AALCO/61/BALI/2023/SD/S1

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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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

(24 April - 2 June and 3 July to 4 August 2023)

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

A. Background

1. In accordance with its Statute, AALCO is obligated to scrutinize subjects under deliberation by the International Law Commission (ILC or Commission) and offer recommendations based on the viewpoints of its Member States. Over the years, executing this mandate has enabled AALCO Member States to play a meaningful role in the codification and progressive advancement of international law, while simultaneously strengthening ties between the two organizations. Article 1(d) of AALCO's Statutes entrusts the Secretariat with the responsibility to address issues related to the ILC's endeavours during its annual sessions. Since its establishment in 1956, AALCO has consistently adhered to this directive. Customarily, ILC Members are invited to speak at AALCO's Annual Sessions, reporting on the Commission's ongoing work. In a reciprocal manner, the Secretary-General of AALCO represents the Organization at ILC sessions to convey the viewpoints of AALCO Member States. This ongoing exchange is highly valued by the ILC, as it enriches their work with insights from the vantage point of Asian-African States.

2. AALCO's Secretariat 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-eighth session of the Sixth Committee is scheduled to meet only from 2 October to 17 November 2023 *inter alia* to discuss the work of the ILC at its seventy-fourth session, this report covers items (i), (ii) and (iv) only.

3. The seventy-fourth Session (2023) of the Commission was held from 24 April to 2 June and from 3 July to 4 August 2023, and the advance version of the report[1] to the UN General Assembly was made available in August 2023 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 Sixty-First Annual Session (2023) of AALCO.

4. The present document (AALCO/61/BALI/2023/SD/S1) reports on the work of the Commission on the following substantive topics that were placed on the agenda for its Seventy-Fourth Session (2023): (1) Succession of States in respect of State responsibility; (2) General principles of law; (3) Sea-level rise in relation to international law; (4) Settlement of disputes to which international organizations are parties; (5) Prevention and repression of piracy and armed robbery at sea; and (6) Subsidiary means for the determination of rules of international law.

B. Deliberations at the Sixtieth Annual Session of AALCO held in New Delhi (Headquarters), in 2022

5. **Dr. Ali Garshasbi, Deputy Secretary-General of AALCO,** opened the session by expressing gratitude to all Member States for their continued engagement with AALCO and the International Law Commission (ILC). He underscored the importance of collaboration between the two organizations, emphasizing that it significantly contributes to the evolution and strengthening of international law. His statement encouraged the Member States to actively engage in discussions, as their insights are invaluable in shaping the future of international law.

6. **The delegate of Malaysia** lauded the work of the ILC in promoting the progressive development of international law. Expressing gratitude to the Special Rapporteur, Mr. Dire Tladi, the delegate touched upon the topic of "Peremptory norms of international law (*jus cogens*)." The delegate emphasized that while certain peremptory norms were clear, others

[1] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 106 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 8 September 2023.

remained controversial and suggested that the list of peremptory norms should be reviewed periodically to keep pace with international law's evolution. On the issue of "Immunity of State Officials from Foreign Criminal Jurisdiction", Malaysia urged caution, stating that the Commission's approach could be perceived as undermining state sovereignty. The delegate also welcomed further discussions on "General Principles of Law" highlighting its importance in international legal discourse.

7. **The delegate of Japan** noted that the ILC was unable to have an exchange of views with regional organizations during the past few years due to the COVID-19 pandemic. Japan further noted that, as the Commission plays a pivotal role in the process of codification and progressive development of international law, it is important that the ILC maintains a dialogue with regional organizations including AALCO in order for views from the international community, particularly voices from Asia and Africa to be properly reflected. Finally, Japan wished that a constructive interaction between these two important organs would be further strengthened.

8. **The delegate of the Islamic Republic of Iran** commended the ILC and its Special Rapporteurs for their work on key international law topics, including peremptory norms of international law (*jus cogens*), immunity of State officials from foreign criminal jurisdiction, and protection of the environment in armed conflicts. Iran expressed concern over the high volume of work in the ILC and advocated for a more cautious approach in topic selection to ensure in-depth consideration by States. On "General Principles of Law", Iran welcomed the ILC's revised language but questioned the inclusion of principles formed solely within international law. They argued that such principles usually emerge from the development of customary international law and are already covered by existing international declarations.

9. In discussing peremptory norms (*jus cogens*), Iran sought clarification on the status of the ILC's "draft conclusions" and "guidelines", questioning whether they were prescriptive or descriptive. Iran emphasized the non-derogability of *jus cogens* norms, even against resolutions from UN bodies like the Security Council. They argued that in cases of conflict between Charter obligations and *jus cogens* norms, the latter should prevail. Lastly, on environmental protection in armed conflicts, Iran noted the limitations of applying customary and treaty law to non-state

actors. While acknowledging the draft principles' applicability to both international and non-international armed conflicts, the Iranian delegation expressed scepticism about the practicality of this approach due to the differing obligations of states and non-state actors.

10. **The delegation of the United Republic of Tanzania** expressed strong support for the ILC and its role in codifying and developing international law. The United Republic of Tanzania highlighted its commitment to adhering to international law principles, both in terms of customary law and as outlined in the United Nations Charter. The delegation emphasized that they have integrated key international norms into their domestic policy and laws, including peremptory norms of customary international law, environmental protection during armed conflicts, and the immunity of State officials as per the Vienna Convention on Diplomatic Relations, 1961.

11. **The delegation of the Republic of Korea** expressed its appreciation for the ILC's recent efforts, focusing on four key topics. Firstly, they commended the ILC for the second reading of draft principles on the protection of the environment during armed conflicts, stating that they contribute to the progressive development of international law. Secondly, the delegation acknowledged the first reading of draft articles on immunity of State officials from foreign criminal jurisdiction, emphasizing the need for outcomes that address States' concerns and mediate divergent opinions. Thirdly, they highlighted the importance of bilateral agreements in the context of State succession and responsibility, noting scepticism about whether universal rules could be ascertained based on State practice. Lastly, they raised concerns about the clarity of general principles formed within the international legal system and called for further examination.

12. **The Delegate of the Republic of Indonesia** praised the ILC's work on various topics of international law. On matters relating to Draft Conclusion 4 regarding the identification of peremptory norms and Conclusion 6 on ‘acceptance and recognition,’ Indonesia stressed the importance of the need to clarify proper criteria relating to the identification of jus cogens. This topic has been the subject of deliberation within Indonesian courts and jurists for a long time. This was exemplified in one of their landmark decisions, where the Indonesian Supreme Court

appears to have applied the principles of international law by declaring that its judges may use rules of international law if they perceive them as part of *jus cogens*. Concerning environmental protection in armed conflict, Indonesia endorsed the draft principles grounded in the Geneva Convention and international humanitarian law, emphasizing the inseparability of humanity and the environment. They clarified their stance on the term "indigenous people" stating that Indonesia does not recognize such a concept but acknowledges "customary law communities" instead.

13. On the topic of immunity of State officials, Indonesia reiterated its opposition to impunity for grave international crimes but called for more study given the topic's complexity. Regarding sea-level rise, Indonesia emphasized the need for maintaining existing maritime boundaries for the sake of clarity and predictability. They also encouraged further international discussion to find the best solutions for challenges posed by sea-level rise, particularly affecting small island States.

14. **The delegate of the Republic of India** called for focused intersessional meetings to address ILC topics important to AALCO Member States. They noted the challenges posed by sea-level rise, particularly for Small Island Developing States (SIDS), and endorsed collective international responsibility for addressing these challenges while respecting UNCLOS.

15. On the topic of State responsibility for internationally wrongful acts, India supported the ILC's work and emphasized the need for attention to remedies in cases involving succession of states. They agreed with the form of draft guidelines over draft articles and highlighted complexities like the "clean slate rule" and "automatic succession". Regarding peremptory norms (*jus cogens*), India commended the ILC's balanced approach but called for further clarification on the identification and list of such norms, and agreed with the ILC's stance that "regional *jus cogens* does not exist".

16. On "General Principles of Law," India emphasized the need for work to be based on Article 38 of the ICJ Statute and State practice. They welcomed further discussions on the role of general principles in gap-filling and their relationship with other sources of international law.

Overall, India stressed the importance of nuanced understanding and further discussions on these critical international legal issues.

17. **The delegation of the People's Republic of China** commended the Commission's efforts in codifying international law, especially amid the challenges of the COVID-19 pandemic. On "Peremptory norms of international law," China thanked the Special Rapporteur and observed that although draft conclusions have been adopted, certain aspects remain controversial and could benefit from further refinement. With respect to the contentious issue of "Immunity of State Officials from Foreign Criminal Jurisdiction", China expressed concerns about the lack of consensus and potential for abuse, particularly targeting officials from developing countries. The delegation suggested that the draft article on this topic needs a serious review based on general state practice and *opinio juris*.

18. On the topic of "General Principles of Law," China agreed with the principle that a wide comparative analysis of national legal systems is required to determine common principles. However, they also argued that there is insufficient theory and practice to support the existence of general principles of law formed solely within the international legal system. China reiterated its commitment to actively support the ILC's work and looked forward to the contributions of new members from AALCO countries. The delegation emphasized that they will continue to support cooperation between AALCO and the ILC in promoting international law and order.

19. Finally, **the delegation of the Socialist Republic of Vietnam** expressed gratitude for the comprehensive report by the AALCO Secretariat and the work of the International Law Commission. They acknowledged the ILC's dedication to advancing international law and thanked AALCO for providing a forum to voice opinions directly to ILC members. On specific topics, the delegation congratulated those responsible for the drafts on "Peremptory norms of international law" and "Protection of environment in armed conflicts," looking forward to their examination in the General Assembly. Regarding the immunity of State officials from foreign jurisdiction, Vietnam stressed the importance of maintaining principles of sovereign equality and non-interference while combating impunity for international crimes.

20. Vietnam also appreciated the latest report on “General principles of law”, emphasizing that any domestic principle transitioned to international law must align with the UN Charter's principles. They suggested a methodical approach for the origin and creation of general principles, focusing on quality and application. On the topic of sea-level rise, Vietnam, being heavily affected, stressed the universal role of UNCLOS in marine issues and stated that maritime boundaries should remain unchanged due to sea-level rise. They encouraged international environmental law to be incorporated into the Study Group's report for long-term coping strategies.

C. AALCO Secretariat’s Suggestions on the Topics to be Deliberated at the Sixty-First Annual Session

21. The seventy-fourth session of the ILC considered the following topics:

(1) Succession of States in respect of State responsibility;
(2) General principles of law;
(3) Sea-level rise in relation to international law;
(4) Settlement of disputes to which international organizations are parties**;**
(5) Prevention and repression of piracy and armed robbery at sea; and
(6) Subsidiary means for the determination of rules of international law**.**

22. The Secretariat suggests that the Member States may deliver statements on the work of the Commission in the aforementioned topics in the Sixty-First Annual Session of AALCO for which reference could be made under each specific topic.

II. SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

A. Background

23. 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).[2] 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,[3] took note of the decision of the Commission to include the topic in its programme of work.

24. The first report of the Special Rapporteur[4] 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. Subsequently, at that session, the Drafting Committee provisionally adopted draft articles 1 and 2 and reported the same to the Commission for information purposes only.[5]

25. At the seventieth session (2018), the Commission considered the second report of the Special Rapporteur[6] 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.

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[2] 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.
[3] UNGA, 'Report of the International Law Commission on the work of its Sixty-Ninth Session' (7 December 2017) UN Doc. A/RES/72/116.
[4] 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.
[5] 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 8 September 2023.
[6] 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.

26. 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.[7] The Commission also decided to request the Secretariat to prepare a memorandum on the treaties registered under article 102 of the UN Charter which 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."

27. At the seventy-first session (2019), the Commission had before it the third report of the Special Rapporteur on the topic[8] 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.[9] At that session, the Commission provisionally adopted draft articles 1, 2, and 5 and the commentaries thereto.

28. 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.

29. Thereafter, at its Seventy-Second Session (2021), the Commission provisionally adopted draft articles 7, 8 and 9 as well as the commentaries thereto.[10] At the same session, the Commission also considered the fourth report of the Special Rapporteur[11] that dealt with the

[7] 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 8 September 2023.
[8] 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.
[9] 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.
[10] ILC, 'Provisional record of the 3560th meeting' UN Doc. A/CN.4/SR.3461 (4 August 2021); ILC. 'Provisional record of the 3562nd meeting' UN Doc. A/CN.4/SR/3462 (4 August 2021)
[11] 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

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.[12]

30. At the seventy-third session, the Commission had before it the fifth report of the Special Rapporteur[13] 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 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.

31. At its seventy-third session (2022), on 17 May 2022, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee (including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur's fifth report.

32. Also at its seventy-third session, the Commission provisionally adopted, with commentaries, draft guidelines 6, 10, 10 bis and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, as well as draft guidelines 7 bis, 12, 13, 13 bis, 14, 15 and 15 bis, which were provisionally adopted by the Drafting Committee in 2022.

33. At the same session, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee

[12] 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
[13] 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

(including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur's fifth report. As a result of the change of form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.

B. Consideration of the topic at the seventy-fourth session (2023)

34. At its seventy-fourth session (2023), the Commission had no report before it on the topic, as the Special Rapporteur was no longer with the Commission. At its 3621st meeting, on 10 May 2023, the Commission decided to establish a Working Group on the topic and appointed Mr. August Reinisch as Chair of the Working Group. Four meetings were held by the working group on 14, 18, 19 and 20 July 2023.[14]

35. The Working Group focused its discussion on considering the way forward for the topic. It considered whether the Commission should continue developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines, or whether it should pursue a different course, as suggested in the plenary in 2022, and convene a dedicated Working Group with a view to eventually producing a report on the topic to be adopted by the Commission.

36. In the course of a deliberation of the Working Group, two main trends emerged. According to one approach, it was preferable to proceed in an incremental manner to continue its deliberations on the way forward. The alternative approach was to take a decision, at the present session, to discontinue the present Special Rapporteur-led format of the work, and instead opt for a Working Group-driven process aimed at preparing a final report to be adopted by the Commission, for eventual submission to the General Assembly within a period of two years.[15]

[14] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 106 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 8 September 2023
[15] Ibid 107

37. A preference for the more incremental approach was expressed whereby a decision on such a way forward would be taken only at the seventy-fifth session, so as to allow more time for reflection.

C. Future work and way forward on the topic

38. At the seventy-fourth session in accordance with the views expressed in the Commission, it was decided that the Working Group be re-established at the seventy-fifth session of the Commission, with the present open-ended composition, with a view to undertaking further reflection on the way forward for the topic, taking into account the views expressed, and the options identified, in the Working Group at the seventy-fourth session (2023).

39. Following consultations within the Bureau and among members, the Commission decided, at its 3655th meeting, on 3 August 2023, to appoint Mr. August Reinisch as Chair of the Working Group to be re-established at the seventy-fifth session and to report to the Commission for further deliberation and decision.[16]

D. Observations and comments of the AALCO Secretariat

40. At the seventy-third session (2022) of the Commission it was decided that the final form of the work of the Commission would be draft guidelines, in light of the views expressed by States in the Sixth Committee of the UN General Assembly. It remains to be seen what future direction the work of the Commission takes in this regard, whether it would prefer to adopt guidelines or a report of the working group. In either case, the work of the Commission would serve as a guide to States and as the work of the Commission is mandated to comprise elements of codification and progressive development of international law. AALCO Member States are encouraged to express their view on the final form of the work of the Commission on this topic in light of the diverse and sparse State practice with a view to guiding the Working Group and the Commission at arriving at a decision at the next session of the Commission.

[16] ILC, 'Provisions summary record of the 3655th meeting of the International Law Commission' (3 August 2023) UN Doc. A/CN.4/SR.3655

III. GENERAL PRINCIPLES OF LAW

A. Background

41. The Commission, during its seventieth session in 2018, decided to include the topic "General principles of law" in its current programme of work. Mr. Marcelo Vázquez-Bermúdez was appointed as the Special Rapporteur for this topic. The UN General Assembly, in paragraph 7 of its resolution 73/265 dated 22 December 2018, acknowledged the Commission's decision to include this topic in its work programme.

42. At its seventy-first session in 2019, the Commission reviewed the Special Rapporteur's first report.[17] This report outlined the Special Rapporteur's approach to the scope and outcome of the topic, as well as the key issues to be addressed. Following a plenary debate, the Commission referred draft conclusions 1 to 3 to the Drafting Committee. An interim report from the Chair of the Drafting Committee, focusing on draft conclusion 1, was later presented to the Commission for its consideration. Also, during its seventy-first session, the Commission directed the Secretariat to prepare a memorandum. This memorandum was to survey the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties relevant to the Commission's future work on this topic.

43. In its seventy-second session in 2021, the Commission considered the Special Rapporteur's second report.[18] This report focused on identifying general principles of law as per Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Commission also reviewed the memorandum it had requested from the Secretariat at its seventy-first session.[19] Following the plenary debate, draft conclusions 4 to 9 were referred to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2, and 4, along with their commentaries.

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[17] ILC, 'First Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (5 April 2019) UN Doc. A/CN.4/732

[18] ILC, 'Second Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc. A/CN.4/741 and Corr.1

[19] ILC, 'General principles of law: memorandum by the Secretariat' (12 May 2020) UN Doc. A/CN.4/742

44. At its seventy-third session in 2022, the Commission reviewed the Special Rapporteur's third report.[20] This report discussed the issue of transposition, the formation of general principles of law within the international legal system, and their functions and relationship with other sources of international law. Following the debate in plenary, the Commission referred draft conclusions 10 to 14 to the Drafting Committee. The Commission provisionally adopted draft conclusions 3, 5, and 7, along with their commentaries, and took note of draft conclusions 6, 8, 9, 10, and 11.

B. Consideration of the topic at the seventy-fourth session (2023)

45. At the seventy-fourth session in 2023, the Commission did not have a new report from the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez. However, the Drafting Committee finalized its consideration of the draft conclusions that had been previously referred to it by the Commission and which had already been provisionally adopted.

46. During its 3628th meeting on 19 May 2023, the Commission received and considered the report of the Drafting Committee.[21] The Commission adopted the draft conclusions on general principles of law on first reading.

47. Between its 3643rd to 3646th meetings, from 24 to 26 July 2023, the Commission adopted the commentaries to the aforementioned draft conclusions. At its 3646th meeting on 26 July 2023, in accordance with articles 16 to 21 of its Statute, the Commission decided to transmit the draft conclusions to Governments for comments and observations. The Commission requested that such comments and observations be submitted to the Secretary-General by 1 December 2024.

48. The text of the draft conclusions adopted by the Commission on the first reading is reproduced below.

[20] ILC, 'Third Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (18 April 2022) UN Doc. A/CN.4/753

[21] ILC, ' General principles of law- Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading' (12 may 2023) UN Doc. A/CN.4/L.982

Conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

Conclusion 2

Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

Conclusion 3

Categories of general principles of law

General principles of law comprise those:

(a) that are derived from national legal systems;

(b) that may be formed within the international legal system.

Conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the various legal systems of the world; and

(b) its transposition to the international legal system.

Conclusion 5

Determination of the existence of a principle common to the various legal systems of the world

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

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Conclusion 6

Determination of transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it is compatible with that system.

Conclusion 7

Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

Conclusion 8

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Conclusion 9

Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

Conclusion 10

Functions of general principles of law

1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.
2. General principles of law contribute to the coherence of the international legal system. They may serve, *inter alia*:
(a) to interpret and complement other rules of international law;
(b) as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules.

Conclusion 11
Relationship between general principles of law and treaties and customary international law
1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.
2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.
3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

C. Observations and comments of the AALCO Secretariat

49. The AALCO Secretariat takes this opportunity to bring to the attention of its Member States the critical developments in the ILC's recent work on the general principles of law. The ILC has completed the first reading of the draft conclusions on this subject, signalling an important step in its ongoing attempts to bring clarity and coherence to this area of international law.

50. As discussed in the recent webinar held by the AALCO Secretariat on this topic, Draft Conclusions 3 and 7 have, in particular, drawn more attention as to those general principles of law formed within the international legal system. Conclusion 3 introduces these and Conclusion 7 defines a set of criteria to determine the existence and content of a general principle of law

formed within the international legal system; some scholars as well as Member States are skeptical about this second category of general principles of law as per Article 38 of the Statute of International Court of Justice. This has posed several interpretive questions regarding their relevance to the broader international legal framework, thus receiving diverse responses from AALCO Member States. Questions ranging from specific criteria for identifying principles that are considered "intrinsic" to the international legal system versus those formed within the international legal system through to their relevance to customary international law and treaty law. To some, it leaves considerable interpretive latitude for States dispute resolution bodies potentially leading to inconsistent applications and interpretations. While some have welcomed the categorization, others have described this as a jeopardy to the cohesive and systematic functioning of international law.

51. General principles of law span diverse fields of international law and form the very basis of international obligations and as such their interpretation and identification is of utmost importance for AALCO Member States. The AALCO Secretariat calls upon its Member States to carefully share their views and comments on the direction they expect the topic to take and to highlight its implications as to the questions previously raised at deliberations of the UNGA Sixth Committee and AALCO.

52. We encourage Member States to participate actively in the upcoming deliberations on this topic at the Sixty-First Annual Session of AALCO and submit their comments and observations to the ILC to further refine these critical aspects of international law.

IV. SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

A. Background

53. During its seventy-first session (2019), the International Law Commission (ILC) decided to include the topic "Sea-level rise in relation to international law" in its programme of work.[22] Additionally, the Commission established 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.[23] The Study Group held discussions regarding its composition, proposed schedule, work plan, and operational methods. During its 3480th meeting on July 15, 2019, the Commission acknowledged the joint oral report prepared by the Co-Chairs of the Study Group.[24]

54. Subsequently, in its seventy-second session in 2021, the Commission reconstituted the Study Group and engaged with the initial issues paper concerning the topic, particularly focusing on the law of the sea.[25] This issues paper was accompanied by a preliminary bibliography.[26] During the 3550th meeting on July 27, 2021, the Commission took note of the joint oral report from the Co-Chairs of the Study Group.[27]

55. Continuing its efforts, the Commission reconstituted the Study Group once again during its seventy-third session in 2022.[28] In this phase, the Study Group examined the second issues paper, this time addressing matters related to statehood and the safeguarding of individuals impacted by the effects of sea-level rise.[29] This issues paper was also presented alongside a

[22] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 88 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023
[23] Ibid 88
[24] Ibid 88
[25] Ibid 88
[26] Ibid 88
[27] Ibid 88
[28] Ibid 88
[29] Ibid 88

preliminary bibliography. During the 3612th meeting on August 5, 2022, the Commission reviewed and approved the report prepared by the Study Group.[30]

B. Introduction of the Additional Paper to the First Issues Paper by the Co-Chairs of the Study Group

56. The purpose of the additional paper to the first issues paper was to expand upon and supplement the content of the first issues paper (2020). This expansion was driven by suggestions put forth by members of the Study Group during discussions held in the seventy-second session (2021) of the Commission. These suggestions, encompassing a broad array of issues, were included in the Commission's 2021 annual report. Due to the inherent limitations of this paper's scope, the Co-Chairs chose to focus on the key aspects highlighted by Member States in their submissions to the Commission and statements presented in the Sixth Committee of the General Assembly subsequent to the issuance of the first issues paper and the corresponding debates in the Commission in 2021. The additional paper was formulated to facilitate deliberations within the Study Group with added contributory papers which may be submitted by members of the Study Group.

57. The additional paper covered the following areas: the concept of “legal stability” concerning the present topic, specifically in relation to the debate on ambulatory versus fixed baselines; the potential scenario where the effects of sea-level rise lead to the cessation of overlapping exclusive economic zones between opposing coastal States, previously delimited through bilateral agreements, the ramifications arising from situations in which a land boundary terminus agreed upon between States ends up situated at sea due to sea-level rise, the relevance of international treaties and legal instruments beyond the United Nations Convention on the Law of the Sea, various principles and their applicability to the topic, the issue of navigational charts in connection with sea-level rise, and the potential impact on third States' benefits in cases involving fixed baselines.

[30] Ibid 88

C. Consideration of the topic at the seventy-fourth session (2023)

58. At the seventy-fourth session, the ILC reconstituted the Study Group on sea-level rise in relation to international law. This Study Group was chaired by two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral.

59. In accordance with the agreed-upon work plan and operational methods, the Study Group had at its disposal an additional paper that supplemented the first issues paper on the subject. The additional paper was authored by Mr. Aurescu and Ms. Oral and was released on April 20, 2023. Furthermore, a selected bibliography, developed in consultation with Study Group members, was issued on 9 June 2023, as an addendum to the additional paper.

60. The Study Group, which convened for this session with 32 members in attendance, conducted a series of 12 meetings. These meetings took place from 26 April to 4 May, and then from 3 July to 5 July 2023. During its 3655th meeting on 3 August 2023, the Commission considered and adopted the report outlining the Study Group's activities during the current session.

D. General view of the members of the Study Group on the Additional Paper

61. Members of the Study Group underscored the importance of the topic for the international community highlighting the repercussions of sea-level rise across various regions, significantly impacting populations, and further emphasized its direct relevance to the realm of peace and security. In this context, they recollected that a meeting was convened by the Security Council on 14 February 2023, specifically addressing “Sea-level rise: implications for international peace and security”. This discussion was held under the agenda item “Threats to international peace and security”, where Mr. Aurescu, in his capacity as Co-Chair, provided a briefing on the progress achieved by the Commission.

62. Additionally, the Inter-American Juridical Committee recently designated Mr. Julio José Rojas Báez as a rapporteur for examining the legal implications of sea-level rise within the inter-

American regional context. Noteworthy initiatives included a dedicated session of the Committee on Juridical and Political Affairs of the Organization of American States, which transpired on 4 May 2023. This session focused on deliberating the outcomes of sea-level rise and the legal consequences associated with it. In light of these developments, the Study Group acknowledged the need for judiciousness when interpreting the silence exhibited by some impacted states. Such silence, it was noted, might not necessarily imply a stance on the interpretation of the United Nations Convention on the Law of the Sea.

63. It was noted that the phenomenon of sea-level rise has paved the way for novel concepts, including "climate displacement", "climate refugees" and "climate statelessness". These terms, as yet undefined in international law, have emerged as a result of this issue as per the Study Group. Furthermore, the term "specially affected State" was recommended to be employed cautiously, given its multifaceted implications. This is particularly relevant since the term does not effectively capture the reality that a substantial number of States, especially developing nations are grappling with the dangerous consequences of sea-level rise.

64. Members of the Study Group expressed their appreciation for the diligent efforts of the Co-Chairs and commended the meticulous, comprehensive and methodologically sound nature of the additional paper. The quality of the research was acknowledged, and the paper was recognized as providing a robust foundation for the Commission to effectively fulfil its mandate in a meaningful manner.

E. Specific aspects of the Additional Paper

65. The Additional Paper presents relevant observations on the topic some of which are discussed briefly in this section.

As highlighted earlier, the purpose of the additional paper to the first issues paper was to expand upon and supplement the content of the first issues paper (2020). In this context, 11 specific issues of high relevance to the topic "Sea-level rise in relation to international law" were subject to deliberation as follows:

a. Issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones

66. At its first and second meetings, held on 26 and 27 April 2023, the Study Group had an exchange on chapter II of the additional paper, on the issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones.[31] The Co-Chair highlighted that Member States had emphasized the necessity of interpreting the United Nations Convention on the Law of the Sea (UNCLOS) in a manner that effectively addresses the challenges posed by sea-level rise. This interpretation was intended to offer practical guidance to nations directly impacted by this phenomenon. Previously, the Convention was interpreted in a way that allowed the shifting of baselines and outer limits of maritime zones. However, an increasing number of Member States now hold the opposing viewpoint, contending that the Convention does not prohibit the establishment of fixed baselines. This perspective aims to ensure the preservation of maritime zones while acknowledging that the Convention does not explicitly forbid the fixation of baselines. Few Member States referred to customary international law, indicating a lack of clear consensus on the existence of a custom regarding fixed baselines.

67. On the concept of legal stability, members of the Study Group acknowledged the incorporation of the concept within the UNCLOS, recognizing its role in upholding international peace and security. While the importance of this legal principle was widely acknowledged, caution was advised in its application. It was highlighted that the concept could not be considered in isolation and was intricately intertwined with other principles, such as the immutability of boundaries. Additionally, the potential consequences of disregarding legal stability, including the loss of land territory, were underscored, particularly for the most vulnerable nations.

68. Furthermore, it was noted that legal stability extended beyond the question of safety of navigation alone. This concept, along with the respect for existing boundaries, emanated from customary international law and could be extended to maritime boundaries. Some expressed

[31] Ibid 90

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concerns that freezing baselines and omitting the obligation to report updated baselines could potentially jeopardize navigation safety and might conflict with instruments dedicated thereto.

69. Members of the Study Group widely supported the preliminary observations made by the Co-Chairs, favouring the establishment of fixed baselines. This support was rooted in the belief that the UNCLOS did not prohibit the adoption of fixed baselines and that ensuring that the final outcome of the Commission's work upheld the sovereign rights claimed by states over their maritime areas was of paramount importance. However, reservations and uncertainties regarding interpreting the Convention were expressed, particularly concerning how to achieve this objective. It was put forth that the Convention did not equate the declaration and publication of baselines with the acquisition of sovereignty or sovereign rights over the affected spaces. Such an interpretation would imply that States could unilaterally decide on their maritime zones.

70. Diverse opinions emerged regarding the applicability of the legal stability concept, as outlined in article 7, paragraph 2, of the Convention, and the outer limits of the continental shelf, as described in article 76, to sea-level rise. Some suggested the option of amending the Convention for ensuring legal stability, although this was deemed challenging. Alternatively, convening a meeting of State parties to interpret the instrument was proposed. This meeting could delve into the relevant provisions' textual context, as well as their objective and purpose.

71. Some Study Group members proposed another avenue to ensure legal stability, suggesting the potential emergence of a customary international law rule. This suggestion was based on preliminary indications pointing towards the formation of such a rule pertaining to fixed baselines. However, it was highlighted that conclusions regarding widespread practice and *opinio juris* favouring fixed baselines and the safeguarding of maritime zones, whether regionally or globally, should not be hastily drawn. Notwithstanding, attention was directed toward the growing trend of practices and viewpoints among states, grounded in a sincere interpretation of the UNCLOS.

72. It was further stressed that the Commission should explicitly clarify that the presence of state practice could validate not only a customary international law rule but also a specific

interpretation of the Convention. Nonetheless, it was mentioned that determining the existence of a customary international law rule lay outside the Commission's mandate.

73. Turning to the issue of fixed baselines, and echoing the 2021 declarations from the Pacific Islands Forum and the Alliance of Small Island States, participants emphasized that the UNCLOS lacked a specific provision compelling State Parties to revise their baselines and maritime zone outer limits in response to coastline changes arising from sea-level rise. It was noted that a distinction existed between legally freezing territorial sea baselines and refraining from updating published baselines; the former could potentially establish a new legal principle and should be approached with caution. Nevertheless, it was acknowledged that if an obligation to update baselines existed, it should have been explicitly mentioned in the Convention. Concurrently, participants emphasized the importance of a balanced stance, considering both permanent and ambulatory approaches as legal and feasible, while favouring practical solutions.

74. A proposal was made to consider the potential value of using subsequent agreements, in line with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), as a valid approach for interpreting the UNCLOS. This suggestion was aimed at leveraging subsequent agreements as a credible method to shed light on the interpretation of the Convention concerning maritime matters.

75. Regarding the matter of *sui generis* regimes, concerns were raised about how the global community could effectively tackle the challenges faced by nations dealing with the loss of land due to rising sea levels. One proposal was for the Study Group to explore the possibility of considering *sui generis regime* status for territories that become submerged due to human-induced sea-level rise. This suggestion stemmed from the notion that sea-level rise is not solely a natural event but is also influenced by human activities. While there was general agreement to consider adaptable approaches to determining territorial boundaries – encompassing both flexible moving boundaries for specific scenarios and stable fixed boundaries for others – there was also a call for thorough contemplation and discussion regarding the potential benefits of creating unique legal frameworks for such situations.

b. Immutability and intangibility of boundaries

76. At the third meeting of the Study Group, held on 1 May 2023, the Co-Chair (Ms. Oral) recalled that chapter III of the additional paper related to the existing definitions and functions of boundaries including the principle of *uti possidetis juris* and its applicability to existing maritime boundaries.[32] Different views were expressed by members on the applicability or otherwise of the principle of *uti possidetis juris* and in this context it was observed by the Co-Chair that the intention was not to conclude that *uti possidetis juris* should apply to maritime delimitations within the context of sea-level rise, but rather to emphasize the importance accorded to ensuring the continuity of pre-existing boundaries in the interests of legal stability and the prevention of conflict. On the issue of self-determination, it was observed by the Co-Chair that the principle was relevant to all three subtopics under consideration and that it would be addressed by the Study Group during the next session of the Commission, to be held in 2024.

c. Fundamental change of circumstances (*rebus sic stantibus*)

77. At the third meeting of the Study Group, held on 1 May 2023, the Co-Chair (Ms. Oral) introduced chapter IV of the additional paper, on fundamental change of circumstances (*rebus sic stantibus*).[33] On the question of fundamental change of circumstances (*rebus sic stantibus*), there was general support for the view of the Co-Chair that the principle was not applicable to maritime boundaries because the latter involved the same element of legal stability and permanence as land boundaries and were thus subject to the exclusion foreseen in article 62, paragraph 2 (a), of the VCLT.

d. Effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap, and the issue of objective regimes; effects of the situation whereby an agreed land boundary terminus ends up being located out at sea; judgment of the International Court

[32] Ibid 93
[33] Ibid 95

of Justice in the Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (*Costa Rica v. Nicaragua*) case

78. During the Study Group's fourth meeting on 2 May 2023, Mr. Aurescu, the Co-Chair, introduced chapter V of the additional paper.[34] It covered initial remarks regarding potential scenarios: when overlapping exclusive economic zones of opposite coastal states, delimited through bilateral pacts, cease to overlap; the outcome of agreed land boundaries extending to the sea; and the impact of the International Court of Justice's ruling in the *Costa Rica v. Nicaragua* case.[35]

79. Some members were of the view that maritime delimitation treaties had diverse strategies for addressing changes in basepoints and baselines. While certain treaties had mechanisms for boundary readjustments, many lacked such provisions and overlooked the broader topic of legal stability. It was also noted that baseline revisions also occurred without corresponding boundary adjustments.

80. Consistent with the findings of the additional paper, some members expressed doubts on the applicability of the Article 61 of the VCLT on supervening impossibility to sea-level rise. The paper and discussions highlighted that Article 61 was not automatically relevant and that sea-level rise would not affect maritime delimitation treaties. Abstractly examining this rule was considered unproductive for the Study Group. It was also observed that impossibility of performance might only arise if a treaty established legal regimes alongside delimitation, where Article 62 would be more fitting. The question arose whether legal regimes could be deemed “indispensable for treaty execution” under Article 61 of the VCLT. Opinions varied among members, while the International Court of Justice had not definitively addressed it in the *Gabčíkovo-Nagymaros* case. Article 61's application to treaties between States and international organizations or between international organizations was noted. Due to international law's

[34] Ibid 96
[35] Ibid 96

ambiguity, it was suggested that the Study Group should not prioritize exploring the relevance of Article 61.

81. As regards cases in which an agreed land boundary terminus ended up being located out at sea, it was observed that two legal options arise: maintaining the boundary as a legal fiction or considering it a maritime boundary. Article 15 of The UNCLOS mandates median line delimitation for opposite or adjacent coasts, but adaptations may be needed for submerged boundaries that do not align with this. Using fixed sea points as an option for adjacent coast states was also observed.

82. Regarding objective regimes, it was observed that maritime delimitation pacts should not bind third nations. A perspective involving legal consequences of acquiescence was suggested in the context of objective regimes. Inapplicability of articles 11 and 12 the Vienna Convention on Succession of States in respect of Treaties Vienna, 1978 was highlighted concerning the sea-level rise context.

83. Members acknowledged the relevance of the *Costa Rica v. Nicaragua* case by the International Court of Justice concerning sea-level rise. However, it was stressed that its findings could not universally apply. It was highlighted that the Court never mandated fixed baselines.

e. Principle that "the land dominates the sea"

84. At the fourth meeting of the Study Group, held on 2 May 2023, the Co-Chair (Ms. Oral) introduced chapter VI of the additional paper, including preliminary observations in paragraph 155, on the principle that "the land dominates the sea".[36] Members of the Study Group had differing opinions regarding the significance of the concept "the land dominates the sea" in international law. Some argued that it was not a principle or a rule of customary law, while others saw it as a legal maxim from case law. Some believed that all maritime rights stemmed from coastal sovereignty, without a broader principle, focusing instead on the baseline rule for

[36] Ibid 98

determining maritime entitlements. The immovable outer limits of the continental shelf despite baseline changes were cited to challenge the universality of "land dominates sea".

85. Another view noted that the principle was longstanding, originating from the cannon-shot rule, and applicable in maritime delimitation. This view claimed it was a customary law reflected in international instruments, including the UNCLOS, while highlighting the need for consistent treatment of changing coastlines and maritime features.

86. The connection between maritime spaces and land was emphasized, suggesting a re-evaluation in the context of statehood. Additionally, the suggestion arose to delve into basepoints for maritime delimitation and consider their fixation similar to baselines. This prompted a call for states facing rising sea levels to disclose their basepoints. In essence, the discourse revolved around whether the principle held legal weight, its relationship with maritime entitlements, and how it should be applied practically, with varying opinions on its status and relevance in international law.

f. Historic waters, title and rights

87. During the fifth meeting of the Study Group on 3 May 2023, the Co-Chair (Ms. Oral) introduced chapter VII of the additional paper, which focused on historic waters, title, and rights.[37] The chapter explored the historical development and application of this principle by States and international courts. It also considered its potential relevance in the context of sea-level rise for maintaining existing rights in maritime areas. Some members recognized the exceptional nature of the historic waters, title, and rights principle, urging caution when assessing its applicability to sea-level rise.

88. Concerns were raised about the ambiguity of the principle's content and its lack of a universal regime, as different cases called for distinct approaches. The International Court of Justice's 2012 ruling in the *Nicaragua v. Colombia* case, which stated that historic considerations

[37] Ibid 98

did not inherently create legal rights but held evidentiary value, was noted. Establishing a historic regime required fulfilling various criteria, including demonstrating effective authority over a region, which could pose challenges for smaller island and archipelagic nations due to resource constraints. Discussion turned to the principle's relevance if an ambulatory baseline approach was adopted. Some members doubted its applicability amidst sea-level rise, fearing that the universal nature of such an event might render all maritime titles historic. However, it was noted that the principle could prove useful in submerged land boundary situations.

89. The Co-Chair (Ms. Oral), emphasized that the principle of historic waters, title, and rights created an exceptional regime with limited application. This regime would be considered on a case-by-case basis, not as a general rule for sea-level rise, only relevant if ambulatory baselines were accepted. She stressed that the principle illustrated the preservation of existing maritime rights that might not align with international law. Overall, the meeting delved into the nuanced nature of historic waters, title, and rights, its potential application amidst sea-level rise, and its specific relevance in the study's context.

g. Equity

90. During the fifth meeting of the Study Group on 3 May 2023, the Co-Chair (Ms. Oral) introduced chapter VIII of the additional paper which focused on the concept of equity in relation to sea-level rise.[38] She highlighted the request from multiple states, particularly Small Island Developing States (SIDS), to examine equity. The chapter discussed general application of equity in international law and its relevance within the law of the sea and in the context of sea-level rise, citing examples of case law and state practice.

91. The importance of equity was acknowledged as it is enshrined in international conventions like the UNCLOS. It was noted that those most vulnerable to human-induced sea-level rise had contributed the least to the issue. Preserving baselines and maritime entitlements not only upheld foundational principles of equity and legal stability but also aligned with notions

[38] Ibid 99

of climate justice rooted in human rights and international law principles. The link between equity and the principle of common but differentiated responsibilities was highlighted.

92. The debate revolved around the legal character of equity. Some questioned whether it could be considered a customary rule or a general principle of law, given its exclusion from the Statutes of the Permanent Court of International Justice and the International Court of Justice. However, others argued it could be a general principle of law, as it had been referenced in the Commission's previous work and international instruments.

93. The complexity of applying equity to sea-level rise was recognized. The interpretation of equity in maritime delimitation cases by the International Court of Justice differed from the broader concept being discussed. Some proposed defining equity for the study's purpose, while others disagreed, cautioning against deviation from positive law. The potential of equity to support the preservation of maritime entitlements, especially through the fixed baselines approach, was noted. However, concerns were raised about equating any loss of maritime entitlement with inherent inequity, particularly regarding the landward shift of exclusive economic zones.

94. The Co-Chairs highlighted the intention to explore applicability of equity to sea-level rise and emphasized the need to find a conclusion that illustrates how equity could be beneficial in this context.

h. Permanent Sovereignty over Natural Resources

95. During the sixth meeting of the Study Group on 4 May 2023, the Co-Chair (Ms. Oral) introduced chapter IX of the additional paper, addressing the principle of permanent sovereignty over natural resources.[39] The chapter delved into the development and application of this principle, particularly its relevance to marine resources and its recognition as customary international law.

[39]Ibid 101

96. Members agreed on its relevance and customary law status, with some hesitations. They discussed distinctions between seabed and water column resources and noted its historical and potential self-determination link. The principle's connection with statehood and the protection of those affected by sea-level rise was emphasized. There was a mixed view on whether the principle supported the loss of marine resources due to changing coastlines. Some thought it might not be sufficient to override changes to maritime entitlements, while others believed it concerned how rights were exercised rather than their existence or scope.

97. The Co-Chair (Ms. Oral) concluded the discussion, highlighting the principle's significance in economic development for developing states and its relevance to preserving maritime entitlements amid sea-level rise.

i. Possible loss or gain by third States

98. During the sixth meeting of the Study Group on 4 May 2023, the Co-Chair (Ms. Oral) introduced chapter X of the additional paper, which explored the potential loss or gain by third States due to sea-level rise effects on maritime entitlements.[40] The chapter addressed different scenarios arising from shifting baselines and their impact on third States, ultimately concluding that preserving existing baselines and boundaries would not lead to losses for any party.

99. Participants praised the Co-Chairs for the clear analysis of possible outcomes. A discussion emerged about the practical relevance of the legal issues, especially considering the limited scenarios where they might apply, particularly when prior maritime delimitation agreements existed. Some members argued that sea-level rise within ambulatory baselines would not disrupt the balance set by the UNCLOS, while adopting a fixed baselines approach could significantly impact third States' rights and change maritime rules. Concerns were raised about how expanding waters under coastal states' sovereignty could affect innocent passage rights of third States. However, others stressed that fixed baselines were essential to maintaining

[40] Ibid 102

predictability and balancing rights. Divergent views were noted about whether the right of innocent passage applied to both merchant and military vessels.

100. The Co-Chair (Ms. Oral) underlined the connection between this topic and the principle of equity discussed in chapter VIII of the additional paper.

j. Nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation

101. During the sixth meeting of the Study Group on 4 May 4 2023, the Co-Chair (Ms. Oral) discussed chapter XI of the additional paper, which focused on navigational charts and their functions under international law.[41] The chapter aimed to explore whether States were obligated to periodically update navigational charts based on provisions in the UNCLOS. The Co-Chairs had gathered information from States, the International Hydrographic Organization, the International Maritime Organization, and the United Nations Office of Legal Affairs.

102. The Co-Chair (Ms. Oral) highlighted the key point that navigational charts primarily served the safety of navigation, with the depiction of baselines or maritime zones being a supplementary aspect. She noted that there was no practical evidence or legal basis for obligating States to frequently update their charts, especially given the limited capacity of many States to conduct hydrographic surveys regularly.

103. Discussions ensued about the primary purpose of navigational charts, with most members agreeing that safety of navigation took precedence over delineating maritime boundaries. Agreement was reached that UNCLOS did not impose an obligation on States to update charts, once deposited with the Secretary-General, to depict basepoints, baselines, or maritime boundaries. Lack of sufficient State practice to support such an obligation was noted, and challenges faced by some States in creating charts due to the absence of dedicated hydrographic agencies were emphasized.

[41] Ibid 102-103

104. The potential clash between fixed baselines and the lack of updating obligation was also raised, as outdated charts could pose safety risks. The Co-Chair (Ms. Oral) clarified that the chapter's intent was to examine navigational chart roles and the updating obligation, which tied into the fixed vs. ambulatory baselines debate. She indicated that the preliminary observations did not contradict the fixed baseline approach.

k. Other sources of law

105. During the seventh meeting on 4 May 2023, the Co-Chair (Mr. Aurescu) introduced chapter XII of the additional paper, which focused on the relevance of other sources of law beyond the UNCLOS and the 1958 Geneva Conventions.[42] The chapter listed potentially relevant international instruments, but the preliminary observations, found in paragraph 280, highlighted their limited relevance to the topic. Some members agreed with this assessment, recognizing the impracticality of exhaustively exploring numerous international instruments. The UNCLOS was emphasized as having a central role.

F. Present status of the topic and future work

106. During discussions on the Study Group's working methods and future plans on the topic of the impact of sea-level rise on maritime entitlements, several suggestions were put forth:

107. Members emphasized the need for a clearer roadmap for the Study Group's work to meet State expectations.[43] Prioritizing issues that the Commission can effectively address was recommended. Some members proposed transitioning to an operative phase where the Study Group would propose concrete solutions to practical challenges stemming from sea-level rise.[44] Providing practical guidance, potentially through a set of conclusions, was suggested.

[42] Ibid 103-104
[43] Ibid 104
[44] Ibid 104

108. Suggestions were made to draft an interpretative declaration on the UNCLOS.[45] This could serve as a basis for future negotiations among States parties, akin to precedent in other treaties. However, the necessity and efficacy of such an interpretative declaration were debated.

109. The Co-Chairs emphasized the importance of exploring the issue of submerged territories, relating to both law of the sea and statehood.[46] They proposed addressing this in future papers (2024 and 2025).

110. Proposals included drafting a framework convention on sea-level rise issues on the lines of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa as a basis for UN negotiations and ensuring any outcome respects sovereign rights over maritime spaces while being rooted in existing international rules.[47] Due to the recent request for advisory opinions to international courts on similar issues, caution was advised in overlapping concerns addressed by different bodies.

111. Looking ahead, the Study Group will focus on statehood and protection of persons affected by sea-level rise in 2024.[48] In 2025, they plan to finalize a comprehensive report consolidating their work on the entire topic.[49]

G. Observations and comments of the AALCO Secretariat

112. The AALCO Secretariat encourages Member States to deeply engage with the ILC on the topic "Sea level rise in relation to international law" holding the topic of high significance to the Afro-Asian region. In this context, the Secretariat would like to recall that the first webinar of AALCO was held on the topic "Rising Sea Levels and AALCO Member States: Perils and Protection under International Law" on 7 June 2022 to bolster Afro-Asian engagement on the

[45] Ibid 104
[46] Ibid 104
[47] Ibid 104
[48] Ibid 105
[49] Ibid 105

topic. In this context, the Secretariat welcomes the Additional Paper to the First Issues Paper prepared by the Co-Chairs that was the subject of deliberations at the recently concluded Seventy-Fourth Session of the ILC.

113. On the issue of fixing of baselines, the AALCO Secretariat is of the view that the Commission should keep the interest of the Small Island Developing States (SIDS) from the Afro-Asian region while approaching the matter. The Secretariat is appreciative of the efforts of the Co-Chairs to approach the issue in a comprehensive manner and believes that equity and fairness should be the primary considerations that guide deliberations on this front while adhering to principles of international law.

114. The AALCO Secretariat is of the view that the legal regime governing the high seas and the legal regime governing climate change should be harmonized to the best extent possible. The issue of sea level rise and its implications for international law cannot be properly analysed without an integrated approach that blends the legal and scientific aspects of both these realms. It is acknowledged that at present much work is happening on this front but a lot is still work in progress.

115. The AALCO Secretariat looks forward to the Commission's engagement on statehood and protection of persons in the context of sea-level rise and hopes that the efforts of the Co-Chair will correctly reflect the international legal position on these aspects while according high priority to considerations of human rights of affected persons. It should be kept in mind that States bear the primary responsibility under international law to protect persons under their jurisdictions and the same logic applies when assessing the legal consequences of sea-level rise as well. The AALCO Secretariat further encourages the Member States to express their observations and share the viewpoints regarding the ILC's work on the topic since all Member State are affected by the phenomenon and the legal consequences thereof whether directly or indirectly.

V. SETTLEMENT OF INTERNATIONAL DISPUTES TO WHICH INTERNATIONAL ORGANIZATIONS ARE PARTIES

A. Background

116. At its 3582nd meeting, during its sixty-eighth session (2016) on 17 May 2022 the topic "settlement of international disputes to which international organizations parties" was included in the long-term programme of work of the Commission.[50] The topic was proposed by Sir Michael Wood who prepared the syllabus for the topic contained in the annex to the report of the Commission on the work of its sixty-eight session (2016).[51]

117. At its seventy-third session (2022), the Commission decided to include the topic "Settlement of international disputes to which international organizations are parties" in its programme of work and appointed Mr. August Reinisch as Special Rapporteur for the topic.[52] It also requested the Secretariat to prepare a memorandum providing information on the practice of States and international organizations regarding their international disputes and disputes of a private character, which may be of relevance to its future work on the topic.[53]

118. At its seventy-third session (2022) the Commission also requested States and relevant international organizations to submit information that may be relevant for the topic.[54] Accordingly, the Secretariat communicated a questionnaire prepared by the Special Rapporteur to the States and concerned international organizations.[55]

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[50] ILC, 'Report of the International Law Commission on the work of its sixty-eighth session' 377 (2 May-10 June and 4 July-12 August 2016) UN Doc. A/71/10
[51] Ibid 387
[52] ILC, 'Report of the International Law Commission on the work of its seventy-third session' 342 (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10
[53] ILC, 'Provisions summary record of the 3582nd meeting of the International Law Commission' (16 July 2022) UN Doc. A/CN.4/SR.3582
[54] Ibid
[55] August Reinisch, 'Questionnaire and background to the topic "Settlement of international disputes to which international organizations are parties" <https://legal.un.org/ilc/sessions/74/pdfs/english/io_questionnaire.pdf> accessed 8 September 2023

119. In its resolution 77/103 of 7 December 2022, the General Assembly noted the Commission's decision to include the topic in its programme of work, and drew the attention of Governments to the importance for the Commission of having their views on the specific issues identified in chapter III of the report of the Commission on the work of its seventy- third session.[56]

120. At its seventy-fourth session (2023) the topic was placed on the agenda of the session and the Commission had before the first report of the Special Rapporteur on the topic.[57]

B. First report of the Special Rapporteur on the topic

121. As stated by the Special Rapporteur, the first report which is exploratory in nature sets outs his preliminary thoughts on the matter and provides a basis for the future work and discussion on the topic.[58] While providing a doctrinal exposition to the work of other codification bodies such as the International Law Association (hereinafter ILA) and the *Institut de Droit International* (hereinafter IDI) as well as the previous work of the Commission on related topics, the Special Rapporteur lays down the scope of the topic and suggests certain use of terms or definitions. The report also proposes two draft guidelines that deal with the scope of the topic in the first one and define the terms "international organizations", "disputes" and "dispute settlement" in the second one. The report also lays down the basis for the draft guidelines with reference to the previous work of the Commission as well as practice and other available sources.

122. Chapter I of the report details the previous relevant work of the Commission and several other bodies dealing with the codification and progressive development of international law. Chapter II of the report discusses the scope of the topic and possible outcomes of the Commission's work on this topic. It addresses the question whether disputes of private law

[56] UNGA, 'Report of the International Law Commission on the work of its seventy-third session' UNGA Res 77/103 (7 December 2022) UN Doc. A/RES/77/103

[57] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 36 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 8 September 2023

[58] ILC, 'First report on the settlement of international disputes to which international organizations are parties by August Reinisch, Special Rapporteur' (3 February 2023) UN Doc. A/CN.4/756

character should be within the scope of the topic and requests the Commission to take decision on the matter. Chapter III thereafter addresses a number of core issues concerning definitions related to the topic. Chapter IV comprises the text of the suggested guidelines and Chapter V outlines the future work plan on the topic.[59]

123. In relation to the previous work of the other bodies dealing with codification and progressive development of international law, the report takes note of the resolutions of the IDI, *inter alia,* 1957 resolution on "Judicial Redress Against the Decisions of International Organs", and the 1971 resolution on "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged".[60]

124. In a similar vein, the report also takes note of the recommendation of the Committee of the Legal Advisors on Public International Law (CAHDI) "to the international organisations to which the member States of the Council of Europe belong" to look at whether "reasonable alternative means of legal protection are available in the event of disputes between international organisations and members of their staff". Further the report appraised the work of the International Law Association on the accountability of international organizations and its review of the use of administrative tribunals, role of domestic courts and arbitration as remedies against international organizations. The report also noted the practice of the Inter-American Juridical Committee that emphasized the need for providing for dispute settlement in disputes between international organizations and private individuals, balancing respect for the right to access of justice for individuals and the immunity of international organizations.[61]

125. While noting that the Commission had not previously worked directly on the topic, there was previous work of the Commission related to the dispute settlement and international organizations. The topics considered previously by the Commission which were identified as relevant for the present topic were arbitration, the law of treaties, status, privileges and

[59] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 36 <https://legal.un.org/ilc/reports/2023/engli sh/a_78_10_advance.pdf> accessed 8 September 2023
[60] ILC, 'First report on the settlement of international disputes to which international organizations are parties by August Reinisch, Special Rapporteur' 4 (3 February 2023) UN Doc. A/CN.4/756
[61] Ibid 6-7

immunities of international organizations (discontinued in 1992) under the topic relations between States and international organizations.[62]

126. Among other observations, the report most importantly identifies the definitions of the term "international organizations" in the previous work of the Commission. It noted that in its work concerning treaty law which has resulted in the creation of a number of conventions, the working definition of "international organizations" and "intergovernmental organizations" was agreed to. Further with the completion of the work of the Commission on the responsibility of international organizations, a definition of the term "international organization" was adopted, which was given in-depth consideration in the report.[63] In this respect, the Special Rapporteur notes that the topic with its focus on dispute settlement complements and continues the previous work of the commission on legal issues involving international organizations.[64]

127. As regards the scope of the topic, the Special Rapporteur adopts a flexible language to ensure that any dispute to which international organizations are parties to could be addressed. The most important aspect that emerges from the report regarding the scope of the topic was the question whether disputes of a private law character could be covered.[65] In light of the deliberations in the Sixth Committee of the UN General Assembly, and in light of the original formulation of the topic in the syllabus, the report states that the most pressing question is related to the settlement of disputes of a private nature.[66] Therefore, the Special Rapporteur expresses agreement with the suggestion of the Commission that disputes of a private nature should be considered, but also expressed his belief that the same should be discussed and decided by the Commission. Further as regards the outcome of the topic, the Special Rapporteur expressed his preference for guidelines, among other reasons due to the diversity of legal relationships of international organizations.[67]

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[62] Ibid 8-11, 32-35
[63] ILC, 'Articles on the Responsibility of International Organizations for Internationally Wrong Acts' taken note of in UNGA Resolution, 'Report on the work of the International Law Commission of sixty-sixth session' UNGA Res. 66/100 (9 December 2022) UN Doc. A/RES/66/100
[64] ILC, 'First report on the settlement of international disputes to which international organizations are parties by August Reinisch, Special Rapporteur' 11 (3 February 2023) UN Doc. A/CN.4/756
[65] Ibid 6
[66] Ibid 12
[67] Ibid 13

128. From his analysis of the fairly vast amount of doctrine, treaty law and practice available, the Special Rapporteur identifies the following elements of the definition of international organizations: (1) established by States and other entities; (2) establishment by international agreements or instruments; (3) establishment of organs capable of expressing the organization's will; (4) the role of international personality. Further with respect to the definition of the term "disputes", the Special Rapporteur places reliance on Article 38 of the Statute of the International Court of Justice and its exposition in case-law of the Court. For the definition of "dispute settlement", the Special Rapporteur draws from Article 33 of the UN Charter that lays down the well-recognized means for dispute settlement. [68]

129. On the basis of the reasons provided in the report and materials referred to and consideration of other codification bodies as well as previous work of the Commission itself, the Special Rapporteur proposed the following draft guidelines.

1. Scope of the draft guidelines.

The present draft guidelines apply to the settlement of disputes to which international organizations are parties.

2. Use of terms.

For the purposes of the draft guidelines:

(a) 'International organization' refers to an entity established by States and/or other entities on the basis of a treaty or other instrument governed by international law and possessing at least one organ capable of expressing a will distinct from that of its members.

(b) 'Dispute' refers to a disagreement concerning a point of law, fact or policy in which a claim or assertion of one party is met with refusal or denial by another.

(c) 'Dispute settlement' refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of solving disputes.

[68] Ibid 17-31

C. Consideration of the topic at the seventy-fourth session (2023)

130. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur on the topic. In his introductory statement on the first report, the Special Rapporteur addressed the scope of the topic and provided an analysis of the subject matter of the topic in light of the previous work of the Commission relevant to it and of other international bodies. His statement introducing the report also addressed the definitional issues.[69] The Special Rapporteur proposed two draft guidelines: one regarding the scope of the draft guidelines, and the other concerning the definitional issues. He also discussed the question of the outcome of the work of the Commission on the topic and made suggestions for the future programme of work.[70]

131. The Commission considered the first report of the Special Rapporteur from its 3613th to 3618th meetings, from 25 April to 3 May 2023.[71] While members of the Commission welcomed the well researched report of the Special Rapporteur and generally agreed with the positions taken, some concerns were raised broadly relating to the inclusion within the scope, purely private law disputes to which international organizations were party to as well as departing from the previous practice of the Commission with respect to the definition of international organization. After much deliberation at its 3618th meeting, on 3 May 2023, the Commission decided to refer draft guidelines 1 and 2, as contained in the first report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[72]

132. At its 3631st meeting, on 25 May 2023, the Commission considered the report of the Drafting Committee on the topic and provisionally adopted draft guidelines 1 and 2. At the same meeting, the Commission reached the decision to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties" with a view to better reflect the scope

[69] ILC, 'Provisions summary record of the 3618th meeting of the International Law Commission' (25 April 2023) 4 UN Doc. A/CN.4/SR.3613
[70] Ibid 7
[71] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 36 <https://legal.un.org/ilc/reports/2023/engli sh/a_78_10_advance.pdf> accessed 8 September 2023
[72] ILC, 'Provisions summary record of the 3618th meeting of the International Law Commission' (3 May 2023) UN Doc. A/CN.4/SR.3618

of the topic that included disputes of private law character to which international organization were parties.[73] Further from its 3647th to 3649th meetings, on 26 and 27 July 2023, the Commission adopted the commentaries to the draft guidelines provisionally adopted.

133. The draft guidelines proposed by the Drafting Committee and provisionally adopted by the Commission were as follows:[74]

Draft guideline 1:

Scope

The present draft guidelines concern the settlement of disputes to which international organizations are parties.

Draft guideline 2:

Use of terms

For the purposes of the present guidelines

(a) "international organization" means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.

(b) "dispute" means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial.

(c) "means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes.

[73] ILC, 'Provisions summary record of the 3631st meeting of the International Law Commission' (25 May 2023) UN Doc. A/CN.4/SR.3631

[74] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 36 <https://legal.un.org/ilc/reports/2023/engli sh/ a_78_10_advance.pdf> accessed 8 September 2023

D. Future work and way forward

134. As regards the future work on the topic, the Special Rapporteur expressed his intention to proceed with the topic by analyzing in his second report in detail the practice of the settlement of "international" disputes to which international organizations are parties, i.e. mostly disputes arising between international organizations and States.

135. Based on this inquiry, it is stated that he would attempt to suggest recommended practices, most likely in the form of further guidelines. Further as regards the third report, in 2025, the report stated that he would continue this discussion in the light of progress with the topic, as well as address in more detail certain issues. As the Commission has already decided to include disputes of a private law character the same would be expected to be covered in the third report. In developing the work programme on this topic, the Special Rapporteur stated that would continue to be guided by the information provided by States and international organizations in response to the questionnaire sent by the Secretariat.[75]

E. Observations and comments of the AALCO Secretariat

136. The law relating to the settlement of disputes to which international organization are parties, as has rightly been identified by the Special Rapporteur, is contained in a myriad of sources not amenable to a single uniform approach. The diversity in practice is witnessed by a number of decisions from national and international courts concerning different approaches to disputes with international organizations either involving States or private individuals. However, invariable questions relating to the immunity of international organizations has been addressed in these decisions, and specific value of judicial decisions would seem to be of particular relevance to State practice in this regard. Further, the work of other bodies involved in the codification and progressive development of international law also favours an approach where dispute settlement procedures are provided for.

[75] ILC, 'First report on the settlement of international disputes to which international organizations are parties by August Reinisch, Special Rapporteur' (3 February 2023) 43 UN Doc. A/CN.4/756

137. While the topic is still in its early phase in the work of the Commission, the guidelines that have been provisionally adopted provide a wide scope to the topic. Within the scope, disputes of private law character have set high expectations for the reports to follow, which are expected to clarify much of the doubt regarding key issues involving immunity of international organizations and the right to access to justice of individuals. With a view to reaching an understanding of the topic cognizant of the diversity of practice in this topic, AALCO Member States are encouraged to share examples of State practice in the form of judicial decisions and other State acts that shed light on disputes of a private law character involving international organizations.

V. PREVENTION AND REPRESSION OF PIRACY AND ARMED ROBBERY AT SEA

A. Background

138. At its seventy-first session (2019), the International Law Commission included the topic "Prevention and repression of piracy and armed robbery at sea" in its long-term programme of work.[76] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission. [77] The topic "Prevention and repression of piracy and armed robbery at sea" was added to the programme of the Commission at its Seventy-third session (2022).[78] Mr. Yacouba Cissé was appointed as the Special Rapporteur for the topic. At this session, the commission requested the Secretariat to prepare a memorandum concerning the topic, addressing, in particular, elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States, writings relevant to the definitions of piracy and of armed robbery at sea, and resolutions adopted by the Security Council and by the General Assembly relevant to the topic.[79]

139. In their syllabus, the Special Rapporteur outlined the scope of the topic, noting that it would include the definition of piracy in the context of provisions of the United Nations Convention on the Law of the Sea (UNCLOS)[80] and taking into account the current and evolving aspects of piracy, and the definition provided by relevant international organizations, such as the

[76] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 51 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023.
[77] Ibid, annex C.
[78]At its 3582nd meeting, on 17 May 2022 (Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10), para. 239). The topic had been included in the long-term programme of work of the Commission during its seventy-first session (2019), on the basis of the proposal contained in annex C to the report of the Commission (Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)
[79] ILC, Report of the International Law Commission, Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10).
[80] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, Treaty Series, vol. 1833, No. 31363, p. 3, Arts. 100–107.

International Maritime Organization (IMO).[81] Subsequently, the Commission also approved the Special Rapporteur's recommendation for the ILC Secretariat to contact States and relevant international organizations in order to obtain information and views concerning the topic in its 3612th Meeting.[82]

140. At its 3618th, 3620th, 3625th, and 3633rd meetings, on 3, 9, 16 and 26 May 2023, the Commission established a Drafting Committee on "Prevention and repression of piracy and armed robbery at sea" with Mr. Mārtiņš Paparinskis as Chair. The Drafting Committee has held a total of 28 meetings on the topic so far.

B. First report of the Special Rapporteur on the topic

141. At its 74th session, the Commission had the first report of the Special Rapporteur[83] and the memorandum prepared by the Secretariat concerning the topic before it.[84] In their first report, the Special Rapporteur addressed the historical, socio-economic and legal aspects of the topic, including an analysis of the international law applicable to piracy and armed robbery at sea, and the shortcomings thereof.

142. The Special Rapporteur has reviewed national legislations and judicial practice of States concerning the definition of piracy and the implementation of conventional and customary international law. They have proposed three draft articles:

a. on the scope of the draft articles;
b. on the definition of "piracy"; and
c. on the definition of "armed robbery at sea".

[81] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 51 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023
[82] ILC, 'Report of the International Law Commission on the work of its seventy-third session' (Advance version of 12 August 2022) (18 April–3 June and 4 July–5 August 2022) 9 <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf> accessed 18 September 2023.
[83] ILC, 'First Report on Prevention and repression of piracy and armed robbery at sea', (22 March 2023) UN Doc A/CN.4/758.
[84] ILC, 'Prevention and repression of piracy and armed robbery at sea Memorandum by the Secretariat', (7 February 2023) UN Doc A/CN.4/757.

143. The report contained comprehensive legislative and judicial practices of five regions affected to varying degrees by the scourge of the crimes of piracy and armed robbery at sea, namely Africa, Asia, the Americas and the Caribbean, Europe and Oceania. The Special Rapporteur also discussed the future programme of work on the topic.

144. The Special Rapporteur's research has shown that there is indeed abundant State practice, with more than one hundred national statutes adopted by States on the criminalization and repression of these two forms of maritime crime.

145. Conclusions made by the Special Rapporteur in his First Report are as follows[85]:

a. The practice found in national legislations and judicial decisions is not uniform or consistent even though the States concerned are parties to the UNCLOS because of increase in piracy occurring in coastal areas or internal waters;

b. Security Council resolutions on the regulation of piracy in Somalia appear to be one-time solutions that are not intended to resolve the crimes of maritime piracy and armed robbery at sea over the long haul;

c. The three draft articles proposed in the present report deal with the scope of the topic, the definition of piracy, and the definition of armed robbery at sea.

C. Consideration of the topic at the seventy-fourth session (2023)

146. At its seventy-fourth session (2023), the Commission had before it the first report of the Special Rapporteur[86], which discussed the historical, socio-economical and legal aspects of the topic and reviewed the national legislation and judicial practice of States concerning the definition of piracy and the implementation of conventional and customary international law.

147. The Special Rapporteur proposed three draft articles: on the scope of the draft articles; on the definition of piracy; and on the definition of armed robbery at sea. He also discussed the future programme of work on the topic.

[85] ILC, 'First Report on Prevention and repression of piracy and armed robbery at sea', (22 March 2023) UN Doc A/CN.4/758.
[86] Ibid.

148. The Commission considered the first report and the memorandum at its 3619th to 3621st and 3623rd to 3625th meetings, from 5 to 16 May 2023. At its 3625th meeting, on 16 May 2023, the Commission decided to refer draft articles 1, 2 and 3, as contained in the first report, to the Drafting Committee, considering the views expressed in the plenary debate.

149. At its 3634th meeting, on 2 June 2023, the Commission considered the report of the Drafting Committee on the topic[87] and provisionally adopted draft articles 1, 2 and 3. At its 3649th and 3651st meetings, on 27 and 31 July 2023, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session.

Text of the draft articles and commentaries provisionally adopted by the Commission at its seventy-fourth Session (2023)[88]

150. The text of the draft articles thereto provisionally adopted by the Commission at its seventy-fourth session is reproduced below.

Article 1

Scope

The present draft articles apply to the prevention and repression of piracy and armed robbery at sea.

Article 2

Definition of piracy

1. Piracy consists of any of the following acts:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

[87] ILC, Statement of the Chair of the Drafting Committee by Mr. Mārtinš Paparinskis (2 June 2023), Document No. A/CN.4/L.984.

[88] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 52 <https://legal.un.org/ilc/reports/2023/engli sh/ a_78_10_advance.pdf> accessed 1 September 2023.

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(*b*) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(*c*) any act of inciting or of intentionally facilitating an act described in subparagraph (*a*) or (*b*).

2. Paragraph 1 shall be read in conjunction with the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

Article 3

Definition of armed robbery at sea

Armed robbery at sea consists of any of the following acts:

(a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;

(b) any act of inciting or of intentionally facilitating an act described in subparagraph (*a*)

D. Summary of commentaries adopted by the Commission at its seventy-fourth session (2023)[89]

151. **Summary of Draft Article 1 Commentary:**

At the onset, it has been made clear that for the purposes of the draft articles and commentary, any reference to piracy means maritime piracy. Draft Article 1 defines the scope of the present draft articles, indicating that they apply to piracy and armed robbery at sea. The provision should be read together with draft articles 2 and 3, which define these two crimes and serve to delimit the

[89] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 51 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023.

scope of the topic. In terms of scope, the present draft articles are broader in scope than the UNCLOS. While the Convention only refers specifically to piracy, the present draft articles also include "armed robbery at sea", a crime that is not as such referred to in the Convention. For the purposes of the draft articles and commentary, reference to piracy means maritime piracy. The draft article takes into account existing applicable international law, regional approaches, extensive State practice, and legislative and judicial practice under national legal systems, especially for armed robbery at sea, which is not addressed under the Convention. Thus, the work on the present topic is not intended to duplicate existing frameworks and academic studies, but instead aims to clarify and build upon them, as well as to identify new issues of common concern.

152. **Summary of Draft Article 2 Commentary**

The Commission has preserved the integrity of the definition of piracy contained in Article 101 of the UNCLOS and thus, the draft Article 2 is in line with the objective of the topic, which is not to seek to alter any of the rules set forth in existing treaties, including the Convention. Instead, it has simply sought to explain the commentaries in Article 101 relating to certain terms which have posed questions of interpretation and application, especially in view of the evolving nature of modern piracy.

153. The commentary of draft Article 2 also makes it clear that Article 101 of the Convention and related provisions thereof regarding piracy apply to the exclusive economic zone as confirmed by the arbitral tribunal in The "*Enrica Lexie*" Incident, which observed that Article 58, paragraph 2, of the UNCLOS "extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone".[90] Explicit mention of the exclusive economic zone was not made and instead the Article was drafted in a neutral manner so as not to prejudice the position of non-parties to the Convention.

154. The Commission recognized that the current definition of piracy may not encapsulate technological developments in maritime security, which may lead to subsequent efforts by the

[90] Permanent Court of Arbitration, *The "Enrica Lexie" Incident (Italy v India)*, Case 2015-28, Award, 21 May 2020, para. 979.

international community to update it. It nonetheless considered it unnecessary to introduce a "without prejudice" clause to accommodate possible further developments.

155. **Summary of Draft Article 3 Commentary**

Draft Article 3 concerns the definition of "armed robbery at sea". The definition is drawn from the one adopted by the Assembly of the IMO in its Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.[91] The commentary explains that the main difference between piracy and armed robbery at sea is the location of the act: the high seas and exclusive economic zone on the one hand, and waters subject to the jurisdiction of the coastal State on the other. This has consequences for the applicable jurisdiction in respect of the two crimes.

156. In the case of piracy, it is acknowledged that universal jurisdiction applies such that any State has the right to prosecute the crime of piracy committed on the high seas. With respect to armed robbery at sea, the coastal State has the exclusive competence to exercise prescriptive and enforcement jurisdiction over such acts. The Commission has adopted the term "armed robbery at sea" and not "armed robbery against ships" (as adopted by IMO Assembly) in view of practice of the Security Council[92] and to avoid unduly restricting the definition. Unlike piracy, to which universal jurisdiction applies, IMO Resolution A.1025(26) states that armed robbery is punishable under coastal State's jurisdiction, as examined in some national legislation and regional conventions as described above. In addition, it has to be noted that armed robbery at sea does not necessarily involve two ships.

157. The definition of armed robbery at sea encompasses acts within a state's internal waters, archipelagic waters, and territorial sea, and it does not necessarily involve two ships. Specific reference to international navigation straits is omitted, as these areas may encompass both coastal state maritime zones and the high seas as in the case of Strait of Korea/Tshushima.[93]

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[91] ILC, First Report on prevention and repression of piracy and armed robbery at sea, by Yacouba Cissé, Special Rapporteur (22 March 2023), 13 <https://documents-ddsny.un.org/doc/UNDOC/GEN/N23/043/88/PDF/N2304388.pdf?OpenElement > accessed 1 September.

[92] Security Council Resolution 2634 (2022). See also, Statement by the President of the Security Council S/PRST/2021/15 of 9 August 2021.

[93] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April–2 June and 3 July–4 August 2023) (advanced version of 14 August 2023) 59 <https://legal.un.org/ilc/reports/2023/english/a_78_10_advance.pdf> accessed 1 September 2023.

E. Present status and future work on the topic

158. The Commission recognized that the current definition of "piracy" may not encapsulate technological developments in maritime security, which may lead to subsequent efforts by the international community to update it. It nonetheless considered it unnecessary to introduce a "without prejudice" clause to accommodate possible further developments.

159. The Commission is still considering requests for information on the topic "Prevention and repression of piracy and armed robbery at sea" contained in the report of its seventy-third session (2022)[94] and would welcome any additional information, by 1 December 2023,[95] concerning:

(a) the legislation, case law and practice of States relevant to the topic, including in relation to Articles 100 to 107 of the UNCLOS;

(b) the agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution; and

(c) the role of international, regional and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea.

160. Writings relevant to the definitions of piracy and of armed robbery at sea will be covered in a subsequent memorandum to be prepared ahead of the seventy-fifth session of the Commission, in view of the required work and with the agreement of the Special Rapporteur.[96]

F. Observations and comments of the AALCO Secretariat

161. Member States of AALCO have largely welcomed the inclusion of the topic in the long-term programme of work of the International Law Commission. Despite certain reservations concerning the current load of the Commission's work and the appropriateness of the Commission's inclusion of this topic in its long-term programme of work because "many other

[94] Ibid.
[95] Ibid.
[96] ILC, 'Prevention and repression of piracy and armed robbery at sea Memorandum by the Secretariat', (7 February 2023) UN Doc A/CN.4/757.

topics had already been or were being considered by the Commission"[97], as this is only the first report of the Special Rapporteur, we can understand that much deliberation is still necessary.

162. In the light of the above, it is the recommendation of the AALCO Secretariat that the AALCO Member States shed some light on relevant State practice, whether their own or even general practice of the Afro-Asian region, which may lead to further consideration in the future work on this topic. Moreover, it is requested that AALCO Member States deliberate upon legislative means that can actively curb maritime piracy and armed robbery at high seas which is an issue that many States in the region face.

163. Furthermore, it is recommended by the AALCO Secretariat to respond to the call for information regarding the topic by the Special Rapporteur with a view to cohesively understanding the topic from the national and regional perspective and that adequate representation is made from the region.

[97] See Japan's statement in United Nations 6th Committee, Summary record of the 26th meeting, 31 October 2019, General Assembly, 74th session, A/C.6/74/SR.26.

VI. SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF INTERNATIONAL LAW

A. Background

164. At its seventy-second session, in 2021, the Commission included the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.[98] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission. [99] The General Assembly, in resolution 76/111 of 9 December 2021, took note of the inclusion of the topic in the long-term programme of work of the Commission.

165. At its seventy-third session, in 2022, the Commission decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and appointed Charles Chernor Jalloh as Special Rapporteur for the topic.[100]

166. The Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant for its future work on the topic, to be submitted for the seventy-fourth session (2023); and a memorandum surveying the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic, to be submitted for the seventy-fifth session (2024).

167. The General Assembly, in paragraph 26 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

[98] ILC, 'Report of the International Law Commission on the work of its seventy-second session' 302 (26 April–4 June and 5 July–6 August 2021) UN Doc. A/76/10.
[99] Ibid.
[100]ILC, 'Report of the International Law Commission on the work of its seventy-third session' 240 (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10.

168. The work of the Commission on the topic as described above has been proceeding in accordance with the resolutions adopted by the General Assembly under the item relating to the report of the International Law Commission.[101]

B. Consideration of the topic at the seventy- fourth session (2023)

169. At its seventy-fourth session (2023), the Commission had before it the first report of the Special Rapporteur, as well as the memorandum prepared by the Secretariat, identifying elements in the previous work of the Commission that could be particularly relevant to the topic, which were considered at its 3625th to 3632nd meetings, from 16 to 25 May 2023.

170. In his first report[102], the Special Rapporteur addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also considered the views of States on the topic, questions of methodology, which is to be grounded in State and international tribunal practice, the previous work of the Commission on the topic, the nature and function of sources of international law and their relationship to the subsidiary means, and the drafting history of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice and its status under customary international law. It also provided an initial assessment of certain aspects of the topic, including judicial decisions, teachings of the most highly qualified publicists of the various nations and possible additional subsidiary means used in the practice of States and international tribunals to determine rules of international law, such as unilateral acts, resolutions and decisions of international organizations and the works of expert bodies. The Special Rapporteur addressed the outcome of the work and, consistent with the related prior work of the Commission, proposed draft conclusions as the final form of output, with the main object of clarifying the law based on current practice. He proposed five draft conclusions and also made suggestions for the future programme of work on the topic.

[101] UNGA, 'Report of the International Law Commission on the work of its seventy-third session' UNGA Res 77/103 (7 December 2022) UN Doc. A/RES/77/103.
[102] ILC, 'First report on subsidiary means for the determination of rules of international law Charles Chernor Jalloh, Special Rapporteur' (13 February 2023) UN Doc. A/CN.4/770.

171. At its 3633rd meeting, on 26 May 2023, the Commission decided to refer draft conclusions 1 to 5, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary debate.

172. At its 3635th meeting, on 3 July 2023, the Commission considered the report of the Drafting Committee on the topic and provisionally adopted draft conclusions 1 to 3. At its 3651st to 3657th meetings, from 31 July to 4 August 2023, the Commission adopted the commentaries to draft conclusions 1 to 3, as provisionally adopted at the current session.

173. At its 3642nd meeting, on 21 July 2023, the Commission considered an additional report of the Drafting Committee containing draft conclusions 4 and 5 provisionally adopted by the Drafting Committee, as orally revised, and took note of the report.[103] The commentaries to these two draft conclusions are expected to be adopted during the next session.

Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission at its seventy-fourth session.

Conclusion 1

Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Conclusion 2

Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(a) decisions of courts and tribunals;

(b) teachings;

(c) any other means generally used to assist in determining rules of international law.

[103] The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission <https://legal.un.org/ilc/guide/1_16.shtml> accessed 8 September 2023.

Conclusion 3

General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, inter alia:

(a) their degree of representativeness;

(b) the quality of the reasoning;

(c) the expertise of those involved;

(d) the level of agreement among those involved;

(e) the reception by States and other entities;

(f) where applicable, the mandate conferred on the body

Draft conclusion 4

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Draft conclusion 5

Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should be had to, inter alia, gender and linguistic diversity.

C. Summary of commentaries adopted by the Commission at the seventy-fourth session (2023)

General commentary

174. The draft articles adopted by the Commission are to be read together with the commentaries. The present draft conclusions seek to contribute greater clarity on the use of subsidiary means and their relationship with the sources of international law in two principal ways. First, they aim to identify and elucidate the roles of subsidiary means for the determination of rules of international law, consistent with the letter and spirit of Article 38, paragraph 1, of the Statute of the International Court of Justice.[104]

175. Second, the present draft conclusions offer a consistent methodological approach when using subsidiary means for determining the existence and content of rules of international law.

176. Regarding the normative value of "draft conclusions", the Commission has, to date, not adopted a one-size fits all definition of draft conclusions, since it must examine the specific needs of each topic on its own terms. However, since States and other users of the Commission's work may be more familiar with "draft articles" as a final form of output, draft conclusions as used here should be understood as the outcome of a process of reasoned deliberation and, more specifically, a statement of the rules derived from the practice found on subsidiary means in the determination of rules of international law.

Conclusion 1

1. Draft conclusion 1 is introductory in nature. It provides, in a general way, that the present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

[104] Statute of the International Court of Justice (adopted 26 June 1945) art 38 <http://www.icj-cij.org/en/statute> accessed 8 September 2023.

Conclusion 2

2. Draft conclusion 2 sets out three main categories of subsidiary means for the determination of rules of international law. These are: the decisions of courts and tribunals; the teachings, in the sense of by those of scholars from the various nations, regions and legal systems of the world; and any other means generally used to assist in determining rules of international law. The first two categories are rooted in and largely track the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. The third category addresses the fact that there are other means used generally in practice to assist in the determination of the rules of international law.

Conclusion 3

3. Draft conclusion 3, which concerns the general criteria for assessing subsidiary means for the determination of rules of international law, seeks to provide guidance to assess the weight to be given to those means.

4. Different subsidiary means will have varying levels of "weight". These may also vary between fields of international law, in the sense that one subsidiary means may have different weight in different contexts. Six criteria are to be used as general factors for determining the relative weight to be given to materials that are already considered subsidiary means.

5. Subparagraph (a) refers to the degree of representativeness of the materials being used as subsidiary means. Subparagraph (b) refers to the quality of the reasoning. Subparagraph (c) refers to the level of expertise of those involved. Subparagraph (d) lists the level of agreement of those involved. An external component is addressed in subparagraph (e): the reception by States and other entities. Finally, subparagraph (f) refers to the significance of the mandate conferred on the body that took the decision being assessed.

Introduction by the Special Rapporteur of the first report

177. The Special Rapporteur introduced his report[105] by making some general observations and discussing the structure and organization of the 10 chapters contained in the report. He

[105] ILC, 'First report on subsidiary means for the determination of rules of international law Charles Chernor Jalloh, Special Rapporteur' (13 February 2023) UN Doc. A/CN.4/770.

explained that, as indicated in chapter I of the report, the main purpose thereof was to provide a solid foundation for the Commission's work on the topic and to obtain the views of members of the Commission and States.

178. In relation to chapter II, the Special Rapporteur noted that the reactions by Member States in the Sixth Committee to the inclusion of the topic in the programme of work of the Commission had been generally positive. He pointed out the views of 24 delegations in the Sixth Committee that had supported the consideration of the topic to complement and complete the prior work of the Commission on the sources of international law and that had suggested that its consideration could help to avoid certain negative consequences of the fragmentation of international law.

179. The Special Rapporteur then referred to chapter III, which proposed three topics for the consideration of the Commission. First, the origins, nature and scope of subsidiary means. The second component of the topic concerned the function and relationship between subsidiary means and the sources of international law, namely, treaties, customary international law and general principles of law. The third component of the topic concerned the opportunity to clarify additional subsidiary means.

180. In chapter IV of the report, the Special Rapporteur considered the question of methodology, and observed that the study of the topic would require a comprehensive examination of a wide variety of primary and secondary materials and legal scholarship on the subject.

181. In chapter IV of the report, the Special Rapporteur considered the question of methodology, and observed that the study of the topic would require a comprehensive examination of a wide variety of primary and secondary materials and legal scholarship on the subject.

182. Chapter VI of the report addressed the nature and function of sources in the international legal system.

183. Chapter VII focused on the drafting history of Article 38 of the Statute of the International Court of Justice, in particular the debate and common ground among the drafters of the provision concerning the appropriate role of subsidiary means in the determination of rules of international law.

184. Chapter VIII of the report analysed the elements of Article 38, considering its ordinary meaning and then its elements.

185. In chapter IX, the Special Rapporteur had analysed other materials that could be considered as subsidiary means for the determination of rules of international law. The Special Rapporteur observed that unilateral acts could be considered as being binding or non-binding depending on the context, and that resolutions of international organizations or intergovernmental conferences could also be binding or non-binding.

186. Finally, in chapter X, the Special Rapporteur had presented five draft conclusions and a tentative programme of work. The Special Rapporteur had further proposed that the second report would address the function of subsidiary means and study judicial decisions, while the third report would be dedicated to teachings and, as appropriate, other subsidiary means, including the study of the role of individuals and private expert bodies, as well as those established by States. He had suggested that, if the proposed timetable was maintained, the Commission could adopt on first reading the entire set of draft conclusions in 2025.

Summary of the plenary debate

General comments

187. Members welcomed the first report of the Special Rapporteur. They agreed with the Special Rapporteur that subsidiary means were not sources of international law, as opposed to those mentioned in Article 38, paragraph 1 (a) to (c), of the Statute of the International Court of Justice.

188. Members also emphasized that the function of subsidiary means was to assist in the determination of rules of international law. As such, it was important for the Commission to elaborate the functions of subsidiary means and to define what "determination" of rules meant.

189. There was consensus among the members on the need, where possible, for consistency with the prior work of the Commission on other topics relating to the sources of international law.

190. Members generally agreed that the category of subsidiary means for the determination of rules of international law was not necessarily exhaustive. Several proposals were made for additional means that could be examined in the present topic. In that connection, some members favoured further analysis of the work of expert bodies and resolutions of international organizations. Members generally expressed support for the study of the weight to be given to subsidiary means.

191. As to the outcome of the topic, members generally agreed that there on draft conclusions as an appropriate form of output for the topic, since that was consistent with the approach in prior related topics.

192. Members generally agreed with the methodology proposed by the Special Rapporteur, which included a careful examination of practice and literature. Some indicated that, while the practice of States and the jurisprudence of international courts and tribunals were a good starting point, the jurisprudence of national courts, the output of international organizations and academic literature would also be relevant.

Draft conclusions 1 to 3

Draft conclusions 1 to 3 were provisionally adopted by the Commission with commentaries at the present session.

Draft conclusion 4

With respect to draft conclusion 4 (decisions of courts and tribunals),[106] several members noted that the draft conclusion overlapped with and further developed draft conclusion 2 on the decisions of courts and tribunals.

193. While it was agreed that, in general, no system of judicial precedent existed in international law, there was nonetheless value in consistency and predictability.

194. Some members were of the view that the authority of the decisions of the International Court of Justice should be taken in context and that, in certain cases, the decisions of other international courts and tribunals could be more relevant due to their expertise in a particular subject. Members generally stressed the need for additional criteria specifically applicable to the decisions of national courts.

Draft conclusion 5

195. With respect to draft conclusion 5 (teachings), members supported the reference to highly qualified publicists of the various nations and underlined that writings should be representative of the principal legal systems and regions of the world. Members were also of the view that the cogency and quality of the reasoning should be a more important criterion than the eminence of the writer.

196. It was noted that the lack of diversity in teachings used should be addressed. It was further suggested that the criterion of representativeness, including considerations of regional distribution, legal traditions, gender and racial diversity, should be included in draft conclusion 5 or in a separate draft conclusion.

[106] The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission <https://legal.un.org/ilc/guide/1_16.shtml> accessed 8 September 2023.

197. It was also suggested that the Commission could elaborate in the commentary on the status of the work of certain bodies, such as the International Committee of the Red Cross, or the possible value of other materials that would not fall within the category of teachings, such as individual and joint separate opinions of judges.

D. Present status and future work on the topic

198. The Commission considered as still relevant the request for information on the topic "Subsidiary means for the determination of rules of international law" contained in chapter III of the report of its seventy-third session (2022) and also welcomed any updates to information already submitted pursuant to such request, by 1 February 2024[107], concerning:

(a) decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations;

(b) statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.

199. Members generally supported the proposal by the Special Rapporteur to address the origins, nature and function of subsidiary means and to focus on judicial decisions and their relationship to the sources of international law. They considered that analysis of that issue in his next report could be complemented by the memorandum requested from the Secretariat surveying the case law of international courts and tribunals, and other bodies.

[107] ILC, 'Report of the International Law Commission on the work of its seventy-third session' 29 (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10.

E. Observations and comments of the AALCO Secretariat

200. The AALCO Secretariat encourages Member States to deeply engage with the ILC on the topic 'Subsidiary means for the determination of rules of international law" and to respond with necessary comments and observations as requested by the ILC by 1 February 2024 [108] concerning:

(a) decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations;

(b) statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.

201. 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 will have long-standing implications on the codification and progressive development of international law.

202. 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.

203. There had been a general consensus among the members of ILC that references to the decisions of national courts on questions of international law could be particularly relevant, while other members had emphasized the need for caution when examining such materials. The

[108] Ibid.

AALCO Secretariat requests the ILC to consider the importance of ensuring diversity in the consideration of jurisdictions, legal traditions and regions of the world. During the plenary debate, many members had referred to the question of diversity of the publicists and the over-reliance by some courts and tribunals on materials from the Anglo-American tradition and limiting to a few languages and legal traditions, and advocated gender diversity as well. The AALCO Secretariat would like to highlight this aspect while analysing the decisions of national and international courts, teachings of highly qualified publicists and statements made in international organizations, international conferences and other forums.

204. The AALCO Secretariat also supports the proposal to rely on materials from all States, regions and legal systems of the world that are as representative as possible and requests the Member States to provide the Commission relevant scholarly works and State practice. This will contribute to addressing concerns as regards representation in the consideration of subsidiary means and to ensure more diversity and bring more legitimacy to the work of the Commission.

205. The AALCO Secretariat further encourages the Member States to share their views and observations on the direction they expect the work of the Commission on the topic should take, and their legal considerations on its diverse aspects.