the view that the ILC should make all efforts to reach out to Afro-Asian States and strive to reflect the position, views, perspectives and aspirations of these States in the work of the Commission. In light of the same, the Secretariat places on record, its sincere appreciation to the Commission for their continuing and noteworthy efforts in this regard.

38. The AALCO Secretariat is of the view that the ILC in the course of its work on the topic should strive to strike a harmonious balance between the interests of the forum State and

[59] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 280.
[60] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 282.
[61] Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf>, accessed 16 August 2022, 188.

the interests of the State of the Official on the one hand and the interests of international criminal justice (including the need to curb impunity) and the rights of the defendants as recognized under international law and the major legal systems of the world on the other. The principle of sovereign equality of States must be safeguarded at all times. It is the view of the Secretariat that the Commission is cognizant of the need to achieve harmony in this regard and efforts of the Commission to take into account divergent and contrary positions must continue.

39. The AALCO Secretariat encourages all stakeholders to work together to bring to fruition a final end product of the draft articles in whatever form and manner that they deem fit. Again, all positions and perspectives must be respected and care should be taken that the recognized principles of international law like sovereign equality are given due recognition in this process.

V. SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

A. Background

1. At its sixty-ninth session (2017), the Commission decided to include the topic 'succession of States in respect of State responsibility' in its long-term programme of work on the basis of the proposal contained in the report to the UN General Assembly on the work of the Commission at the sixty-seventh session (2015).[62] At the same session, the Commission appointed Mr. Pavel Šturma as Special Rapporteur. Thereafter, the General Assembly subsequently, vide resolution 72/116 of December 2017,[63] took note of the decision of the Commission to include the topic in its programme of work.

2. The first report of the Special Rapporteur[64] which was submitted to the Commission for its consideration at the sixty-ninth session (2017) dealt with the scope and outcome of the topic and provided an overview of the general provisions relating to the topic. Following the debate in the plenary, it was decided to refer draft articles 1 to 4, as proposed in the first report to the Drafting Committee. Subsequently, the Drafting Committee provisionally adopted draft articles 1 and 2 and reported the same to the Commission for information purposes only.[65]

3. At the seventieth session (2018), the Commission considered the second report of the Special Rapporteur[66] on the topic that looked at certain general rules regarding succession of state responsibility and the transfer of obligation arising from the internationally wrongful act of the predecessor State, that provide for exceptions from the aforesaid general rules. The Commission considered the second report at its 3431st to 3435th meetings from 17 to 24 July 2018.

4. At its 3435th meeting on 24 July 2018, the Commission decided to refer the proposed draft articles in the second report *i.e.* draft articles 5-11 to the Drafting Committee to consider the report taking into account the views of the members in plenary session. At its 3443rd meeting, on 3 August 2018 the Chair of the Drafting Committee presented his interim report which provisionally adopted draft article 1, paragraph 2 and draft articles 5 and 6.[67] The Commission also decided to request the Secretariat to prepare a memorandum on the treaties registered under article 102 of the UN Charter that may be relevant to the future work on the topic. During the discussion in the Commission the Special Rapporteur indicated that he agreed that the Commission should consider changing the title of the topic to "State responsibility problems in cases of succession of States."

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[62] ILC, 'Report of the International Law Commission on the Work of its 68th Session' 274 (2 May- 10 June and 4 July- 12 August 2016) UN Doc A/71/10.

[63] UNGA, 'Report of the International Law Commission on the work of its Sixty-Ninth Session' (7 December 2017) UN Doc. A/RES/72/116.

[64] ILC, 'First Report on succession of States in respect of State Responsibility by Pavel Šturma Special Rapporteur' (31 May 2017) UN Doc. A/CN.4/708.

[65] ILC, 'Statement of the Chairman of the Drafting Commission, Aniruddha Rajput, on the Succession of States in respect of State responsibility' <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf&lang=E> accessed 23 August 2022.

[66] ILC, 'Second Report on succession of States in respect of State Responsibility by Pavel Šturma, Special Rapporteur' (6 April 2018) UN Doc. A/CN.4/719.

[67] ILC, 'Statement of the Chairman of the Drafting Commission, Charles Churnor Jalloh, on the Succession of States in respect of State responsibility' <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sosr.pdf&lang=E> accessed 23 August 2022.

5. At the seventy-first session (2019), the Commission had before it the third report of the Special Rapporteur on the topic[68] as well as the memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[69] At that session, the Commission provisionally adopted draft articles 1, 2, and 5 and the commentaries thereto.

6. On 31 July 2019, at its 3495th meeting based on the discussion of the draft articles proposed in the second report of the Special Rapporteur three draft articles 7, 8, and 9 were presented to the Commission for information purposes.

7. Thereafter, at its seventy-second session (2021), the Commission provisionally adopted draft articles 7, 8 and 9 as well as the commentaries thereto.[70] At the same session, the Commission also considered the fourth report of the Special Rapporteur[71] that dealt with the impact of succession of States on forms of responsibility particularly reparations, cessation, assurances and guarantees of non-repetition on the basis of which 5 draft articles were proposed *i.e.* draft articles 7 *bis*, 16, 17, 18 and 19. During the plenary at that session, the Commission also decided to refer draft articles 7 bis, 16, 17, 18 and 19 to the Drafting Committee. Further draft articles 10, 10 bis and 11 were provisionally adopted by the Drafting Committee and presented to the Commission for information.[72]

8. At the present session, the Commission had before it the fifth report of the Special Rapporteur[73] on the topic that dealt with the question of a plurality of injured successor States and a plurality of responsible successor States. The report did not propose any new draft articles on the basis of his report but proposed a new scheme for the consolidation and restructuring of the draft articles referred to the Drafting Committee on the basis of previous reports.

B. The Fifth Report of the Special Rapporteur

9. As mentioned above, the fifth report on the topic dealt with the question of a plurality of injured successor States and a plurality of responsible successor States among other issues. Part one focuses on providing an updated overview of the work on the topic undertaken thus far, includes a summary of the debate in the Sixth Committee held at the seventy-sixth session of the General Assembly along with an explanation of the methodology of the report. Part two of the report addresses the main focus of the report i.e. the question of a plurality of injured successor States and a plurality of responsible successor States. Part three of the report proposed a new scheme for the consolidation and restructuring of the draft articles referred to the Drafting Committee at previous sessions on the basis of proposals contained in his previous reports. The concluding part four addressed the future work of the Commission on the topic.

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[68] ILC, 'Third Report on succession of States in respect of State Responsibility by Pavel Šturma, Special Rapporteur' (6 April 2018) UN Doc. A/CN.4/731.

[69] ILC, 'Memorandum by the Secretariat, Information on treaties which may be of relevance to the future work of the Commission on the topic' (20 March 2019) UN Doc. A/CN.4/730.

[70] ILC, 'Summary record of the 3560th meeting' UN Doc. A/CN.4/SR.3461 (4 August 2021); ILC. 'Summary record of the 3562nd meeting' UN Doc. A/CN.4/SR/3462 (4 August 2021).

[71] ILC, 'Fourth Report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur' (27 March 2020) UN Doc. A/CN.4/743 Corr. 1.

[72] UNGA, 'Report of the International Law Commission on the work of its Seventy-First Session' (26 April- 4 June and 5 July – 6 August 2021) UN Doc. A/76/10.

[73] ILC, 'Fifth Report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur' (1 April 2022) UN Doc. A/CN.4/751.

Text of the draft guidelines provisionally adopted by the Commission at its seventy-third session

Draft guideline 6
No effect upon attribution
A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Draft guideline 7 *bis*
Composite acts
1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.
2. The breach of an international obligation by a successor State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the successor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.
3. The provisions of paragraphs 1 and 2 are without prejudice to whether the breach of an international obligation by a successor State may occur through a series of actions or omissions defined in aggregate as wrongful that commences with the predecessor State and continues with the successor State.

Draft guideline 10
Uniting of States
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.

Draft guideline 10 bis
Incorporation of a State into another State
1. 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.
2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Draft guideline 11
Dissolution of a State
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 take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Draft guideline 12
Cases of succession of States when the predecessor State continues to exist
1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.
2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.
3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Draft guideline 13 Uniting of States
When two or more States unite and so form one successor State, and any of the predecessor States was injured by an internationally wrongful act of another State, the successor State may invoke the responsibility of that other State.

Draft guideline 13 bis
Incorporation of a State into another State
1. When an internationally wrongful act has been committed against a State prior to its incorporation into another State, the incorporating State may invoke the responsibility of the wrongdoing State.
2. When an internationally wrongful act has been committed against a State prior to incorporating another State, the injured State continues to be entitled to invoke the responsibility of the wrongdoing State.

Draft guideline 14
Dissolution of a State
1. When a State that has been injured by 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, one or more of the successor States may, in particular circumstances, be entitled to invoke the responsibility of the wrongdoing State.
2. The wrongdoing State and the relevant successor State or States should endeavour to reach agreement for addressing the injury. They should take into account any territorial link, any loss or benefit derived for nationals of the successor State, any equitable proportion and all other relevant circumstances.

Draft guideline 15
Diplomatic protection
The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States.

Draft guideline 15 bis
Cessation and non-repetition
1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:
(a) to cease that act, if it is continuing;
(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft guideline 7 bis, paragraph 1 or paragraph 2, is under an obligation:
(a) to cease that act, if it is continuing;
(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

C. Introduction by the Special Rapporteur of the fifth report on the succession of States in respect of State responsibility.

10. In his introduction of the fifth report on the succession of States in respect of State responsibility, the Special Rapporteur sought to explain the various parts of the report that dealt with different issues. It was stated that part one recalled some general consideration applicable to the topic as a whole, namely, the subsidiary nature of the draft articles, prioritization of agreements between States as well as the importance of maintaining consistency with the Commission's previous works.

11. In relation to part two, it was explained that it addressed terminological issues particularly the meaning of the term 'plurality of States' which included both responsible and injured States. It was also reminded that the same was consistent with the Commission's previous work on the topic namely articles 46 and 47 of the Articles on the Responsibility of State for Internationally Wrongful Acts, 2001. He further stated in his introduction that while the term 'shared responsibility' was also used widely based on the guiding principles on shared responsibility produced by a group of international lawyers at the University of Amsterdam, the same was of limited use in the context of the topic.

12. Regarding Part Three of the report, the Special Rapporteur stated that it addressed three scenarios *i.e.* plurality of injured successor States, plurality of responsible successor States and plurality of States in cases of continuing or composite acts. On the basis of the assessment of these scenarios the Special Rapporteur explained that he did not consider it necessary to propose a dedicated draft article on the plurality of States or shared responsibility in the context of succession.

13. With respect to Part Four of the report, it was explained that it proposed certain recommendations for consolidation and restructuring of the draft articles to facilitate the adoption of the entire set on first reading in light of the fact that certain draft articles had left pending in the Drafting Committee between sessions, which in the view of the Special Rapporteur had led to confusion about the status of the topic. The draft articles were divided into four parts, due to the fact that draft articles 3 and 4 proposed in the first report were to be deleted in view of the debate in the Commission.

14. While introducing Part Five which set out the proposed future programme of work for the topic, the Special Rapporteur stated that it was his sincere wish that the Commission would complete the first reading of the draft articles at the present session. He also stated that it would also be helpful for the future work of the Commission which might decide to resume its work on the topic after it had received comments and observations from States on the full set of draft articles.

D. Consideration of the Topic at the Seventy-Third Session (2022)

15. The fifth report on the topic prepared by the Special Rapporteur was welcomed by the members of the Commission who expressed their appreciation for his work. By and large, there was general agreement with the views expressed in the report by the Special Rapporteur, although there were disagreements the same were addressed by the members of the Commission in the deliberations in the plenary sessions.

16. At the plenary session of the Commission, the members generally agreed with the proposal of the Special Rapporteur that there was no need to introduce a provision on plurality of States. The members emphasized that particular aspects of the existence of a plurality of States in cases of continuing or composite acts could be resolved on the basis of general rules of State responsibility. Some members expressed the view that it was advisable to include such a provision, along the lines of article 7, "Plurality of successor States", of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility or to include a reference thereto. Some members were also of the view that it was unnecessary to include a "without prejudice" clause in relation to articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.

17. A majority of members expressed agreement with the proposal of the Special Rapporteur that there was no need to examine separately the concept of "shared responsibility", since, in their view, the concept was not directly relevant to the present topic. On the other hand, it was also suggested that examination of the concept could provide clarity to the Commission's work, and that it could find place in the commentaries on the draft articles.

18. Regarding the final form of the work several members questioned whether the development of draft articles was the most appropriate outcome, particularly in light of concerns expressed by some Member States in the Sixth Committee that there was a paucity of State practice available to justify the adoption of draft articles. Accordingly, it was suggested that the Commission consider changing the format of its work on the topic to draft guidelines or draft conclusions, which would be designed to serve as general guidance for States.

19. Some members also expressed doubt whether the adoption of the full set of draft articles was feasible at the present session, and that work be discontinued and instead be continued in the form of a Working Group, chaired by the Special Rapporteur, with the aim of producing a report on the topic that would be annexed to the Commission's report, as had been done with previous topics such as the obligation to extradite or prosecute (*aut dedere aut judicare*.)

20. On the basis of the debate in the plenary the Commission instructed the Drafting Committee to prepare draft guidelines on the topic, including the provisions which had been referred to the Drafting Committee previously as well as those provisionally adopted by it. The Commission also provisionally adopted guidelines 6, 10, 10 bis and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, respectively, as well as draft guidelines 7 bis, 12, 13, 13 bis, 14, 15 and 15 bis, which were provisionally adopted by the Drafting Committee at the present session.

E. Observations and Comments of the AALCO Secretariat

21. As the term of the Special Rapporteur has come to end at the Commission and the form of the topics has been revised from draft articles to draft guidelines, the present topic stands at a crucial juncture where the final form of the draft guidelines needs to be worked out.

22. While several States agreed with the view of the Special Rapporteur that agreements between States would take precedence over the draft articles, they expressed concern that many of the provisions were not based on consistent State practice which reflects crystallization of particular rules on this topic.

23. Some States have favoured the rule of automatic successions while others favoured the clean slate rule. In light of these concerns, it is the recommendation of the AALCO Secretariat that the AALCO Member States shed some light on relevant State practice, both of their own and general practices in the region, which may lead to some breakthrough in the future work on the topic. Further it would also guide the deliberations on this topic if the States could respond to the particular cases of succession and their consequences for State responsibility referred to by the Special Rapporteur, with a view to informing the understanding behind the particular practice that has been extracted from the specific cases.

VI. GENERAL PRINCIPLES OF LAW

A. Background

1. During its seventieth session (2018), the Commission decided to include the topic "General principles of law" in its current programme of work[74] and appointed Mr. Marcelo Vázquez- Bermúdez as Special Rapporteur. The UN General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

2. At its seventy-first session (2019), the Commission considered the Special Rapporteur's first report[75], which set out his approach to the topic's scope and outcome, as well as the main issues to be addressed in the course of the Commission's work. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft conclusion 1, provisionally adopted by the Committee in English only, which was presented to the Commission for information.[76]

3. Also at its seventy-first session, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

4. At its seventy-second session (2021), the Commission considered the Special Rapporteur's second report[77], in which the Special Rapporteur addressed the identification of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Commission also had before it the memorandum it had requested from the Secretariat[78] at its seventy-first session. Following the debate in plenary, the Commission decided to refer draft conclusions 4 to 9, as presented in the second report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 4, together with commentaries, and took note of draft conclusion 5, as contained in the report of the Drafting Committee. The Commission reiterated its request to States to provide information regarding their practice relating to general principles of law.

B. The Third Report by the Special Rapporteur

5. The third report seeks to complete the set of draft conclusions proposed by the Special Rapporteur on this topic. It addressed the functions of general principles of law in the sense of Article 38 paragraph 1 (c), of the Statute of the International Court of Justice and the relationship between general principles of law and the other sources of international law contained in Article 38, namely, treaties and customary international law. It re-examined certain aspects related to the identification of general principles considering the debate held in

[74] A/72/10, para. 267.
[75] A/CN.4/732.
[76] The interim report of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.
[77] A/CN.4/741 and Corr.1.
[78] A/CN.4/742.

the Commission at its seventy-second session and in the Sixth Committee at its seventy-sixth session (2021).

6. Part One of the third report further analysed the issue of transposition of general principles of law derived from national legal systems to the international legal system. The purpose of this part was to address questions that had been raised by members of the Commission and Member States in the Sixth Committee, in particular regarding draft conclusion 6 proposed in the Special Rapporteur's second report. The Special Rapporteur was in agreement with those who suggested that draft conclusion 6 could be simplified to avoid being overly prescriptive.

7. Moreover, the Special Rapporteur emphasized that for recognition to occur, in the sense of Article 38 paragraph 1 (c) of the Statute of the International Court of Justice, it was not sufficient for a principle to be recognized *in foro domestico*; rather, recognition of its applicability in the international legal system was also necessary due to differences between national legal systems and the international legal system. He further explained that a formal act of recognition was not required and that recognition in the context of transposition essentially occurred implicitly. He noted that determining the compatibility of the principle with the international legal system was necessary. He also emphasized that, when addressing the question of transposition of general principles of law, a balance needs to be struck between rigor and flexibility so that the methodology for identification is based on objective criteria, but without making it overly burdensome to identify general principles in a way that they cannot perform their functions.

8. Part Two of the report summarized the differing views expressed in relation to the second category of general principles of law reflected in draft conclusion 7, namely general principles of law formed within the international legal system and clarified certain matters regarding the methodology for their identification. The Special Rapporteur reiterated that there was sufficient practice and doctrine to substantiate a draft conclusion on the second category, while acknowledging that caution was required, especially in view of concerns raised that this category should not be confused with customary international law. He emphasized that the main challenge consisted in formulating a clear and precise methodology for the identification of general principles of law formed within the international legal system.

9. Part Three of the report addressed the functions of general principles of law and their relationship with other sources of international law, in particular treaties and customary international law. Following the discussion on this part, five draft conclusions were proposed in the third report. Firstly, this part dealt with the essential function of general principles of law of filling gaps that might exist in conventional and customary international law. It was explained that a general principle of law could only fill a gap to the extent that the existence of the said principle could be determined following the methodology for its identification.

10. Further, it was highlighted that such a function was widely recognized in practice and doctrine and that the report was careful not to suggest that there was a hierarchy between the three sources of international law (treaties, customary international law, and general principles of law), but, rather, that this relationship should be understood in light of the principle of *lex specialis*. On the question of *non liquet*, the Special Rapporteur clarified that it was not necessary for the Commission to delve into the matter as (a) the analysis of the gap-filling function of general principles of law already answered the question of *non liquet*, and (b) the

question of *non liquet* was applicable only in the judicial context and general principles of law, as a source of international law, were not limited to such perspective.

11. Furthermore, the report covered specific functions of general principles of law. The Special Rapporteur noted that the said functions were not necessarily exclusive to general principles of law and needed to be understood in light of their essential gap-filling role. The Special Rapporteur concluded by summarizing the specific functions that general principles of law could serve, as identified in the third report: (a) as an independent basis for rights and obligations; (b) as a means to interpret and complement other rules of international law; and (c) as a means to ensure the coherence and consistency of the international legal system.

12. The draft conclusions proposed by the Special Rapporteur in his third report read as follows:

Draft conclusion 10
Absence of hierarchy between the sources of international law

General principles of law are not in a hierarchical relationship with treaties and customary international law.

Draft conclusion 11
Parallel existence

General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.

Draft conclusion 12
Lex specialis principle

The relationship of general principles of law with rules of the other sources of international law addressing the same subject matter is governed by the *lex specialis* principle.

Draft conclusion 13
Gap-filling

The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.

Draft conclusion 14
Specific functions of general principles of law

General principles of law may serve, *inter alia*:
(a) as an independent basis for rights and obligations;
(b) to interpret and complement other rules of international law;
(c) to ensure the coherence of the international legal system.

C. Consideration of the Topic at the Seventy-Third Session (2022)

13. At the seventy-third session, the Commission considered the Special Rapporteur's third report wherein he proposed five draft conclusions mentioned above. During the general debate,

differing views were expressed regarding the nature of general principles of law as a primary source of international law. Several members agreed that general principles of law were a primary and independent source, while others expressed doubts. The need to draw a clear distinction between general principles of law and judicial techniques or maxims, as well as between principles with normative scope and principles without normative scope, was emphasized.

14. A concern was raised regarding a perceived overreliance in the third report on judicial decisions and individual commentators rather than on State practice. It was highlighted that the recognition of general principles of law was incumbent upon States. In respect of general principles of law formed within the international legal system, States could manifest such recognition either in the express form of treaty provisions or in the unwritten form of customary international law. A view was expressed that if gap-filling, where no treaty or customary international law rule applied, was an essential function of general principles of law, then finding evidence of State recognition of the general principle of law in question would be challenging.

15. Some members suggested adding to the draft conclusions a non-exhaustive list of general principles of law, similar to draft conclusion 23 of the topic "Peremptory norms of general international law (*jus cogens*)". A view was expressed that the main objective of the work on the topic should be the identification and confirmation of the specific content of general principles of law, even if it was in the form of an indicative list.

16. With respect to draft conclusion 6 (ascertainment of transposition to the international legal system), as proposed in the second report of the Special Rapporteur, some members reiterated their support for the two-step approach (existence in national legal systems and transposition) proposed by the Special Rapporteur, while the notion of transposition itself was questioned by others. Several members supported implicit transposition rather than an express, active or formal act of transposition. A number of members suggested simplifying draft conclusion 6, in order to favour flexibility in the identification of general principles of law derived from national legal systems, while maintaining certain rigour in the process. Some members emphasized that the Commission should aim at ensuring a text that avoided creating the impression that transposition was either automatic or that it required a formal act.

17. Regarding draft conclusion 10, while some members agreed with the third report that the absence of a hierarchy between sources of international law was well supported in the practice of States and scholarly writings, others questioned this approach. According to the members who questioned the approach, even if in theory there was no hierarchy between sources, in practice there was an informal hierarchy between the sources listed in Article 38 of the Statute of the International Court of Justice, which were applied *en ordre successif*. In that connection, it was stated that general principles of law did not in practice have the same status as a treaty or a rule of customary international law. Several members suggested that there was a tension between draft conclusion 10 and draft conclusion 13 (gap-filling), in the sense that a gap-filling function placed general principles of law below treaties and customary international law. A view was expressed that general principles of law were a subsidiary source of international law.

18. Several members expressed support for draft conclusion 11 as correctly reflecting the possibility of the parallel existence of general principles of law and rules of treaty law and/or rules of customary international law. In that regard, the jurisprudence outlined in the third

report to support such proposition was emphasized. Other members considered the provision unnecessary or of limited practical applicability. It was suggested that the content of draft conclusion 11 could be dealt with in the commentary and that the discussion on parallel existence was not relevant to the topic since the Commission was not engaged in a general discussion on sources. The view was expressed that general principles of law could not coexist with rules of customary international law of similar or identical content since the processes for the formation and identification of general principles of law and customary international law would often overlap.

19. Draft conclusion 12 was supported by some members, who considered that *lex specialis* was a principle that may be applicable to resolve conflicts between rules derived from general principles of law on the one hand, and rules of treaty law and customary international law on the other hand. Others questioned whether the provision was needed, as it appeared that its content could be discussed in the commentary. Several members expressed doubts regarding the sole focus on the *lex specialis* principle in the third report and, consequently, in the draft conclusion, when other methods for deconflicting sources could also be relevant and applicable, such as the *lex posteriori* principle. Reconsideration of the focus on the *lex specialis* principle was called for.

20. Regarding draft conclusion 13, several members agreed that the essential function of general principles of law was to fill the lacunae left in the international legal system where the other sources offered no solution. Some members stated that general principles of law did not have a monopoly on filling gaps, since treaties and customary international law could also play a similar role. In that connection, the view was expressed that not every gap could be filled with general principles of law. It was also stated that gap-filling did not constitute the main role of general principles of law because they performed a major function in the interpretation and application of existing rules and in providing coherence to the international legal system. While some members supported the use of the term "gap-filling", others considered it ambiguous and misleading.

21. With respect to draft conclusion 14, some members supported it in substantive terms, agreeing that it correctly identified a number of the functions that general principles of law may serve in the international legal system. Other members, however, questioned whether the functions identified in the provision were exhaustive and raised concerns regarding the characterizations employed therein.

22. At its 3585th meeting, on 1 June 2022, the Commission provisionally adopted draft conclusion 5, which had been provisionally adopted by the Drafting Committee at the seventy-second session. At its 3592nd meeting, on 12 July 2022, the Commission decided to refer draft conclusions 10 to 14, as contained in the third report, to the Drafting Committee, taking into account the views expressed in the plenary debate. At its 3605th meeting, on 29 July 2022, the Commission considered the report of the Drafting Committee[79]on the consolidated text of draft conclusions 1 to 11, provisionally adopted by the Drafting Committee. The Committee provisionally adopted draft conclusions 3, 6, 7, 8, 9, 10 and 11. At its 3605th meeting, on 29 July 2022, the Commission provisionally adopted draft conclusions 3 and 7 and took note of draft conclusions 6, 8, 9, 10 and 11. At its 3605th to 3612th meetings, from 29 July to 5 August 2022, the Commission adopted the commentaries to draft conclusions 3, 5 and 7, provisionally adopted at the seventy-third session.

[79] A/CN.4/L.971.

D. Observations and Comments of the AALCO Secretariat

23. The Secretariat would like to bring to the attention of the Member States the following issues.

24. While it was primarily incumbent on States to recognise general principles of law, the third report emphasizes judicial decisions and works of publicists besides State practice. In a similar vein, the notion of transposability, as given in Draft Conclusion 6, could raise the question of overshadowing the will of States in a key aspect of the process of recognition of general principles of law and be used as an excuse to ascertain the transposition of general principles of law by special arrangements between States or by controversial judicial decisions.

25. While the Special Rapporteur has addressed concerns regarding the relationship of general principles of law with other sources of law, namely treaties and customary law in Draft Conclusion 11, it seems that the question of hierarchy still remains specially with the "gap-filling" function of the general principles of law as in Draft Conclusion 13; a legitimate question could be raised as to *what gap* a general principle of law is expected to fill if other sources *i.e.* treaties and customary international law, do not supersede the same. This is further highlighted by the comments of some members of the Commission raising the point that *States manifest recognition of general principles of law formed within the international legal system either in the express form of treaty provisions or in the unwritten form of customary international law*.

26. Since general principles of law are attributed to the "community of nations", it seems relevant that the Asian and African members of AALCO contribute actively to the ongoing debates on the topic so as to reach a clear and comprehensive understanding of the notion of general principles of law as an important source of international law s recognized in Article 38, Paragraph 1 (c), of the Statute of the International Court of Justice.

VII. SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

A. Introduction

1. At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term programme of work.[80] Subsequently, the UN General Assembly, in its resolution 73/265 of 22 December 2018, noted the inclusion of the topic in the long-term programme of work of the Commission.

2. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[81]

3. At the same meeting, the Study Group decided that, of the three subtopics identified in the syllabus prepared in 2018,[82] it would examine the first – issues related to the law of the sea – in 2020, under the co-chairpersonship of Mr. Aurescu and Ms. Oral, and the second and third – issues related to statehood and issues related to the protection of persons affected by sea-level rise in 2021 under the co-chairpersonship of Ms. Galvão Teles and Mr. Ruda Santolaria. Owing to the outbreak of the coronavirus disease (COVID-19) pandemic, and the ensuing postponement of the Seventy-Second Session of the Commission, the initial calendar for the discussion of the first and second issues papers was delayed by one year.

4. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic[83], which had been issued together with a preliminary bibliography. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.

5. During its seventy-third session (2022), the Commission reconstituted the Study Group on sea-level rise in relation to international law. The Study Group had before it the second issues paper[84] concerning issues relating to statehood and to the protection of persons affected by sea-level rise, prepared by two of the Co-Chairs of the Study Group, Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria. The Study Group had an exchange of views based on the second issues paper and on other matters related to the subtopics under consideration. The Study Group also addressed a series of guiding questions prepared by the Co-Chairs and held a discussion on the future programme of work on the topic.[85]

[80] Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), para. 369.
[81] Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 265–273.
[82] Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), para. 369, Annex B.
[83] A/CN.4/740 and Corr.1.
[84] A/CN.4/752 and Add.1.
[85] Report of the International Law Commission, Seventy-Third Session, A/77/10 (Advance version of 12 August 2022).

B. The Second Issues Paper by the Co-Chairs of the Study Group

6. The second issues paper[86] is intended to serve as a basis for discussion in the Study Group. It covers the subtopics of statehood and the protection of persons affected by sea-level rise and is divided into an introduction and four parts.

7. The introduction addresses certain general matters: the inclusion of the topic in the Commission's programme of work and the consideration of the topic by the Commission so far; the positions of the Member States during the debates in the Sixth Committee in the previous years; the level of support from Member States for the subtopics addressed in the present issues paper; and outreach undertaken by the Co-Chairs of the Study Group. It also includes a summary of scientific findings and prospects of sea-level rise that are relevant to the subtopics of statehood and the protection of persons affected by sea-level rise, and an update regarding the consideration of these subtopics by the International Law Association.

8. Part Two of the paper, entitled "Reflections on statehood", deals with the following issues: criteria for the creation of a State; some representative examples of actions taken by States and other subjects of international law; references to concerns expressed relating to the phenomenon of sea-level rise and some measures that have been taken in that regard; and the formulation of possible alternatives for the future in respect of statehood. It explores a few past or present experiences or situations to establish a list of relevant international law issues to be analysed from the perspective of both *lex lata* and *lex ferenda*.

9. Specifically, this part explored the characteristics of a State contained in Article 1 of the 1933 Convention on the Rights and Duties of States and did a comparative analysis with the provisions of other illustrative texts— namely, the 1936 resolution of the *Institut de Droit International* concerning the recognition of new States and new Governments; the 1949 draft Declaration on Rights and Duties of States; the 1956 draft articles on the law of treaties proposed by the Special Rapporteur; and the opinions of the Arbitration Commission of the 1991 International Conference on the Former Yugoslavia.

10. Further, it contained some representative examples of actions taken by States and other subjects of international law, starting with the Holy See and the Sovereign Order of Malta. In this regard, it was noted that those entities, despite having been deprived of their territories at a certain point in history, maintained their legal personality and continued to exercise some of their rights under international law, in particular the right of legation and the treaty-making power. It also considered the example of Governments being forced in exile by foreign military occupation or other circumstances. Relatedly, it was noted that, despite losing control over all or a large part of their territory, the affected States retained their status as such and their representative organs moved to territories under the jurisdiction of third States that hosted them, which was regarded as constituting evidence of a presumption of continuity of statehood. In a similar vein, the paper, drawing upon certain international instruments, including the Convention on the Rights and Duties of States, noted that once a State was created as such under international law, it had an unalienable right to take measures to remain as a State.

11. Furthermore, it stressed the need to examine measures aimed, on the one hand, at mitigating the effects of sea-rise level – such as coastal reinforcement measures and the

[86] "Sea-Level Rise in Relation to International Law", Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, A/CN.4/752.

construction of artificial islands – and, on the other hand, possible alternatives for the future concerning statehood in the event of complete inundation of a State's territory by sea-level rise. With respect to the former, the high cost of preservation measures and the need to assess their environmental impact were underlined, including through cooperation in favour of the most affected States. In connection with the latter, the urgent necessity to consider the perspective of small island developing States was also emphasized.

12. Against this background, the paper presented several preliminary alternatives that were neither conclusive nor limitative. The first of the proposed alternatives was to assume a presumption of continuity of statehood. That proposal was in line with the preliminary approach taken by the International Law Association and with the views expressed by some States that the Convention on the Rights and Duties of States applied only to the determination of the birth of a State rather than to its continued existence. At the same time, it was noted that continuity of statehood in the absence of a territory could entail certain practical problems, such as statelessness of its population or difficulties in exercising rights over maritime zones.

13. Another possible alternative that could be explored consisted in maintaining some form of international legal personality without a territory, like the examples of the Holy See and the Sovereign Order of Malta, in relation to which the paper outlined various modalities: (a) ceding or assignment of segments or portions of territory in other States, with or without transfer of sovereignty; (b) association with other State(s); (c) establishment of confederations or federations; (d) unification with another State, including the possibility of a merger; and (e) possible hybrid schemes combining elements of more than one modality, specific experiences of which may be illustrative or provide ideas for the formulation of alternatives or the design of such schemes.

14. Part Three of the paper addresses the subtopic of the protection of persons affected by sea-level rise. It begins with introductory considerations and continues with a mapping exercise of the existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise. A preliminary mapping exercise of State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise is then presented.

15. Therein, it was noted that the existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise were fragmented and general in nature, suggesting that they could be further developed to address specific needs of affected persons. In particular, the existing framework could be further complemented to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that the affected persons could remain *in situ*, be displaced within their own territory, or migrate to another State to cope with or avoid the effects of sea-level rise. In that connection, the Commission's prior work, namely the 2016 draft articles on the protection of persons in the event of disasters, was regarded as a basis for that exercise.

16. It was also noted that, while relevant State practice at the global level remained sparse, it was more developed among States already affected by sea-level rise. The Co-Chair observed that some of the practice identified was not specific to sea-level rise, but generally concerned the phenomena of disasters and climate change. Nonetheless, the practice revealed several principles that might prove useful for the Study Group's examination of the topic. It was also observed that international organizations and other entities with relevant mandates were taking

a more proactive approach to promote practical tools to enable States to be better prepared to address issues related to human rights and human mobility in the face of climate displacement.

17. Part Four presents preliminary observations, guiding questions for the Study Group and the future programme of work. The guiding questions were divided into three subsets, relating to: (a) the principles applicable to the protection of the human rights of the persons affected by sea-level rise; (b) the principles applicable to situations involving evacuation, relocation, displacement, or migration of persons, including vulnerable persons and groups, owing to the consequences of sea-level rise or as a measure of adaptation to sea-level rise; and (c) the applicability and scope of the principle of international cooperation to help States with regard to the protection of persons affected by sea-level rise. The guiding questions were proposed to structure the future work of the Study Group on the topic, and that proposals or contributions from its members on any of the issues raised therein, and on aspects of State practice and the practice of relevant international organizations and other relevant entities with regard to the issues raised therein, would be welcomed.

C. Consideration of the Topic at the Seventy-Third Session (2022)

18. The Study Group had before it the second issues paper on the topic, prepared by Ms. Galvão Teles and Mr. Ruda Santolaria and issued in April 2022, together with a selected bibliography[87], finalized in consultation with members of the Study Group and issued only in its original language in June 2022. The Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022. At the first meeting of the Study Group, held on 20 May 2022, the Co-Chair (Ms. Galvão Teles) indicated that the purpose of the six meetings scheduled in the first part of the session was to allow for an exchange of views on the second issues paper. The second issues paper was thereafter presented.

19. Commenting on the topic in general terms, it was also noted that while the needs of small island developing States as specially affected States should be carefully taken into account, consistent with the position of the Commission in its conclusions on identification of customary international law, the Commission ought not to overlook the comments and needs of other States, given that the legal consequences of sea-level rise would affect not only small island developing States and coastal States, but all States. It was also noted that a middle path had to be found between the human and legal dimensions of the topic to make sure that the former was wedded with the latter. It was furthermore underlined that some aspects of the topic addressed difficult and sensitive matters in the nature of policy questions, in relation to which the Commission ought to be cautious. As regards the content of the paper, it was also noted that the relevance of some developments in the paper – such as comments on the issues of nationality and diplomatic protection with regard to statehood – was not obvious.

20. As regards the scope of the work of the Study Group, differing views were expressed in relation to both the material scope and the temporal scope of the topic; while some members of the Study Group considered that they were too ambitious and ought to be narrowed, limitations placed upon the topic were viewed by others as preventing the Study Group from reaching conclusions on whether existing international law would be sufficient to address the challenges faced or whether new rules or principles were required to fill potential gaps. The need to focus on the legal dimension of the topic and avoid speculative scenarios, while

[87] A/CN.4/752/Add.1.

ascertaining the operational role of the Commission and distinguishing matters of policy from matters of international law, was also emphasized.

21. With regard to scientific findings, while it was suggested that the Commission might need to appraise the scientific findings upon which it relied so as to be in a position to provide a uniform assessment of the risks, members largely recalled that the work of the Study Group was based on the common ground that sea-level rise was a fact, already proved by science, which was significantly affecting several States and was a global phenomenon. On whether future meetings with scientists were needed, differing views were expressed. Members of the Study Group nonetheless welcomed the Co-Chairs' proposal to organize focused meetings to inform and educate them about the aspects most relevant to their study of the legal questions.

22. Members of the Study Group reiterated that State practice was essential to the work of the Study Group on the topic and that the limited State practice available restricted the mapping exercise with which it had been entrusted. It was also emphasized that, so far, no States were in the process of becoming completely submerged or otherwise uninhabitable. In terms of scale and representativity, while it was noted that regional practice from small island States – specifically in the Pacific – was steadily emerging, a paucity of comments from Latin America and the Caribbean, Asia and Africa was observed, in conjunction with the need for the Commission to pursue governmental outreach initiatives and for members of the Study Group to prepare contribution papers on regional practice.

23. Regarding the sources of law, it was reiterated that the Commission should take account of treaties, custom and general principles of law that could be applicable – including, for example, the principle of equity, the principle of good faith and the principle of international cooperation – as relevant to the topic. The central role of the United Nations Convention on the Law of the Sea and the need to preserve its integrity was also emphasized.

24. During the exchanges on statehood, it was noted that statehood was a complex issue deserving of caution, and emphasized, as outlined in the second issues paper, that there was neither a generally accepted definition of a State, nor clearly defined criteria for the extinction of a State. Diverse views were expressed regarding the relevance of the four criteria for the establishment of a State as set out in article 1 of the Convention on the Rights and Duties of States, namely that a State have a permanent population, a defined territory, a sovereign Government, and the capacity to enter into relations with other States and other subjects of international law. In that connection, it was noted that each of the criteria was multifaceted, with many exceptions, possibilities and changing definitions. While these criteria were deemed to be a useful anchoring or starting point for the discussion on statehood and sea-level rise, it was noted that they were the product of a different historical context, at a time when the disappearance of a territory due to environmental changes was conceivable as a matter of fiction only.

25. As regards the presumption of continuity of submerged or uninhabitable States and the maintenance of their international legal personality, as outlined in the second issues paper, various views were expressed by members of the Study Group. It was indicated that the presumption of continuity of statehood was a relevant solution to address the consequences of sea-level rise, expressing support for the customary presumption to be considered by the Study Group as a starting point, given that, in particular, there was no clear criterion in customary international law for the cessation of a State. According to another view that was presented, preliminary presumption of continuity of statehood was subject to further consideration by

States, some of which had previously supported that option, disfavouring the extinction of States affected by sea-level rise. It was also suggested that it was not an issue on which the Commission could draw a specific conclusion, given that its role should be limited to outlining the relevant legal problems arising from the situation of sea-level rise, rather than taking further steps to provide specific solutions.

26. During discussions on "the protection of persons affected by sea-level rise and related guiding questions" at the fourth and fifth meetings of the Study Group, it was noted that there was no legal framework that provided for a distinct legal status of persons affected by sea-level rise and that existing applicable frameworks were highly fragmented. Support was voiced for the proposal to identify and assess the effectiveness of the existing principles applicable to the protection of persons affected by sea-level rise. The need to consider different features of sea-level rise in the course of that exercise was emphasized. According to another view, it was questionable as to whether the fragmented nature of applicable rules caused any practical problems. It was therefore considered unnecessary to develop a highly specific legal framework for the protection of the narrow group of persons affected by sea-level rise.

27. While commenting on the question of the applicability of existing legal frameworks, some members noted that international refugee law, climate change law and international humanitarian law were not equipped to deal with the protection of persons affected by sea-level rise. In contrast, several relevant international legal instruments, such as the Kampala Convention, the New York Declaration for Refugees and Migrants and the Global Compact for Safe, Orderly and Regular Migration, were noted as examples of successful State cooperation. With respect to the question of available State practice, regret was expressed that only a few States had provided the Commission with relevant information on the topic. It was proposed that the request to States, international organizations and other relevant entities for information and practice be reiterated. Examples were provided of administrative policies adopted by States in response to cross-border displacement induced by sea-level rise. The practices of issuing humanitarian visas and of granting subsidiary protection to persons not qualifying as refugees were regarded as requiring further examination.

28. During the discussions on the applicability of human rights law to the issue, some members of the Study Group questioned whether the international human rights law framework could be fully relevant to the protection of persons affected by sea-level rise. It was observed that while States had human rights obligations towards individuals, the sea-level rise phenomenon was not directly attributable to any particular State. Accordingly, it was unclear how human rights rules would operate within that context and, specifically, how and against whom claims related to sea-level rise could be brought. Those questions were considered even more pertinent in the case of a State whose territory was completely submerged or rendered uninhabitable. In response, it was also argued that human rights law was an important lens through which to view the sea-level rise phenomenon and maintained that the human rights of individuals remained inalienable even if their State had ceased to exist owing to sea-level rise.

29. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group. At the same meeting, the Commission decided to request the Secretariat to prepare a memorandum identifying elements in the Commission's previous work that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons affected by sea-level rise, for its consideration at its seventy-fifth session.

D. Future Work of the Study Group

30. A concern was expressed that the scope of the subtopics was too broad, and it was suggested that the number of questions under examination be reduced. A proposal was also made to focus predominantly on areas with sufficiently developed practice. Relatedly, it was suggested that the Study Group should leave issues related to statehood aside and focus its future work on issues related to the law of the sea and to the protection of persons affected by sea-level rise.

31. Regarding the subtopic of statehood, it was noted that further study was required of the question of extinction of statehood, as it had not been sufficiently explored in the second issues paper. Likewise, it was noted that the Study Group should further examine cases of partial land inundation, cases in which the land territory became uninhabitable despite not being totally covered by the sea, and coastal defence measures and the construction of artificial islands. With respect to the subtopic of the protection of persons affected by sea-level rise, it was proposed that matters of protection of persons *in situ* and in displacement be considered separately. Moreover, three broad subjects for further study were put forward: (a) human rights obligations; (b) issues specific to the movement of persons, including displacement; and (c) the obligation to cooperate.

32. It was noted that the Study Group's work needed to be based on the previous work of the Commission, in particular on the draft articles on the protection of persons in the event of disasters. At the same time, the need to examine specific aspects of sea-level rise, namely its irreversibility and long-term nature, was emphasized. It was also proposed that the Study Group consider establishing a dialogue with human rights expert bodies within the United Nations system on the subtopic of the protection of persons affected by sea-level rise. On that subtopic, it was further suggested to operate on the basis of a combined rights-based and needs-based approach.

33. Regarding the outcome of the Study Group's work, various proposals were made, including that a framework convention be drafted on issues related to sea-level rise, which could be used as a basis for further negotiations within the United Nations system, following the example of the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. Another proposal was to focus the work of the Study Group on more concrete, limited outcomes, such as a draft treaty on a new form of subsidiary protection for persons affected by sea-level rise, or a detailed analysis, for illustrative proposes, of certain specific human rights to determine how exactly they were affected and should be protected when affected by sea-level rise. Support was voiced for the development of guidelines for bilateral agreements between States and for the preparation of a list of legal questions to be addressed at the political level within the United Nations. It was also noted that the short-term outcome of the Study Group's work would be its final report, on all subtopics, yet the Commission's work could be continued beyond that outcome in a different format. In that regard, a proposal was made to include, in the final report of the Study Group, a draft resolution addressing all outstanding political issues, for the consideration of the General Assembly.

E. Observations and Comments of the AALCO Secretariat

34. The second issues paper and the ensuing discussions at the Commission primarily focussed on statehood and protection of persons affected by the sea-level rise. The issue of

statehood assumes utmost importance as many small island States may risk complete submergence or becoming uninhabitable, possibly resulting in insufficient supply of drinking water for the population. There may be a displacement of persons to other States, raising several concerns relating to the rights and legal status of nationals of particularly affected States, including questions concerning the prevention of situations of *de facto* statelessness. Also, since all climate change-related issues including the risks posed by the sea-level rise inevitably affect all States regardless of geographical traits, it is important that all States contribute to the ongoing discussion at the Commission, and that the views and practices of all States are taken into consideration.

35. In this context, the Member States may consider deliberating on the following concerns.

- Could the international community consider a relaxed set of criteria to determine the existence and continuity of the statehood in exceptional circumstances involving complete submergence of the territory?
- What measures can be taken to legally protect the affected persons from *de facto* statelessness?
- what norms and principles are, or should be, applicable to the protection of the human rights of persons affected by sea-level rise?
- What is or should be the applicability and scope of the principle of international cooperation by other States, in the region and beyond, and by international organizations, to help States with regard to the protection of persons affected by sea-level rise?

36. Finally, the Co-Chairs of the Study Group have pointed out the lack of information as regards the practice of Asian and African States. They have also emphasized the need for collaboration with entities and institutions from different regions of the world to ensure diversity and representativeness, especially regarding the practice in regions for which less information was available, such as Latin America and the Caribbean, Asia and the Pacific and Africa. Particularly, the Study Group will focus on the subject of sea-level rise in relation to the law of the sea in its deliberations in the next session of the Commission.

37. In this connection, the Secretariat would like to draw the attention of AALCO Member States to the request of the Study Group to furnish information on (a) examples of practice relating to the updating, and frequency of updating, of national laws regarding baselines used for measuring the breadth of maritime zones; and of practice relating to the frequency of updating of national maritime zone notifications deposited with the Secretary-General of the United Nations; (b) examples of practice relating to the updating, and frequency of updating, of charts on which baselines and outer limits of the exclusive economic zone and of the continental shelf are drawn, as well as lists of geographical coordinates prepared in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the Secretary-General of the United Nations and given due publicity; and examples of practice relating to updating, and frequency of updating, of navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas; (c) any examples of reconsideration or modification of maritime boundary treaties due to sea-level rise; (d) information on the amount of actual and/or projected coastal regression due to sea-level rise, including possible impact on basepoints and baselines used to measure the territorial sea; (e) information on existing or projected activities related to coastal adaptation measures in relation to sea-level rise, including preservation of basepoints and baselines.