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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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

A. Background

1. As mandated by its Statute, AALCO has the responsibility to examine the topics under consideration by the International Law Commission (ILC or Commission) and provide recommendations that reflect the perspectives of its Member States. Throughout the years, fulfilling this obligation has allowed AALCO Member States to contribute significantly to the codification and progressive development of international law while concurrently enhancing the relationship between the two organizations. Article 1(d) of AALCO's Statutes assigns the Secretariat the duty to consider matters related to the work of the ILC during its annual sessions, a responsibility that AALCO has consistently fulfilled since its inception in 1956. It is customary for ILC Members to be invited to AALCO's Annual Sessions to provide updates on the ongoing work of the Commission. Reciprocally, the Secretary-General of AALCO attends ILC sessions to represent the views of AALCO Member States. The ILC greatly appreciates this continuous exchange, as it enriches their work with perspectives from Asian-African States.

2. AALCO's Secretariat report on the ILC for a given Annual Session typically covers (i) the work of the Commission on the substantive topics on its agenda at its most recent session, (ii) discussions on the topic at the previous Annual Session of AALCO, (iii) a summary of the views expressed by 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-ninth session of the Sixth Committee is scheduled to meet only from 2 October to 22 November 2024, *inter alia*, to discuss the work of the ILC at its seventy-fifth session, this report covers items (i), (ii), and (iv) only.

3. The seventy-fifth Session (2024) of the Commission was held from 29 April–31 May and 1 July–2 August 2024, and the advance version of the report to the UN General Assembly was made available in August 2024 on the official website of the Commission. To keep the Member States informed about the Commission's most recent work and facilitate deliberations, the

Secretariat deemed it appropriate to present it based on this advance version to the Member States at the Sixty-Second Annual Session (2024) of AALCO.

4. The present document (AALCO/62/BANGKOK/2024/SD/S1) reports on the work of the Commission on the following substantive topics that were placed on the agenda for its Seventy-Fifth Session (2024):

I. Settlement of disputes to which international organizations are parties
II. Subsidiary means for the determination of rules of international law
III. Prevention and repression of piracy and armed robbery at sea
IV. Immunity of State officials from foreign criminal jurisdiction
V. Succession of States in respect of State responsibility
VI. Sea-level rise in relation to international law; and
VII. Non-legally binding international agreements

B. Deliberations on the Select Items from the Agenda of the International Law Commission at the Sixty-First Annual Session (Bali, Indonesia)

5. The topic was introduced by H.E. Dr. Kamalinne Pinitpuvadol, the Secretary-General of AALCO. The Secretary-General emphasized the strong and historic relationship between AALCO and the International Law Commission (ILC). He mentioned that AALCO examines topics deliberated at the ILC, communicating observations to Member States, and offering recommendations contextualising Afro-Asian region. The Secretary-General acknowledged the significant contributions of Asian and African members to the ILC. He welcomed delegations from AALCO Member States urging active participation in discussions on key topics from the ILC's Seventy-Fourth Session, emphasizing the importance of these discussions for advancing international law in the Afro-Asian region.

6. Thereafter, the Vice-President of the Sixty-First Annual Session and Chair of the Meeting, H.E. Mr. Ronald Ozzy Lamola, Minister of Justice and Correctional Services, the Republic of South Africa, opened the floor for statements. Dr. Bimal Patel and Prof. Masahiko Asada, Members of the ILC, delivered their statements. Thereafter, the following delegations

delivered statements on the agenda item: the Republic of India, the Islamic Republic of Iran, Malaysia, the Republic of Indonesia, the People's Republic of China, the Kingdom of Thailand, Japan, the Republic of Kenya, the Socialist Republic of Vietnam, the Republic of Korea, and the Russian Federation.

7. **Dr. Bimal Patel, Member, ILC,** delivered a detailed address highlighting the significant developments and ongoing challenges within the ILC during its 74th session. He noted the substantial turnover in membership, with 18 new members joining, and emphasised the growing representation of Asia and Africa, now accounting for half of the Commission's members. Dr. Patel discussed the introduction of three new topics to the ILC's active agenda: Repression and Prevention of Piracy and Armed Robbery at Sea, Settlement of Disputes to which International Organizations are Parties, and Subsidiary Means for the Determination of Rules of International Law. Additionally, the topic of Non-legally Binding International Agreements was elevated to the active agenda, though Dr. Patel pointed out the lack of comprehensive studies on this topic from the perspectives of Asian and African States.

8. Dr. Patel expressed concern over the continuing underrepresentation of Asian and African practices in the ILC's work despite the significant State practices in these regions. He highlighted the need for greater regional diversity in leadership roles within the ILC, noting that representation in roles such as Special Rapporteurs and Chairs of Working Groups remains skewed towards Western Europe and other regions. He suggested that AALCO and its Member States consider forming working groups or sub-committees to conduct studies parallel to the ILC's work, thereby promoting and integrating Asian and African perspectives into international legal discussions.

9. Dr. Patel also advocated for the adoption of more inclusive processes within the ILC, such as the establishment of study groups for certain topics, to ensure broader regional participation. He urged AALCO Member States to be more proactive in influencing the ILC's agenda and to consider proposing topics that reflect the pressing concerns of their regions. Additionally, he called for coordinated efforts to enhance the participation of Asian and African States in the upcoming 75th-anniversary commemorative event of the ILC, emphasising the

importance of regional contributions to the development and codification of international law. Dr. Patel concluded by expressing his commitment to addressing these challenges and encouraging further reflection on the issues of representativeness, diversity, and inclusivity within the ILC.

10. **Prof. Masahiko Asada, Member, ILC,** discussed the topic of "Sea-level Rise in Relation to International Law," focusing on its implications for the law of the sea. The ILC has recently completed deliberations on this issue, particularly regarding the aspects of law of the sea. He highlighted the key issues of regression of coastlines and submergence of maritime features. Prof. Asada explained that sea-level rise could lead to the regression of coastlines, causing a shift in baselines from which maritime zones are measured. This shift could result in former internal waters becoming territorial seas and former EEZs (Exclusive Economic Zones) and continental shelves becoming high seas. While the changes might seem minor, they could lead to significant losses of landmass and investment, particularly in the development of natural resources on continental shelves. Prof. Asada also discussed the potential consequences of maritime features being submerged due to sea-level rise. According to the UNCLOS, islands, rocks, and low-tide elevations generate different maritime zones. If an island becomes uninhabitable due to inundation, it may be reclassified as a rock, losing its EEZ and continental shelf, potentially amounting to a loss of sovereign rights over vast areas. Submergence of basepoints could also force the redrawing of baselines, risking the loss of entire archipelagic waters for some States.

11. Prof. Asada also addressed the question of Cut-off Date noting the increasing support for a fixed baseline approach, where States maintain their original maritime zones despite sea-level rise. The challenge remains in determining when these baselines should be fixed. He suggested using charts or lists of geographical coordinates deposited with the United Nations, as required by the UNCLOS, as a potential solution. However, he acknowledged that this system might not resolve all issues related to the regression of coastlines. He proposed that a resolution be adopted at the Meeting of States Parties of the UNCLOS and the UN General Assembly to encourage or require States to deposit charts indicating their baselines. This resolution could serve as an interpretation of the UNCLOS, potentially amending it in practice. He urged States to take action

within the framework of these international bodies and expressed hope that AALCO would play a leading role in this effort.

12. **The Delegate of the Republic of India** expressed appreciation for the AALCO Secretariat's comprehensive report on the work of the ILC and thanked distinguished members, including Prof. Bimal Patel and Prof. Asada, for their valuable contributions. The Delegate underscored India's commitment to increasing participation by Asian and African countries in the ILC's work to reflect the concerns of the developing world. India emphasised the importance of the topic of "succession of States in respect of State responsibility," noting its complexity and practical relevance. The delegate urged the ILC's Drafting Committee to further examine issues related to shared responsibility and the obligation of cessation during state succession, advocating for consensus-based decision-making.

13. On the topic of "General Principles of Law," the Delegate noted the Draft Articles focusing on the scope, identification, and relationship of these principles with other sources of international law. India appreciated the inclusive approach to identifying general principles from national legal systems and welcomed the Draft Article on the transposition of these principles. The Delegate also addressed the issue of "Sea-Level Rise in relation to International Law," recognising the challenges faced by small island developing states and the need for international deliberations. On the topic "Prevention and Repression of Piracy and Armed Robbery at Sea," India welcomed the ILC's work and supported the preservation of the definition of piracy as per UNCLOS. Finally, India endorsed the inclusion of topics such as "Subsidiary Means for the Determination of Rules of International Law" and the "Settlement of International Disputes to which International Organizations are Parties" in the ILC's programme of work.

14. **The Delegate of the Islamic Republic of Iran** expressed gratitude to the Secretariat for its detailed reports on the work of the ILC at its seventy-fourth session. The Delegate highlighted key points on several topics, including the settlement of disputes involving international organisations, the expulsion of aliens, subsidiary means for determining rules of international law, and the protection of persons in the event of disasters. On the issue of dispute settlement, the Delegate emphasised that the focus should be on legal disputes rather than political

disagreements and suggested that private law disputes involving international organisations should also be considered. Regarding the expulsion of aliens, the Delegate noted the balance between state sovereignty and human rights obligations, asserting that states should retain the right to expel aliens without needing to provide exhaustive grounds, provided fundamental human rights are respected.

15. The Delegate also discussed the subsidiary means for determining international law, expressing concerns about the scope of Article 38 of the ICJ Statute and the overlap between international custom and subsidiary means. The Delegate noted the need for further study on unilateral acts and resolutions of international organisations as sources of obligations. On the topic of disaster protection, the Delegate criticised the Draft Articles for not adequately balancing the rights and obligations of affected and assisting states, particularly regarding humanitarian assistance. The Delegate stressed the importance of respecting national sovereignty and non-interference, arguing that assistance should be provided only upon the affected state's request. Finally, the Delegate concluded that the Draft Articles were not yet suitable for adoption as a treaty due to insufficient state practice supporting their provisions.

16. **The Delegate of Malaysia** highlighted Malaysia's active engagement on several vital topics. On "General Principles of Law," Malaysia emphasised the importance of this topic for international law's development and voiced concerns about several adopted draft conclusions. The Delegate confirmed Malaysia's commitment to providing substantive insights on these draft conclusions by submitting detailed written comments to the United Nations by December 2024. Regarding "Sea-level rise in relation to international law," Malaysia acknowledged the co-chairs' work and the in-depth discussions on the topic. While supporting the idea of freezing baselines to address sea-level rise, Malaysia urged further analysis of legal implications. Malaysia cautions against using climate change to justify preserving maritime space without solid scientific evidence.

17. The Delegate also addressed the topic of "Settlement of disputes to which international organizations are parties," commending the ILC's Draft Guidelines for providing clarity on key terms. Malaysia highlighted the challenge of enforcing decisions against international

organisations due to their immunity under domestic laws, suggesting a balance between immunity and accountability. On "Prevention and repression of piracy and armed robbery at sea," Malaysia acknowledged the existing codification under UNCLOS and other treaties but remained open to the Draft Articles serving as guidelines for states. Finally, Malaysia shared concerns about the clarity and potential overlaps in the draft conclusions on "Subsidiary means for the determination of rules of international law," calling for further elaboration to ensure consistency in the interpretation and application of these criteria.

18. **The Delegate of the Republic of Indonesia** expressed deep concern over the impact of climate change, particularly sea-level rise, on small island developing states and low-lying coastal areas. Representing the largest archipelagic country, the Delegate emphasised the existential threat posed by rising sea levels to Indonesia's 17,000 small islands. The delegate highlighted the broader implications of climate change for statehood, migration, and marine environments. The Delegate stressed the importance of ILC continuing its work on this issue, advocating for exhaustive studies to develop and codify international law while avoiding speculative scenarios.

19. The Delegate noted that climate change was not considered during the negotiations of the United Nations Convention on the Law of the Sea (UNCLOS), resulting in a "climate silent" framework. Given the current realities, the Delegate urged a balance between stability and security in the law of the sea and promoting equity in addressing climate change. The Delegate advocated maintaining existing boundary delimitation agreements despite the sea-level rise and called for cautious deliberation on this sensitive issue, ensuring that it does not undermine the existing regime of the law of the sea. The Delegate encouraged further study on the implications of sea-level rise on statehood and the protection of affected persons.

20. **The Delegate of the People's Republic of China** highlighted the importance of the ILC's work in the codification and progressive development of international law, especially at the start of a new quinquennium. The Delegate emphasised the significance of researching sources of international law, particularly in the context of "General Principles of Law." The delegate urged the ILC to avoid rushing the review process and to consider feedback from

governments thoroughly. The Delegate stressed that general principles of law should reflect the recognition of the international community, including Asia-Africa developing countries, rather than just a few nations. Concerns were raised about the theoretical and practical support for certain draft conclusions and the need for extensive and careful comparative studies, particularly regarding subsidiary means for determining rules of international law.

21. On the topic of dispute settlement involving international organisations, the Delegate argued that the scope should be limited to intergovernmental organisations, excluding NGOs and commercial entities, as these have different legal statuses. The delegate also expressed concerns about including private law disputes within this topic, as it might deviate from the original focus on international disputes. Regarding "Succession of States in respect of State responsibility," the Delegate noted the difficulty due to the scarcity of universal state practice and emphasised the need for further study. Lastly, the delegate called for the ILC's work to reflect a balance in regional and linguistic representation, advocating for contributions from Asian and African countries to ensure diverse perspectives in international law.

22. **The Delegate of the Kingdom of Thailand** emphasised Thailand's commitment to the ILC's role in developing and codifying international law, particularly welcoming the inclusion of "non-legally binding international instruments" in the ILC's programme. Thailand suggested that AALCO consider initiating a study on this topic, focusing on the application of the Vienna Convention on the Law of Treaties to both legally and non-legally binding instruments. The Delegate also highlighted the importance of clear criteria for identifying general principles of law and expressed concerns about overly expansive interpretations that could deviate from the intent of the ICJ Statute.

23. The Delegate addressed the topic of sea-level rise, advocating for the finality of maritime boundaries once established by treaties or court decisions. Thailand looked forward to further discussions on statehood and the protection of individuals affected by sea-level rise. On the topic of disputes involving international organisations, the Delegate supported a flexible definition of "international organization" based on state practice and welcomed the study's expanded scope to include private law disputes. Thailand also underscored the importance of addressing new issues,

such as piracy and armed robbery at sea, stressing the need for comprehensive victim support. The Delegate concluded by urging inclusive participation in ILC discussions to ensure the diverse needs and voices of all countries are represented.

24. **The Delegate of Japan** emphasised Japan's belief in the more significant involvement of Asian and African States in the work of the ILC. Japan proposed exchanging information on state practices as a foundational aspect of developing international law, suggesting that AALCO could compile and report on such practices. The Delegate expressed appreciation for Thailand's alignment on this point and considered the idea of establishing a working group, as suggested by Professor Patel, but stressed the importance of structuring discussions effectively. Japan sought further input from experts on the relevance of state practices and the best approach to reflecting regional perspectives in the ILC's work. Additionally, Japan encouraged AALCO Member States to submit their views on ILC draft documents, specifically highlighting the importance of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction.

25. The Delegate also emphasised on Japan's priority on the issue of sea-level rise, commending the ILC's progress on this pressing topic. Japan emphasised the need for legal stability and predictability, especially in relation to the United Nations Convention on the Law of the Sea (UNCLOS). Japan supported maintaining existing maritime zones despite coastline regression due to climate change, aligning with the Pacific Islands Forum (PIF) declaration. The Delegate reaffirmed Japan's commitment to upholding and developing a maritime order based on international law, particularly UNCLOS. Japan also welcomed the ILC's addition of the topic of non-legally binding international agreements to its programme of work and looked forward to further deliberations on this matter.

26. **The Delegate of the Republic of Kenya** commended the ILC and its collaboration with AALCO, highlighting the role of Asian and African States in the UN's Sixth Committee (Legal). The Delegate discussed the ILC's work on general principles of law, noting the distinction between principles derived from domestic legal systems and those from international legal systems. While the former is widely accepted, the latter remains contentious. On sea-level rise, Kenya emphasised Africa's vulnerability to climate change and the potential legal disputes it

could cause. The Delegate urged Member States to honour international commitments to combat global warming and protect ecosystems to prevent future conflicts.

27. **The Delegate of the Socialist Republic of Vietnam** expressed gratitude for the AALCO Secretariat's report and acknowledged the work of the ILC members. On the topic of general principles of law, Vietnam emphasised that principles derived from domestic systems must align with international law and urged a revisiting of the draft Conclusion 11 to recognise a hierarchy among sources of international law. On sea-level rise, Vietnam, a country directly impacted by this issue, stressed the importance of maintaining maritime boundaries as established by UNCLOS and called for careful examination of the legal implications without creating parallel mechanisms. The Delegate also appreciated the ILC's focus on piracy and armed robbery at sea, advocating that any related regulations should be firmly grounded in UNCLOS.

28. **The Delegate of the Republic of Korea** commended the AALCO Secretariat for their insightful report. The Delegate expressed reservations about the ILC's draft conclusion that general principles of law could be formed within the international legal system. They questioned whether this concept might blur the line between general principles and customary international law, suggesting that the ILC should further examine this issue.

29. The Delegate also addressed the global issue of sea-level rise, stressing its impact on millions of lives and highlighting Korea's support for the Pacific Island Forum Declaration. They called for meaningful discussions during the Annual Session. Additionally, the Delegate discussed the "Subsidiary Means for the Determination of Rules of International Law," emphasising that international court decisions must be carefully evaluated based on the quality of reasoning, state reception, and the court's mandate. They cited concerns over a recent ICJ decision on continental shelf delimitation, arguing that such decisions should carry little weight if their reasoning is widely criticised.

30. **The Delegate of the Russian Federation (a non-member State)** expressed appreciation for the ILC's ongoing work and discussed several key issues. Regarding "General Principles of Law," Russia raised concerns about the lack of clarity in the Draft Articles and the potential for

these principles to impose obligations on states beyond treaty or customary law. They urged the ILC to thoroughly review and define these principles before proceeding. On "Subsidiary Means for the Determination of Rules of International Law," Russia supported the Commission's cautious approach but warned against elevating subsidiary means to primary sources of law and stressed the need to balance the influence of English-language jurisprudence with other global perspectives.

31. The Delegate also highlighted concerns about the Draft Articles on "Immunities of State Officials from Foreign Criminal Jurisdiction," which could undermine sovereign equality and international cooperation. On maritime issues, the delegate highlighted that Russia emphasised the importance of preserving the UNCLOS framework while balancing interests affected by sea-level rise. They welcomed the inclusion of "Non-legally Binding International Agreements" in the ILC's work but suggested discontinuing the topic of "Succession of States in Respect of State Responsibility" due to insufficient state practice. Finally, the delegate called for more effective discussions in the General Assembly on ILC products, stressing the importance of addressing key topics like "Crimes against Humanity" and state responsibility with urgency.

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

32. The seventy-fifth session of the ILC considered the following topics:

I. Settlement of disputes to which international organizations are parties
II. Subsidiary means for the determination of rules of international law
III. Prevention and repression of piracy and armed robbery at sea
IV. Immunity of State officials from foreign criminal jurisdiction
V. Succession of States in respect of State responsibility
VI. Sea-level rise in relation to international law; and
VII. Non-legally binding international agreements

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

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

A. Background

34. The topic "settlement of international disputes to which international organizations are parties" was included in the long-term programme of work of the Commission, during its sixty-eighth session (2016), on the basis of a syllabus prepared by Sir Michael Wood on the topic which was annexed to the report.[1]

35. At its seventy-third session (2022), it was further decided to include the topic in its programme of work and appoint Mr. August Reinisch as Special Rapporteur for the topic.[2] The Commission 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.[3]

36. 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.[4] Accordingly, the Secretariat communicated a questionnaire prepared by the Special Rapporteur to the States and concerned international organizations.[5]

37. The General Assembly took note of the Commission's decision to include the topic in its programme of work,[6] and drew the attention of Governments to the importance for the

[1] ILC, 'Report of the International Law Commission on the work of its sixty-eighth session' 226 (2 May-10 June and 4 July-12 August 2016) UN Doc. A/71/10
[2] 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
[3] ILC, 'Provisions summary record of the 3582nd meeting of the International Law Commission' (16 July 2022) UN Doc. A/CN.4/SR.3582
[4] Ibid
[5] 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
[6] UNGA Res 77/103 of 7 December 2022

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.[7]

38. At its seventy-fourth session (2023) the Commission considered the first report of the Special Rapporteur, which was of an exploratory character, and proposed 2 Draft Guidelines on the "scope of the Draft Guidelines" and on the "use of terms."[8] The Commission considered the first report of the Special Rapporteur from its 3613th to 3618th meetings, from 25 April to 3 May 2023.[9] By large the proposal of the Rapporteur was accepted by the Commission, and 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.[10]

39. Thereafter 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. It was also decided that the title of the topic be changed 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 of the topic that included disputes of private law character to which international organization were parties.[11] Further from its 3647th to 3649th meetings, on 26 and 27 July 2023, the Commission adopted the commentaries to the Draft Guidelines provisionally adopted.[12]

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

[8] 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

[9] 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

[10] ILC, 'Provisions summary record of the 3618th meeting of the International Law Commission' (3 May 2023) UN Doc. A/CN.4/SR.3618

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

[12] ILC, 'Provisions summary record of the 3647th meeting of the International Law Commission' (26 July 2023) UN Doc. A/CN.4/SR.3647; ILC, 'Provisions summary record of the 3648th meeting of the International Law Commission' (27 July 2023) UN Doc. A/CN.4/SR.3648; ILC, 'Provisions summary record of the 3649th meeting of the International Law Commission' (27 July 2023) UN Doc. A/CN.4/SR.3649

40. At the present seventy-fifth session, the Commission had before it the second report of the Special Rapporteur on the renamed topic "Settlement of disputes to which international organizations are parties" ("the Report") that proposed 4 Draft Guidelines for consideration.[13] Further the Commission also had before it a memorandum prepared by the Secretariat to guide the Commission in it its work that contained the responses of States and International Organizations to the questionnaire.[14]

B. Second Report of the Special Rapporteur

41. The second report of the Special Rapporteur, as envisaged in the previous report, focussed on disputes that were "international" in character to which international organizations were party to. The report broadly states about disputes wherein the parties are international organizations, States or other subjects of international law. It further adds another element to the scope of "international" disputes by placing reliance on the proposal on the topic prepared by Sir Michael Wood, which stated that "disputes which are international, in the sense that they arise from a relationship governed by international law."[15] The detailed Report made available timely, comprises of an introduction followed by four chapters that cover largely two issues: the scope of "international" disputes and broad guidelines for their settlement on the basis of rule of law considerations.

42. At the outset, the introduction to the Report noted that the discussions in the Sixth Committee at the seventy-sixth session of the UNGA on the topic broadly agreed with the planned approach of the Commission, which sought to propose guidelines on the basis of an evaluation of the actual practice of dispute settlement. The key recommendations and the various positions of States were summarised in the Report with a note that the Special Rapporteur was particularly grateful for the constructive comments and suggested their consideration by the Commission before the first reading. Further, the Special Rapporteur also expressed his gratitude

[13] ILC, 'Second report on the settlement of disputes to which international organizations are parties by August Reinisch, Special Rapporteur' (1 March 2024) UN Doc. A/CN.4/766
[14] ILC, 'Settlement of disputes to which international organizations are parties: Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.5/768
[15] ILC, 'Report of the International Law Commission on the work of its seventy-third session' (2 May- 10 June and 4 July – 12 August 2016) UN Doc. A/71/10

in the Report for the replies to the Questionnaire to States and international organizations as well as the secretariat for the preparation of the memorandum on that basis.

43. Chapter I of the report presented the focus of the Report, which was "international disputes." It stated that "disputes between international organizations, as well as between international organizations and States or other subjects of international law, arising under international law can be qualified as international disputes." Presenting a general survey of the disputes wherein one party was an international organization while the other being States, individuals, or legal persons, the Report affirmed the distinction between "international" and non-international disputes. However, it did recognize that at the outset that the distinction "could pose challenges and complexities"[16] and clarified that non-international disputes to which international organizations are parties may also involve questions of international law, including accordance of domestic legal personality, immunity, and access to justice.[17] After noting these considerations, the Report proposed Draft Guideline 3 as follows:

"3. International disputes
For the purposes of the present Draft Guidelines, international disputes to which international organizations are parties are disputes between international organizations as well as disputes between international organizations and States or other subjects of international law arising under international law."

44. Chapter II of the Report presented an analysis of the actual practice of settling international disputes involving international organizations. It found that international organizations used various dispute settlement methods, with non-adjudicatory methods being more common than arbitration or international courts or tribunals. It noted that negotiation and consultation were common, as many treaties and agreements provided for amicable dispute settlement as an initial step, while the use of confidential mediation and conciliation was found to be less common.

[16] ILC, 'Second report on the settlement of disputes to which international organizations are parties by August Reinisch, Special Rapporteur' 7 (1 March 2024) UN Doc. A/CN.4/766
[17] ILC, 'Provisional summary record of the 3658th meeting' (29 April 2024) UN Doc. A/CN.4/SR.3658

As regards arbitration particularly, the Report stated that is rarely provided for as a form of dispute settlement in treaties and noted a general reluctance to its use by international organizations. However, it also stated that arbitration clauses are found in treaties relating to privileges and immunities treaties and have led to actual practice.

45. With respect to judicial settlement the Report notes that the International Court of Justice's power to render advisory opinions is more relevant in practice, as some treaties considered opinions issued by the Court as decisive and binding. On the other hand, it notes that most human rights courts and tribunals do not allow international organizations as parties with a few exceptions that allow international organizations to appear as claimants or to request advisory opinions, expanding their role within the human rights framework. The report also provided a brief overview of the extensive practice within regional economic integration organizations, where judicial mechanisms are in place to resolve disputes between these organizations and their member States.

46. On the basis of the presentation of the practice of the various forms of dispute settlement to which international organizations have been parties to the Report proposed the following Draft Guideline 4.

"4. Practice of dispute settlement
International disputes to which international organizations are parties are settled by the means of dispute settlement laid down in Draft Guideline 2 (c). In practice, negotiation and other means of dispute settlement, falling short of binding third party adjudication, are widely used. Arbitration and judicial settlement are often not provided for and are therefore resorted to less frequently."

47. In Chapter III of the Report, on policy issues and suggested recommendations, the Report stated that the recommendations did not reflect legal obligations but were based on Underlying policy considerations only highlighted in the report and were mostly anchored in the rule of law as applicable at the international level.

48. Chapter III addressed the concept of the rule of law, which had originally been developed at the national level, and showed that it was also relevant at the international level, including in respect of international organizations. With respect to dispute settlement, three key aspects of the rule of law were identified i.e. access to dispute settlement; judicial independence and impartiality, and due process and a fair trial.

49. On the basis of those considerations, it was suggested in the Report that arbitration and/or judicial settlement of disputes should be made available more widely for the settlement of disputes to which international organizations were parties. Various developments in this regard were noted in Chapter III such as the adoption in 1996 of the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, and their amendment in 2012, and the repeated proposals to extend the contentious jurisdiction of the International Court of Justice to international organizations. Accordingly Draft Guidelines 5 and 6 as proposed in the Report read as follows:

"5. Access to arbitration and judicial settlement.
Arbitration and judicial settlement should be made available and more widely used for the settlement of international disputes to which international organizations are parties."

"6. Dispute settlement and rule of law requirements
The means of adjudicatory dispute settlement made available should conform to the requirements of the rule of law, including the independence and impartiality of adjudicators and due process."

C. Consideration of the Topic at the seventy-fifth Session (2024)

50. At its seventy-fifth session (2024), the Commission considered the second report of the Special Rapporteur on the topic. In his introductory statement on the second report, the Special Rapporteur addressed the specific elements of the topic, including those disputes to which international organizations were parties that were international in character, in accordance with his planned approach to the topic. His statement introducing the report addressed the bi-fold focus of the Reports i.e. to define the scope of international disputes and suggest guidelines for

their conduct on the basis of actual practices.[18] The Special Rapporteur proposed 4 Draft Guidelines: Draft Guideline 3 defining the scope of international disputes, Draft Guideline 4 presenting an empirical finding on the modes of dispute settlement, Draft Guideline 5 encouraging the use of adjudicatory modes of dispute settlement and Draft Guideline 6 recognizing the well-accepted rule of law prescriptions for dispute settlement.

51. He also apprised the meeting of the timeline proposed for the outcome of the work of the Commission, regarding which he stated that, after the presentation of his forthcoming third report on the topic of non-international disputes, the Commission could complete its first reading on the topic. He proposed that the Commission could thereafter send the entire set of guidelines to the General Assembly. Accordingly, in his statement, he envisaged the completion of the second reading on the topic in 2027.[19]

52. The Commission considered the Report of the Special Rapporteur from its 3658th to 3662nd meetings, from 29 April to 3 May 2024.[20] While members of the Commission welcomed the extensive and comprehensive analysis of the dispute settlement practice in the Report, they were divided on whether the distinction between international and non-international disputes needs to be distinguished on the basis of the parties or the applicable law, or both. Further, some members expressed their preference for the Draft Guideline with normative content, rather than descriptive content at the same time avoiding a hierarchy among dispute settlement methods. Members also expressed caution over recommending more arbitration and judicial settlements over making them more accessible. As regards the policy recommendation that adjudicatory settlements conform to rule of law requirements, there was wide support among the members, albeit with some disagreement on how best it could be expressed in the Draft Guidelines. [21]

53. After a detailed deliberation witnessing statements by 16 members at its 3662nd meeting on 3 May 2024, the Commission decided to refer Draft Guidelines 3, 4, 5 and 6, as contained in

[18] ILC, 'Provisional summary record of the 3658th meeting' (29 April 2024) UN Doc. A/CN.4/SR.3658
[19] Ibid 9
[20] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 18 <https://legal.un.org/ilc/reports/2024/engli sh /a_79 _10_advance.pdf > accessed 19 August 2024
[21] Ibid 6

the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[22]

54. At its 3673rd meeting, on 31 May 2024, the Commission considered the report of the Drafting Committee on the topic[23] and provisionally adopted Draft Guidelines 3 to 6.[24] Further, at its 3688th to 3692nd meetings, from 23 to 25 July 2024, the Commission adopted the commentaries to the Draft Guidelines provisionally adopted at the current session.[25]

55. The Draft Guidelines proposed by the Drafting Committee and provisionally adopted by the Commission were as follows:[26]

Part Two

Disputes between international organizations as well as disputes between international organizations and States

Guideline 3

Scope of the present Part

This Part addresses disputes between international organizations as well as disputes between international organizations and States.

Guideline 4

Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement

[22] ILC, 'Provisional summary record of the 3662nd meeting' (3 May 2024) UN Doc. A/CN.4/SR.3662
[23] ILC, 'Settlement of disputes to which international organizations are parties: Titles of Part One and Part Two, and texts and titles of Draft Guidelines 3, 4 and 5 as provisionally adopted by the Drafting Committee on 7 and 9 May 2024' (10 May 2024) UN Doc. A/CN.4/L.998
[24] ILC, 'Provisional summary record of the 3673nd meeting' (31 May 2024) UN Doc. A/CN.4/SR.3673
[25] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 20 <https://legal.un.org/ilc/reports/2024/engli sh/a_79 _10_advance.pdf > accessed 19 August 2024
[26] Ibid 19

referred to in Draft Guideline 2, subparagraph (*c*), that may be appropriate to the circumstances and the nature of the dispute.

Guideline 5

Accessibility of means of dispute settlement

The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.

Guideline 6

Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

D. Future Work and Way Forward

56. As regards the future work on the topic, the Special Rapporteur expressed his intention to proceed with the topic by analyzing in his third report in detail the practice of the settlement of "non-international" disputes to which international organizations are parties, i.e. disputes arising between international organizations on the one hand and States, other international organizations, individuals and other private legal persons governed by domestic law. As acknowledged by the Special Rapporteur in the first and second reports, it is often the case that a dispute to which an international organization is party to is of a "private law character" but nonetheless may involve important questions of international law. Questions such as the accordance of domestic legal personality in conformity with the constituent instrument of the international organization, and the respect for the immunities of international organizations and their personnel, were some of the disputes which are governed by domestic law but would very likely have strong international law element.

57. Based on the approach of appraising actual practice and suggesting prescriptive texts, the Special Rapporteur believes that the Commission would be in a position to conduct a first

reading of the set of guidelines together with commentaries after the consideration of the third report. In this regard, he further stated that the entire set of Draft Guidelines with commentaries could be sent to the General Assembly for consideration thereafter.[27]

58. In developing the guidelines in the third report on this topic, the Special Rapporteur stated that he would continue to be guided by the information provided by States and international organizations in response to the questionnaire sent by the Secretariat.[28] Further, the Special Rapporteur also proposed that the second report of the guidelines would take place in 2027, based on the comments and observations received in the General Assembly.

E. Observations and Comments of the AALCO Secretariat

59. The distinction between international and non-international disputes to which international organizations are parties was sought to be made in the form of a definitional clause proposed in the Report on the basis of the dual elements of the identity of parties and applicable law. However, the Commission could not arrive at a consensus on this in drafting committee, and it was decided not to include a definitional clause but set out the scope of part omitting any reference to applicable law.

60. The approach taken signals the intention of the Commission not to restrict the scope of the guidelines on the basis of applicable law, as it has been observed that it was not always clear whether a dispute arose under international law or was of a private law character. Further, disputes to which international organizations are parties at times involved were triggered by, or were governed by, both international law and national law. It was agreed that the commentaries would explain the scope of the part that it would govern disputes arising under international law, and other disputes would be addressed in another part.

61. Further, the omission of the reference to "other subjects of international law" also seems to be avoid any doubts and confusion as there is no consensus on who the other subjects of

[27] ILC, 'Provisional summary record of the 3658th meeting' (29 April 2024) UN Doc. A/CN.4/SR.3658
[28] ILC, 'Second report on the settlement of disputes to which international organizations are parties by August Reinisch, Special Rapporteur' 7 (1 March 2024) UN Doc. A/CN.4/766

international law exactly are. In this regard, the commentary clarifies that the provision did not apply to dispute between international organizations and private parties, which would be addressed in a separate part.

62. As regards the proposed guidelines relating to the provisions on the modes of disputes, it would be trite to recall that practice shows adjudicatory modes of dispute settlement are not the most appropriate modes of dispute settlement where international organizations are parties. This approach has been taken by the Commission in the revised guideline which takes care not to allude to any hierarchy between the modes of dispute settlement. Further reference only to the specific elements of the rule of law to dispute settlement is welcome step and provides more clarity as regards the conduct of the dispute settlement process.

63. The Draft Guidelines have been prepared after in-depth deliberations between the members of the Commission who hail from the major juridical systems of the world and such it would be useful to observe that the word product reflects this diversity broadly. Further, the common elements gleaned from the wealth of material available in the form of the actual practice of dispute settlement by international organizations is also evident in the Draft Guidelines of the Commission. There is little doubt that the guidelines shall prove useful for judges, arbitrators and other legal practitioners involved in the settlement of future disputes to which international organizations are parties.

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

A. Background

64. The Commission, at its seventy-third session (2022), decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur. Also at its seventy-third session, 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). 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.

65. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,[29] which 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 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. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[30]

[29] 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.
[30] UNGA, 'Memorandum by the Secretariat- Elements in the previous work of the International Law Commission that could be particularly relevant to the topic' (8 February 2023) UN Doc. A/CN.4/759.

66. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 5, as presented in the Special Rapporteur's first report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 3, together with commentaries, and took note of the report of the Drafting Committee on draft conclusions 4 and 5.

B. The Second Report of the Special Rapporteur

67. In his second report[31], the Special Rapporteur aims to build on his first report and the progress made so far on the topic. The report is divided into 5 chapters, with the first chapter being introductory in nature. In chapter II, the Special Rapporteur discusses the previous consideration of the topic. It contains a brief summary of the outcome of the debate in the Commission followed by a more detailed summary of the debate in the Sixth Committee.

68. In chapter III, the Special Rapporteur examines the nature and function of subsidiary means, focusing on judicial decisions as subsidiary means for the determination of rules of law. In chapter IV, the Special Rapporteur explores the relationship between Article 38, paragraph 1 (d), and Article 59 of the Statute of the International Court of Justice. The chapter contains a brief comparative section on the common law and civil law approaches to precedent in judicial adjudication at the domestic level. The question of precedent in international law is thereafter analysed in relation to the International Court of Justice, focusing on elements of the practice concerning Article 59, including in respect of what it aims to achieve by protecting the rights of third parties. The Special Rapporteur then briefly discusses examples of how the International Tribunal for the Law of the Sea, which, like the International Court of Justice, also resolves inter-State disputes and issues advisory opinions, approaches precedents before drawing conclusions. In the final part of the report, chapter V, the Special Rapporteur addresses the future programme of work on the topic.

[31] ILC, 'Second report on subsidiary means for the determination of rules of international law, Charles Chernor Jalloh, Special Rapporteur' (30 January 2024) UN Doc. A/CN.4/769

69. The draft conclusions proposed by the Special Rapporteur in his second report are as follows:

Draft conclusion 6

Nature and function of subsidiary means

(a) Subsidiary means are auxiliary in nature vis-à-vis the sources of international law found in treaties, customary international law and general principles of law.

(b) Subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law.

Draft conclusion 7

Absence of a rule of precedent in international law

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents.

Draft conclusion 8

Persuasive value of decisions of other courts or tribunals

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, may follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions address analogous factual and legal issues and are found persuasive for resolution of the issue at hand.

C. Consideration of the Topic at seventy-fifth Session (2024)

70. At its seventy-fifth session (2024), the Commission had before it the second report of the Special Rapporteur. The Special Rapporteur addressed: the work of the Commission on the topic thus far; the functions of subsidiary means for the determination of rules of international law, including in the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the practice of the International Court of Justice and other international

tribunals, and scholarly writings concerning the functions of subsidiary means; and the general nature of precedent in domestic and international adjudication, including Article 38, paragraph 1 (*d*), and its relationship to Article 59 of the Statute of the International Court of Justice, as well as the relationship between Article 59 and Article 61 of the Statute of the International Court of Justice, and the link to the rights of third States. He proposed three draft conclusions and also made suggestions for the future programme of work on the topic.

71. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in "the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic".[32] In its second memorandum, the Secretariat reviews the case law of international courts and tribunals, and other bodies, including arbitral tribunals, and the decisions of other bodies. It provides comprehensive information on the actual practice of a wide range of bodies, addressing both (a) the functions of subsidiary means and (b) the use of precedents to resolve both procedural and substantive questions.

72. The Commission considered the second report of the Special Rapporteur and the memorandum by the Secretariat at its 3663rd to 3667th meetings, from 9 to 15 May 2024. The Special Rapporteur proposed three draft conclusions on the nature and function of subsidiary means (draft conclusion 6); the absence of a rule of precedent in international law (draft conclusion 7); and the persuasive value of decisions of courts or tribunals (draft conclusion 8).

73. The Members of the Commission welcomed the Special Rapporteur's comprehensive report and its rich discussion of complex conceptual issues. They supported the Special Rapporteur's view that subsidiary means were not a source of international law, and the view that in general there was no system of binding precedent in international law, but that judicial decisions were followed, including for reasons of legal certainty and predictability, which was the essence of any legal system based on the rule of law. Hesitancy was expressed, however, over the reference to the "persuasive value" of judicial decisions. Some members sought clarification of the reference made by the Special Rapporteur in his second report not only to the general

[32] UNGA, 'Memorandum by the Secretariat' (17 January 2024) UN Doc. A/CN.4/765.

function of subsidiary means, but also to specific functions that one or other of the subsidiary means might have. Some members also suggested that the draft conclusions give guidance not just to courts and tribunals as users of judicial decisions, but to others including policymakers, legal advisers, agents and advocates.

74. At its 3667th meeting, on 15 May 2024, the Commission decided to refer draft conclusions 6, 7 and 8, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate. The Special Rapporteur introduced the conclusions and presented a series of working papers adjusting his proposed draft conclusions to take into account the views of members expressed during the debate. Concerning draft conclusion 6, the Drafting Committee favoured a negative phrasing that subsidiary means were not a source of international law; decided to address the nature and function in a single provision which referred to the assistive function of subsidiary means; and clarified that this was without prejudice to the use of the same materials for other purposes. The Special Rapporteur recommended that the question of the placement of draft conclusion 6 on function be revisited once the Commission had completed its first reading on the topic in 2025. Regarding draft conclusion 7 on the absence of legally binding precedent in international law, the Drafting Committee decided on a general rule in the first sentence that "decisions of international courts and tribunals may be followed on points of law where those decisions address the same or similar issues"; and in the second sentence a clear statement that "such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law". As to draft conclusion 8, the Drafting Committee noted that the non-exhaustive criteria in draft conclusion 8 concerning the weight to be accorded to decisions of courts and tribunals were supplemental to draft conclusion 3, as envisaged by the Commission in the commentary to that conclusion adopted in 2023.

75. At its 3674th meeting, on 1 July 2024, upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft conclusions 6, 7 and 8 and at its 3693rd to 3699th meetings, from 25 to 31 July 2024 the Commission adopted the commentaries thereto. The Commission had, earlier in the current session, at its 3661st meeting, on 2 May 2024 also provisionally adopted draft conclusion 4 (Decisions of courts and tribunals) and draft conclusion

5 (Teachings), as orally revised, which had only been taken note of during the seventy-fourth session, and also adopted commentaries thereto.

Text of the draft conclusions and summaries of commentaries thereto on subsidiary means for the determination of rules of international law provisionally adopted by the Commission at its Seventy-Fifth session

76. The text of the draft conclusions, together with summaries of commentaries provisionally adopted by the Commission at its seventy-fifth session, is presented below.

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.

Summary of the Commentary

77. Draft conclusions 4 (decisions of courts and tribunals) and 5 (teachings) build on the prior work of the Commission. They both seek to clarify how decisions of courts and tribunals and teachings, the two principal subsidiary means derived from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, are to be used for the purpose of determining the existence and content of rules of international law.

78. Draft conclusion 4 concerns the role of decisions of international and national courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law. It consists of two paragraphs. Paragraph 1 addresses decisions of international courts and tribunals, especially those of the International Court of Justice, which are a subsidiary means for the determination of the existence and content of rules of international law. Paragraph

2 considers the more limited role of decisions of national courts as a subsidiary means for the determination of the existence and content of rules of international law. As indicated in draft conclusion 6, paragraph 2, the latter use of decisions of national courts is without prejudice to their other uses. It is also without prejudice to the use of decisions in the writings of scholars and in other subsidiary means.

79. The draft conclusion underscores that the decisions of "international courts and tribunals" should be understood broadly. The term is intended to cover "any international body exercising judicial powers" and which is called upon to determine the existence and content of rules of international law. The Commission placed greater emphasis on the decisions of international courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law. However, the use of the decisions of national courts calls for some caution. This caution is reflected in the use of the terms "may be used" and "in certain circumstances" in paragraphs 1 and 2, qualifying the phrase "subsidiary means for the determination of the existence and content of rules of international law."

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 also be given to, *inter alia*, gender and linguistic diversity.

Summary of Commentary

80. Draft conclusion 5 concerns the role of teachings or materials understood in a broad sense to include writings, as well as recorded lectures and audio-visual materials. The term also generally encompasses teachings produced by an individual or collectives of individuals organized into *ad hoc* or permanent expert groups, whether created by individuals or by States and/or international organizations. The draft conclusion takes up "teachings" whenever they are used in the process of determining the existence and content of rules of international law.

81. The draft conclusion does not require scholarly consensus, let alone unanimity, for a high-quality teaching to be found valuable in determining the existence and content of rules of international law. On the other hand, diverging views among scholars could also be relevant to determining the weight to attach to a particular teaching. While there may be a preference for teachings that reflect special expertise or competence in international law, the Commission recognizes the possibility that there may be circumstances whereby teachings in disciplines other than international law could also be relevant for the determination of the existence and content of rules of international law.

Conclusion 6

Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Summary of the Commentary

82. Draft conclusion 6 aims to clarify the role of subsidiary means for the determination of rules of international law vis-à-vis the sources of international law. It consists of two paragraphs. Paragraph 1 considers the nature and function of subsidiary means, while paragraph 2 is a without prejudice clause.

83. Paragraph 1 of draft conclusion 6 is composed of two sentences. The first sentence addresses the nature of subsidiary means and provides that subsidiary means are not a source of international law. The Commission found that there is an extensive body of international and national judicial practice and scholarly works, as well as drafting history, to justify this conclusion. Paragraph 2 of draft conclusion 6 is comprised of a single sentence. It provides, in a simple statement, that the use of "materials" as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes. This proposition takes as a point of departure the fact that materials used as subsidiary means, for example judicial decisions and teachings, may be used for multiple purposes.

Conclusion 7

Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Summary of the Commentary

84. Draft conclusion 7 deals with the question of precedent in international law. It confirms the existence of an extensive practice from which the Commission has established that, as a general rule, there is no system of legally binding precedent, or *stare decisis*, in international courts or tribunals under international law. However, for reasons of legal security, stability and consistency, which is the essence of any rule of law-based legal system, international courts or tribunals routinely take into account the legal reasoning contained in the decisions of other courts and tribunals, although they are not obligated to apply them. The general rule, in international adjudication involving States, is that decisions of courts are binding only on the parties to the case – as is stated in Article 59 of the Statute of the International Court of Justice.

Conclusion 8

Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

(*a*) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;

(*b*) the extent to which the decision is part of a body of concurring decisions; and

(*c*) the extent to which the reasoning remains relevant, taking into account subsequent developments.

Summary of the Commentary

85. Draft conclusion 8 sets out more specific criteria to guide users when employing decisions of courts and tribunals in the determination of the existence and content of rules of

international law. It builds on the general criteria for the assessment of subsidiary means for determining rules of international law contained in draft conclusion 3. In other words, while draft conclusion 3 concerns the general criteria for assessing the weight to be given to subsidiary means, draft conclusion 8 serves the specific purpose of clarifying how the decisions of courts and tribunals are to be assessed by adding additional relevant criteria that should be considered to carry out a proper assessment.

86. The present draft conclusion seeks to specify which additional criteria the Commission deems particularly appropriate to ensure that proper weight is given to decisions of courts or tribunals as subsidiary means.

D. Future Work and Way Forward

87. The Special Rapporteur will work and subsequently submit his third report in 2025 at the seventy-sixth session, where he will analyse teachings and other subsidiary means. In the report, the Special Rapporteur will focus on the role played by the works of both private and public (or State-empowered) bodies, as well as regional and other codification bodies, as subsidiary means in the determination of the rules of international law.

88. During the plenary debates, there were additional issues concerning both judicial and other decisions, and possibly other aspects of the topic, that could merit further examination in future reports. These may be taken up by the Special Rapporteur in the next session by proposing adjustments to the tentative programme of work.

E. Observations and Comments of the AALCO Secretariat

89. In the conclusions and the commentaries adopted by the Commission on the topic, the nature and general function of subsidiary means is explained, recalling that they were subordinate to the sources of international law found in subparagraphs (*a*) through (*c*) of Article 38, paragraph 1, of the Statute of the International Court of Justice. It is clarified that they play an assistive role in relation to the sources of international law. This was supported by the drafting

history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and confirmed in the actual practice of the International Court of Justice and other international courts and tribunals, in the practice of some domestic courts and by the works of scholars.

90. The conclusions also address the general nature of precedent in domestic and international adjudication. Although international law lacked a formal theory or doctrine of precedent within the narrow sense of the term, the International Court of Justice and other international courts and tribunals followed prior decisions and judgments where, *inter alia*, there was no reason to depart from previous legal reasoning that might still be regarded as sound. In this connection, the relationship between Article 38, paragraph 1 (*d*), and Article 59 of the Statute of the International Court of Justice was examined, which provided that the decisions of the Court were binding only on the parties to the case. The discussions among the members concluded that although there is no *stare decisis* in international law, the legal effects of decisions were constraining not only on the parties, as the effects were also felt by third parties, due to the force of the decisions of the International Court of Justice as expressions of rules of international law, and followed for reasons of legal certainty and predictability and the persuasive and practical value of past decisions in helping resolve a later dispute.

91. 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 share 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, which could be useful for the topic. We encourage Member States to participate actively in the upcoming deliberations on this topic at the Sixty-Second Annual Session of AALCO and submit their comments and observations to the ILC to further refine these critical aspects of international law.

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

A. Background

92. At its seventy-first session in 2019, the International Law Commission added the topic "Prevention and Repression of Piracy and Armed Robbery at Sea" to its long-term work programme. A syllabus outlining the potential structure and approach to the topic was included in that year's report. This topic was further incorporated into the Commission's programme at its seventy-third session in 2022, with Mr. Yacouba Cissé appointed as Special Rapporteur.

93. In the syllabus, the Special Rapporteur defined the topic's scope, highlighting the inclusion of piracy definitions under the United Nations Convention on the Law of the Sea (UNCLOS) and considering both current and evolving aspects, as well as definitions from relevant international organisations like the International Maritime Organization (IMO). The Commission also endorsed the Special Rapporteur's recommendation for the ILC Secretariat to reach out to States and international organisations to gather information and perspectives on the topic during its 3612th Meeting.

94. The Special Rapporteur's first report on the topic focused solely on reviewing state practices at legislative and judicial levels across different regions: Africa, Asia, the Americas and the Caribbean, Europe, and Oceania. The Special Rapporteur found that these practices lacked the necessary generality, consistency, and uniformity to support a codification effort. In the current report, the Special Rapporteur focuses on international and regional cooperation among states in addressing piracy and armed robbery at sea.

B. Second Report of the Special Rapporteur

95. The second report of the Special Rapporteur and the Memorandum prepared by the ILC Secretariat was presented at the Seventy-fifth ILC Session.[33] The second report emphasises the

[33] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

significance of regional cooperation in combating piracy and armed robbery at sea. The main aim of the report, as informed by the Special Rapporteur, was to identify how States cooperate in addressing the commission of acts of piracy and armed robbery at sea. The report briefly deals with the practice of International Organizations (IOs), but its priority was to study the practice of states through regional and subregional Organizations as well as bilateral and multilateral or multinational practices. The Report has dealt with the work of international organisations such as the United Nations (specifically The General Assembly, the Security Council, and the International Maritime Organization), and the North Atlantic Treaty Organization (NATO).

Practice of IOs

96. Several multilateral conventions have been adopted under the United Nations, which urges States to enhance international cooperation in tackling specific types of crime at sea to ensure the safety of navigation. The United Nations General Assembly (UNGA) has consistently emphasised the importance of international cooperation at all levels to address maritime security threats, particularly piracy and armed robbery at sea. As early as 1958, under the auspices of the United Nations, the General Assembly adopted the Convention on the High Seas at the United Nations Conference on the Law of the Sea, which was held in Geneva in 1958. In recent years, the UNGA has urged States to implement International Maritime Organization guidelines through the development of a "Common Approach".[34] The Assembly has highlighted the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea as key frameworks for combating piracy. In response to piracy off the Somali coast and in the Gulf of Guinea, the Assembly adopted resolutions urging States, especially coastal nations, to take appropriate actions. This includes building capacity, reporting incidents, and cooperating on legal matters. Moreover, the UNGA expanded the definition of maritime safety to include piracy and armed robbery and urged States to adopt national laws in line with international agreements.[35]

97. The Rapporteur mentions several resolutions passed by the United Nations Security Council (UNSC) urging international cooperation, the criminalisation of piracy in national laws,

[34] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.
[35] ibid

and the use of military force where necessary. The UNSC has also linked piracy with terrorism financing and called for regional strategies, legal frameworks, and partnerships to combat these crimes effectively.

98. As a UN Specialised Agency, the IMO ensures maritime safety by setting standards and addressing threats like piracy. It has facilitated regional cooperation to combat piracy, with a focus on key areas like the South China Sea and Somali waters specifically. IMO's initiatives include the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, and the International Ship and Port Facility Security Code (2002), and resolution A.1025(26)[36] on the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships enhancing safety and preventing terrorism and other crimes at sea. It also tracks and publishes piracy incidents, distinguishing between piracy and armed robbery, helping improve global maritime security.

99. Among other IOs, NATO has been involved in the fight against maritime piracy, with the authorization of the UNSC acting under Chapter VII of the Charter of the United Nations, notably in the Gulf of Aden and the surrounding area off the coast of Somalia. Between 2009 and 2016 NATO conducted Operation Ocean Shield[37] to combat piracy in the region.

100. The Rapporteur has found that although international regulation is necessary, it is also appropriate to consider regional approaches to addressing certain global challenges, such as maritime safety in general, and piracy and armed robbery at sea in particular.[38]

Regional and Subregional Practice

- *African Region*

[36] IMO, Assembly resolution A.1025(26) of 2 December 2009, <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/A.1025.pdf> accessed on 14 August 2024.
[37] NATO, "Counter-piracy operations (2008–2016)", 19 May 2022, <https://www.nato.int/cps/en/natohq/topics48815.htm> accessed on 14 August 2024.
[38] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

101. With respect to regional and subregional approaches to combating piracy and armed robbery at sea, the Special Rapporteur has studied the practice of regional and subregional organizations in Africa, Asia, Europe, the Americas and Oceania.

102. The rapporteur noted that Africa, particularly the Gulf of Guinea and the Indian Ocean off the coast of Somalia, has been the most affected by piracy and armed robbery at sea.[39] The UNSC Resolution 2039[40] was unanimously adopted, urging the States in the Gulf of Guinea to develop a regional anti-piracy strategy. In 2014, the African Union adopted the African Integrated Strategy for the Seas and Oceans (2050).

103. The Lomé Charter is a non-legally binding instrument aimed at improving maritime security and cooperation among African states. It is not yet in force. It encourages efforts to combat piracy and other illegal activities at sea through information exchange, coordination, and strengthening the capacities of African states. Additionally, it promotes the development of the blue economy, offering alternative economic opportunities to reduce incentives for piracy. The charter remains unenforced but sets the groundwork for harmonising national laws on piracy and fostering international collaboration. Prior to the Lomé Charter, Africa had adopted other instruments concerning maritime safety, such as the African Maritime Transport Charter. These efforts, including initiatives by Economic Community of West African States (ECOWAS) and Economic Community of Central African States (ECCAS), focus on combating maritime crimes like piracy through regional cooperation. Organisations like Southern African Development Community (SADC) and the East African Community have also prioritised harmonising laws to facilitate extradition and prosecutions related to piracy. Cooperation between states and international bodies remains central to these efforts.

104. The Djibouti Code of Conduct is another legal instrument that targets piracy and armed robbery in the Horn of Africa especially in the Gulf of Aden and the western Indian Ocean. Though non-legally binding, the code promotes cooperation through national maritime committees and international collaboration to tackle illegal activities such as human trafficking

[39] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.
[40] UN Security Council Resolution 2039 (2012), Document No. S/RES/2039 (2012).

and illegal fishing. The Jeddah Amendment to the Djibouti Code of Conduct of 2017 further expanded its scope to address transnational maritime crimes, with states encouraged to share information, apprehend offenders, and support victims, emphasising the need for a cooperative legal framework.

105. The Yaoundé Code of Conduct is a regional framework established to combat piracy, armed robbery at sea, and other maritime crimes in West and Central Africa, particularly in the Gulf of Guinea. Adopted in 2013, it emphasizes cooperation among African states through enhanced coordination at both regional and national levels. The Code is supported by the Yaoundé Architecture, a four-tier system involving political, operational, and security institutions, which includes centres for maritime security. Although non-binding, it facilitates joint patrols, harmonization of legal frameworks, and regional maritime surveillance, aiming to bolster security and economic stability in the region.

106. Additionally, the Rapporteur highlighted more regional exercises that deals with maritime safety, such as Interregional Coordination Centre in Yaoundé, the Regional Coordination Centre for Maritime Security in Central Africa (CRESMAC) in the Congo, and the Regional Centre for Maritime Security in West Africa (CRESMAO) headquartered in Abidjan.[41]

- *Asian Region*

107. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia is a legally binding international agreement concluded in 2004 by 16 Asian countries. It aims to promote maritime safety through regional cooperation in fighting piracy and armed robbery at sea. The agreement facilitates information sharing, mutual legal assistance, and capacity-building among the contracting parties, helping to coordinate efforts to prevent and respond to criminal activities at sea. The associated Information Sharing Centre, based in Singapore, plays a key role in real-time data collection and regional coordination for maritime safety. The agreement encourages real-time information sharing on incidents, enabling rapid

[41] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

responses to piracy. Training sessions, exercises, and workshops are held to enhance the capabilities of the contracting parties, including training maritime security forces.

108. Regional and international organisations, such as the IMO and the Association of Southeast Asian Nations (ASEAN)[42], work closely with the Information Sharing Centre to bolster maritime security. Various initiatives and dialogues have also been established to promote regional cooperation, including naval patrols and joint exercises. The agreement is open to non-Asian states and strengthens maritime safety through cooperation, capacity-building, and the sharing of best practices.

109. The Rapporteur highlighted additional initiatives to combat piracy within the Asian region, such as International Maritime Bureau (Kuala Lumpur) and ASEAN code of conduct on piracy, Indian Ocean Naval Symposium. He concluded that cooperation within the Asian region has been strengthened through communication, including the sharing of information and best practices, and through capacity-building, and also serves as a vehicle for receiving external assistance.[43]

- *European region*

110. Europe has established itself as a significant global actor in maritime security through its strategies and international cooperation. Despite its waters being relatively safe, European-flagged ships have been targeted by pirates in high-risk zones. Over the past three decades, Europe has focused on combating piracy in Africa's Gulf of Guinea and Somalia's Indian Ocean waters, utilising naval patrols, private security, and judicial reforms. The Maritime Information Cooperation and Awareness Center (MICA) in France plays a crucial role in tracking piracy globally, and Europe has implemented mechanisms like the Maritime Domain Awareness for Trade in the Gulf of Guinea to enhance maritime safety.

[42] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.
[43] ibid

111. The European Union has adopted regulations and launched initiatives, such as Operation Atalanta, aimed at combating piracy off Somalia's coast. Cooperation with global actors like the IMO and the UN supports these efforts. The EU also works on capacity-building in piracy-vulnerable countries and strengthens maritime security through regulations on port security and maritime surveillance. Additionally, bilateral and multilateral partnerships between European and African nations bolster anti-piracy measures, contributing to safer maritime navigation in key regions like the Gulf of Guinea.

- *The Americas and Oceania*

112. In the Americas, maritime piracy is not as severe as in regions like Southeast Asia or Africa, but there are concerns, particularly in the Caribbean and parts of Latin America. In the Caribbean, piracy is often related to armed robbery at sea, mainly involving small pleasure crafts or fishing boats. Additionally, some coastal areas in South and Central America, like the Gulf of Mexico, face piracy involving cargo or fuel theft. North America, including the United States and Canada, has established agencies like the Coast Guard to strengthen maritime safety, and countries in the region cooperate through agreements such as the Caribbean Community (CARICOM) Maritime and Airspace Security Cooperation Agreement of 2008 to address maritime crime.

113. The Rapporteur notes that piracy is not as widespread in Oceania but the region still faces maritime safety challenges, especially in the South Pacific.[44] Incidents of armed robbery at sea mainly affect small fishing boats. Due to Oceania's geography, with its many scattered islands, navigation safety is a significant concern. Island nations work together, along with regional organisations like the Pacific Islands Forum, to address these issues. They focus on maritime safety, resource management, and adapting to the impacts of climate change, ensuring the sustainable use of their vast waters.

[44] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

114. With respect to bilateral and multilateral or multinational practices, the rapporteur mentioned various international and regional agreements on the topic apart from the aforementioned, including:

a. UNCLOS, Convention on the International Regulations for Preventing Collisions at Sea, 1972
b. the International Convention for the Safety of Life at Sea, 1974 and the associated International Code for the Security of Ships and of Port Facilities
c. the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
d. the United Nations Convention against Transnational Organized Crime (Organized Crime Convention), 2000.

The Special Rapporteur proposed four Draft Articles in their second Report[45]:

a. On General Obligations
b. On Obligation of prevention
c. On Criminalisation under national law
d. On the establishment of national jurisdiction

115. The Rapporteur has found that cooperation under Article 100 of the UNCLOS can take various forms, including bilateral, regional, and multinational efforts. He noted that such cooperation has significantly reduced piracy and armed robbery at sea, with regional regulations being crucial. The effectiveness of these efforts depends on harmonising national laws with international rules. In Africa, non-binding codes of conduct face implementation challenges, while Asia has adopted a legally binding agreement to strengthen regional cooperation. Developed countries like those in Europe and the United States support affected regions by providing resources, expertise, and operational capacity.

[45] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

C. Consideration of the Topic at the Seventy-fifth Session (2024)

116. At its seventy-fifth session (2024), the Commission had before it the second report of the Special Rapporteur on the topic and the Memorandum prepared by the Secretariat. ILC Members praised the Special Rapporteur's second report, acknowledging its depth in addressing international and regional cooperation on piracy and armed robbery at sea. They appreciated the Secretariat's memorandum and emphasised the importance of using UNCLOS as a foundational reference. Some members noted that the Convention does not explicitly cover armed robbery at sea, leaving room for the application of general international law. The need for effective regulations to safeguard the freedom of the high seas against piracy was also highlighted, alongside the importance of international cooperation and harmonising national laws with global frameworks.

117. Members suggested that future reports should better link practice with proposed Draft Articles.[46] They stressed caution in interpreting Security Council resolutions as deviations from the Convention's norms. The need for a detailed study of international law on piracy and armed robbery was raised, with some members suggesting that distinct approaches are necessary for the two crimes. They proposed creating separate articles for each and advocated for a roadmap to guide future work on the topic**.**

118. At the 3681st meeting of the Drafting Committee on 10 July 2024, the Commission was informed that Mr. Yacouba Cissé had resigned as Special Rapporteur for the topic and Mr. Louis Savadogo was appointed as Special Rapporteur for the topic at its 3701st meeting, on 2 August 2024.

119. Article 4 which deals with General obligations, is the only Draft Article presented at the seventy-fifth session that has been provisionally adopted by the Drafting Committee.[47] At the session, ILC Members emphasised the importance of deciding the final form of the

[46] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 59 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.
[47] ILC, Report of the Drafting Committee, Document No. A/CN.4/L.1000, 31 May 2024.

Commission's work on the topic. Some supported continuing with Draft Articles as a basis for a binding instrument for States. Others suggested creating guidelines to harmonise laws and identify gaps. There was also a proposal to wait for the Special Rapporteur's third report before making further decisions.

120. In his concluding remarks, the Special Rapporteur recalled that his first report showed that State practice was not general, constant or uniform, which had led him to conclude that a work of codification was not possible in the current topic. He opined that the work on the topic was about advancing the law for combating piracy without fundamentally changing it.[48]

Text of the Draft Articles Presented in the Second Report of the Special Rapporteur (2024)[49]

Article 4

General obligations

1. Each State has the obligation to cooperate to the fullest possible extent in the prevention and repression of piracy on the high seas or in any other place outside the jurisdiction of a State.

2. Each State undertakes to prevent and to repress piracy and armed robbery at sea, which are crimes under international law, whether or not committed in time of armed conflict.

3. No circumstances of any kind whatsoever may be invoked as a justification of piracy or armed robbery at sea.

Article 5

Obligation of prevention

Each State undertakes to prevent and to repress piracy and armed robbery at sea, in conformity with international law, through:

(a) Effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction and on the high seas; and

[48] Ibid (n. 14).

[49] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.

(b) Cooperation with other States, competent intergovernmental organizations, and, as appropriate, other organizations or non-State actors with an interest in the safety of maritime navigation.

Article 6

Criminalization under national law

1. Each State shall take the necessary measures to ensure that piracy and armed robbery at sea constitute criminal offences.

2. Each State shall take the necessary measures to ensure that the following acts are criminal offences:

(a) Committing acts of piracy or armed robbery at sea;

(b) Attempting to commit such crimes; and

(c) Ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such crimes.

3. Each State shall also take the necessary measures to ensure that financiers, sponsors, superiors or other persons giving orders are criminally responsible for acts of piracy and armed robbery at sea committed by their subordinates.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this Draft Article was committed pursuant to an order of a Government, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this Draft Article was committed by a person performing an official function is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this Draft Article shall not be subject to any statute of limitations and that they shall be punishable by appropriate penalties, taking into account their grave nature.

Article 7

Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present Draft Articles in the following cases:

(a) When the offence is committed in a territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present Draft Articles in cases where the alleged offender is present in a territory under its jurisdiction, and it does not extradite or surrender the person in accordance with the present Draft Articles.

3. The present Draft Articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Summary of Debate on Draft Articles Presented at the Commission at its Seventy-fifth Session (2024)[50]

Summary of Draft Article 4 Debates

121. Members supported the inclusion of a provision outlining States' general obligations regarding piracy and armed robbery at sea, with some suggesting closer alignment with the UNCLOS. There was uncertainty about whether the obligation to cooperate applied equally to both crimes, with some members recommending a focus solely on piracy. Clarification was requested on the specific areas and forms of cooperation required. Members questioned the legal basis for including an obligation to repress piracy and armed robbery at sea, especially for coastal States lacking capacity. Concerns were also raised about labelling piracy and armed robbery as international crimes and linking them to armed conflict.[51] Some members expressed

[50] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 59 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.

[51] ibid.

caution regarding the prohibition of justifications for these crimes, noting potential conflicts with national legislation.

Summary of Draft Article 5 Debates

122. Members expressed support for Draft Article 5 but noted a need for clarity in distinguishing between prevention and repression of piracy, as both were discussed under a single title. They also highlighted that the obligation of prevention differs between piracy and armed robbery at sea due to varying jurisdictional and legal frameworks. Concerns were raised about preventive measures potentially infringing on principles of high seas freedom and exclusive flag State jurisdiction. Cooperation with international organisations was welcomed, though members questioned the inclusion of non-State actors and requested further explanation regarding their role.[52]

Summary of Draft Article 6 Debates

123. Members supported harmonizing national laws for the criminalization of piracy and armed robbery at sea but noted that the UNCLOS does not mandate such criminalization.[53] They appreciated the inclusion of inciting, facilitating, and inchoate offences but requested clearer definitions of the criminal acts. Concerns were raised about the inclusion of acts committed under government orders, as piracy and armed robbery are understood to be for private ends. Additionally, members questioned the proposal to exclude piracy and armed robbery from statutes of limitations, doubting its alignment with State practices.

Summary of Draft Article 7 Debates

124. Members supported establishing national jurisdiction for piracy and armed robbery at sea but suggested separate provisions for each crime. They noted that the UNCLOS does not obligate States to establish jurisdiction for piracy, only authorizing it after arrests. Concerns were raised about multiple claims to jurisdiction, with suggestions for an order of preference. Some members found the inclusion of stateless residents problematic, recommending a clearer focus on the

[52] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 59 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.
[53] ibid

country of residence.[54] Doubts were also expressed about the universal jurisdiction regime for armed robbery, questioning its alignment with customary international law.

D. Present Status and Future Work

125. In his Second Report, the Rapporteur notified that he plans to conduct a detailed study of the doctrine on different issues relating to the prevention and repression of piracy and armed robbery at sea.[55] However, at the seventy-fifth session of the ILC, the members raised concerns as to the study of the doctrines in the future and believed that a theme-based analysis should be conducted instead. For the Special Rapporteur's third report on the topic[56], the following possible themes have been suggested and highlighted by the ILC members:

i. criminal law aspects of the topic, including the applicability of universal jurisdiction;
ii. police cooperation and mutual legal assistance;
iii. root causes of piracy and armed robbery at sea;
iv. repression of those crimes by members of armed forces or by private military contractors;
v. the consequences of technological developments in the fight against piracy and armed robbery at sea;
vi. humanitarian aspects including the assistance, compensation and repatriation of victims;
vii. the right to conduct hot pursuit across maritime zones; and
viii. the issue of the loss of flag.

It was noted and made clear that issues related to evidence admissibility and penalty imposition were considered beyond the scope of the topic.

[54] ibid
[55] ILC, Second report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770, 4 March 2024.
[56] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (advanced version of 12 August 2024) 59 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.

E. Observations and Comments of the AALCO Secretariat

126. Member States of AALCO have generally welcomed the inclusion of the topic in the long-term programme of work of the ILC. In the last ILC session, there were 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.[57] Currently, suggestions have been made at the seventy-fifth ILC Session for a change of approach from source-based to theme-based, and this is likely to be reflected in the Special Rapporteur's Third Report.

127. It is requested that the AALCO Member States deliberate upon legislative means that can actively curb maritime piracy and armed robbery at the high seas, which is an issue that many States in the Afro-Asian region face. It is recommended that future deliberations may include state positions on the applicability of universal jurisdiction on the criminal law aspects, mutual legal assistance and regional and international cooperation, assistance, compensation and repatriation of victims.

128. The AALCO Secretariat congratulates Malaysia, the Republic of Mauritius, the Sultanate of Oman, the State of Qatar, Singapore, the Republic of Türkiye, the Republic of Korea and the Socialist Republic of Vietnam for putting forward their state practice on piracy and armed robbery on the high seas before the ILC. As the Afro-Asian region has paved the way for regional and bilateral cooperation on curbing piracy and armed robbery, the Secretariat recommends that the views of other Member States on the topic should be adequately represented at the deliberations. Thus, the Secretariat humbly requests Member States to put forward their views before the ILC before the release of the Special Rapporteur's Third Report on the topic.

[57] 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.

V. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Background

129. The International Law Commission in 2007 decided to include the topic "Immunity of State Officials from foreign criminal jurisdiction" in its programme of work at its fifty-ninth session[58]. Mr. Roman A. Kolodkin was appointed as Special Rapporteur for the topic.[59] At this session, the Commission requested the Secretariat to prepare a background study on the topic and the same was made available to the Commission at its sixtieth session in 2008[60]. Mr. Kolodkin, the Special Rapporteur submitted three reports, the preliminary report of which was considered by the Commission at its sixtieth session in 2008 and the second and third reports were considered at the sixty-third session held in 2011.[61] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[62]

130. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission[63]. The Special Rapporteur submitted eight reports.[64] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, her seventh report during the seventy-first session (2019), and her eighth report during the seventy-second session (2021).[65]

[58] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 70 <https://legal.un.org/ilc/reports/2024/englis h /a_79_10_advance.pdf> accessed 15 August 2024.
[59] Ibid 70.
[60] Ibid 70.
[61] Ibid 70.
[62] Ibid 70.
[63] Ibid 70.
[64] Ibid 70.
[65] Ibid 70.

131. At its seventy-third session (2022), the Commission adopted, on first reading, the entire set of Draft Articles on the immunity of State officials from foreign criminal jurisdiction, which comprised 18 Draft Articles and a draft annex, together with commentaries thereto.[66] It decided, in accordance with articles 16 to 21 of its statute, to transmit the Draft Articles, through the Secretary-General, to Governments for comments and observations.[67] The Commission, at its seventy-fourth session (2023), appointed Mr. Claudio Grossman Guiloff as Special Rapporteur to replace Ms. Escobar Hernández, who was no longer a member of the Commission.[68]

B. Consideration of the Topic at the Seventy-fifth Session (2024)

132. At the seventy-fifth session, the Commission had before it the first report of the Special Rapporteur as well as comments and observations received from Governments.[69] The Special Rapporteur, in his first report, examined the general comments and observations received from Governments on the Draft Articles, as well as comments and observations received from Governments specifically on Draft Articles 1 to 6, as adopted on the first reading.[70] Proposals were made for consideration on the second reading in relation to Draft Articles 1 to 6 in furtherance of comments and observations made by States as well as the Sixth Committee.[71]

133. From 1 to 9 July 2024, the Commission considered the first report of the Special Rapporteur.[72] On 9 July 2024, the Commission decided to refer Draft Articles 1 to 6 to the Drafting Committee, taking into account the comments and observations made during the plenary debate[73]. On 30 July 2024, the Chair of the Drafting Committee introduced the report of the Drafting Committee where the Commission took note of Draft Articles 1, 3, 4 and 5.[74]

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[66] ibid 70.
[67] ibid 70.
[68] ibid 71.
[69] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 71 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.
[70] ibid 71.
[71] ibid 71.
[72] ibid 71.
[73] ibid 71.
[74] ibid 71.

Introduction by the Special Rapporteur of the Report

134. The Special Rapporteur highlighted the importance of the topic noting that it was a priority for the Commission since 2007 and recalled the progress achieved to date by the Commission, including the adoption at the seventy-third session (2022) of 18 Draft Articles along with the annex and commentaries at first reading[75]. The Special Rapporteur noted that the report comprised a summary of States' comments and observations on the Draft Articles adopted on first reading, his analysis of the subject matter discussed, and his reflections on said comments and observations. His first report covered Draft Articles 1 to 6.

135. The Special Rapporteur observed that the 35 States that had provided comments had largely emphasized the importance of promotion of friendly relations between States and the stability of international relations as the main guiding principles underscoring the work of the Commission on this topic. The Special Rapporteur noted the various positions of States on whether the Draft Articles reflected the codification of customary international law or the progressive development of international law highlighting paragraph 12 of the general commentary to the Draft Articles that clarified that the Draft Articles was a combination of both.

Summary of the Debate

136. Members welcomed the first report of the Special Rapporteur. Several members expressed appreciation for his efforts to respond to the concerns raised by Governments in their written comments and observations and in the Sixth Committee.[76] Approval was also expressed for the modest changes he had proposed to Draft Articles 1 to 6, as adopted in the first reading. In addition, several members expressed gratitude for the work of the two previous Special Rapporteurs for the topic, Mr. Kolodkin and Ms. Escobar Hernández, and for the compilation of comments and observations received from Governments.

[75] ibid 71.
[76] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 73 <https://legal.un.org/ilc/reports/2024/englis h /a_79_10_advance.pdf> accessed 15 August 2024.

137. Several members highlighted the importance of the topic for States and the need for the Commission to appropriately balance respect for the sovereign equality of States and ensuring accountability for the most serious crimes under international law. Others underscored the need to preserve friendly relations between States and maintain international peace and security. Several members observed that the content of Draft Article 7 would be key to the success of the Draft Articles as a whole. Several members highlighted the central role that Government comments should play in the Commission's consideration at second reading. Some members recalled comments made by States before the conclusion of the first reading and suggested that those might be relevant to the Commission's present work. Other members supported the methodology of the Special Rapporteur. The importance of giving adequate and equal consideration to the views of States from all regions was emphasized. The Commission was encouraged to take into consideration relevant views expressed by States outside the formal process of consultations by the Commission.

138. The complexities surrounding interpreting silence by those Governments that had not submitted observations was also noted, and the hope was expressed that more delegations would offer their views in the debate in the Sixth Committee on the present report. The importance of building consensus, taking into account different views of States, was underscored.

139. Members also emphasized the need to reflect new developments in State practice, jurisprudence and teachings relevant to the topic, which was especially pertinent in view of the time elapsed since the provisional adoption of Draft Articles 1 to 6 on first reading. The relevance of State practice beyond judicial decisions was also noted. Members reflected on the challenges the Commission would face as it proceeded with the second reading of the Draft Articles. The Commission was encouraged to seek solutions that could be applied generally in light of the peculiarities of the topic and the differences in the views of States. The importance of reflecting customary international law in a technical and apolitical way was highlighted by members.

Draft Article 1 (Scope of the present Draft Articles)

140. On Draft Article 1, a number of questions were raised in connection with the scope of the Draft Articles. Some members considered that definitions of "criminal jurisdiction" and "exercise of criminal jurisdiction" were necessary, at least in the commentary. Others agreed with the Special Rapporteur that such definitions were not needed. It was noted that paragraph 5 of the commentary to Draft Article 9 contained reflections on the notion of exercise of criminal jurisdiction that might be better placed in the general commentary.

141. The importance of discussing the distinction between immunity from criminal jurisdiction and immunity from other forms of jurisdiction, including civil jurisdiction and administrative jurisdiction, was raised. An alternative view was also expressed that such distinctions should be left to national legal systems.

142. A number of members supported the proposal of the Special Rapporteur to clarify the distinction between immunity and inviolability in the commentaries. It was observed that the International Court of Justice had combined discussion of the two concepts in its decisions. The view was expressed that inviolability could be seen as comprising a form of immunity from enforcement jurisdiction.

143. As regards paragraph 1 of Draft Article 1, some members suggested drafting changes. It was proposed that the text refer to "current and former" State officials to reflect that former State officials could also enjoy immunity *ratione materiae*. It was also suggested that reference be made to immunity "from the exercise of criminal jurisdiction", in particular to avoid the implication that immunity from prescriptive jurisdiction existed. However, concerns were also raised that such a change might limit the scope of the Draft Articles.

144. Members generally agreed with the Special Rapporteur that it was not necessary to modify paragraph 2. However, the inclusion in the commentary of more examples of special rules raised by States, including those relating to international conferences, international commissions and international judicial or arbitral proceedings, was recommended. It was also

suggested that the commentary explain more clearly that members of armed forces were not necessarily excluded from the scope of the Draft Articles, particularly when participating in an armed conflict. A number of members supported the inclusion of paragraph 3, as it made clear that the Draft Articles were without prejudice to the special regimes that apply to international criminal tribunals.

145. Members discussed the scope of the terms "treaty" and "agreement" in the paragraph. Several members expressed a preference for one term or the other and generally supported the consistent use of one term or the other. Some members noted that the first reading text could be interpreted as not covering all possible modalities for the establishment of international criminal tribunals; for example, the ad hoc tribunals established by the Security Council. However, it was also noted that the legal basis for such tribunals was ultimately a treaty, namely the Charter of the United Nations. Some members expressed concern that it was not clear whether hybrid and internationalized tribunals were included within the scope of the provision, and it was suggested that an express subparagraph might be necessary to that end.

Draft Article 2 (Definitions)

146. With regard to Draft Article 2, subparagraph (a), on the definition of "State official", the discussion concentrated on the use of the term "current and former State officials". Some members suggested omitting such terms to streamline the text and its application vis-à-vis Draft Article 6 on the scope of immunity *ratione materiae*. It was also proposed that the content of subparagraph (a) be moved to Draft Article 5 or Draft Article 6. Nevertheless, a number of members agreed with the proposal by the Special Rapporteur not to amend Draft Article 2, since any necessary clarification regarding the provision could be appropriately dealt with in the commentary and thus no textual change was required.

147. Regarding subparagraph (b), on the definition of "act performed in an official capacity", some members favoured keeping the text as adopted on first reading, while others expressed doubts as to whether the provision was necessary or if it would be more appropriate to

incorporate the provision into Draft Article 6. On the differences between acts performed in an official capacity, *ultra vires* acts and illegal acts, several members considered that there was still confusion on the matter and suggested further explanation in the commentary.

148. Several members discussed the relationship between the articles on responsibility of States for internationally wrongful acts and Draft Article 2, particularly in the context of attribution. It was stated that careful consideration and a detailed analysis in the commentary of the relationship and the differences between the two regimes was needed. It was highlighted that, while the connection between the two should be recognized, the differences should be clear as well. Some members proposed additional terms to be defined under Draft Article 2, such as "immunity", "criminal jurisdiction", "jurisdiction", "exercise of criminal jurisdiction", and "inviolability", while noting that appropriate explanations could also be added to the commentary instead of the provision itself. The Commission was urged to take a cautious approach when considering whether to add new definitions to Draft Article 2, in particular regarding the difference between criminal jurisdiction and exercise of criminal jurisdiction.

149. Greater clarity in the commentary was deemed necessary on the distinction between immunity and inviolability. Members cited the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* judgments to highlight this point. The view was expressed that, since Draft Article 2 dealt with definitions, the matter could be taken up when the Commission had the entire text of the Draft Articles under consideration.

150. It was also proposed that cases regarding the nationality of a State official, such as where an official may be the national of a State but serve as a State official for a different State, be clarified in the commentary. It was also proposed that issues related to status-of-forces agreements, status-of-mission agreements and the primary responsibility of the State of nationality be clarified in the commentary.

Draft Article 3 (Persons enjoying immunity *ratione personae*)

151. Members generally accepted the proposal by the Special Rapporteur not to amend Draft Article 3 and, accordingly, not to expand immunity ratione personae to State officials beyond the troika provided in Draft Article 3, i.e., Heads of State, Heads of Government and Ministers for Foreign Affairs (troika). The reasons not to expand immunity beyond the troika were broadly as follows:

- Draft Article 3 was consistent with, and reflected, settled customary international law;
- In the light of the case *Certain Questions of Mutual Assistance in Criminal Matters*, there were no legal grounds to expand the scope of the provision;
- There was nothing in recent practice that would justify the provision being amended;
- In current international law, there was no general practice, or clear and established practice, or *opinio juris*, to expand immunity ratione personae to other State officials; and
- Different countries had different regimes for their high-ranking officials and it would be challenging to establish a consistent list of high-ranking officials eligible for immunity ratione personae outside the troika.

152. Calls were made for greater nuance in the commentary regarding special cases where officials who were not formally Heads of State or Heads of Government, but de facto occupied a comparable place in national hierarchy. A view was expressed that the commentary could benefit from explaining the immunity status of acting Heads of State, Heads of Government and Ministers for Foreign Affairs, and a request was made for further details on the temporal scope of immunity *ratione personae*.

Draft Article 4 (Scope of immunity *ratione personae*)

153. Regarding Draft Article 4, a number of members generally agreed with the approach by the Special Rapporteur. With respect to paragraph 1, several members preferred retaining the expression “term of office”. While acknowledging that the expression might not accurately reflect certain situations in practice, those members considered that the issue would be better

explained in the commentary since the current text was widely used, avoided ambiguity and circumvented challenges that could be presented with the particularities of legal and institutional practices of national law. With respect to paragraph 2, a proposal was made to merge it with paragraph 1, as it would clarify the text without having an impact on the content.

154. On paragraph 3, while several members supported the proposal by the Special Rapporteur to omitting the phrase "the rules of international law concerning", others were not agreeable. Members who supported it were of the view that the proposal simplified the text without affecting its content or losing the essential legal point. It was also considered that there was no doubt that the application of immunity rules presupposed the existence of the rules of international law in that domain. The importance was underlined of using the commentary to provide such clarifications and a direct reference to the relevant rules of customary international law and treaty law related to immunity, should the Commission adopt the proposed amendment. Members who opposed the proposal were of the view that deleting the phrase would have the effect of suggesting that immunity *ratione materiae* automatically applied after the cessation of immunity *ratione personae*, which was deemed to be unfounded, in particular in relation to crimes covered by Draft Article 7.

Draft Article 5 (Persons enjoying immunity *ratione materiae*)

155. With respect to Draft Article 5, members generally supported the suggestion of the Special Rapporteur to delete the phrase "acting as such". A number of them considered that the phrase duplicated the content of Draft Articles 2, subparagraph (a), and 6, and was therefore unnecessary. Others, however, noted that use of different words from the provision could cause confusion. It was recalled that the phrase had been included in the provision to signal the distinction between immunity ratione personae and immunity *ratione materiae*.

156. Furthermore, a number of members supported the addition of the phrase "in accordance with Draft Article 6" at the end of the provision. Some members proposed instead to use broader phrasing referring to Part Three or the Draft Articles as a whole, to clarify that those provisions

also applied to the enjoyment of immunity *ratione materiae*. The view was also expressed that such a reference was not necessary.

157. A number of members proposed merging Draft Article 5 with Draft Article 6, and particularly with Draft Article 6, paragraph 1. Other members opposed such a merger. A separate provision clearly stipulating the general rule on immunity *ratione materiae* was also noted by some members.

Draft Article 6 (Scope of immunity *ratione materiae*)

158. Support was also expressed for the content of Draft Article 6. It was proposed that the phrase "in accordance with international law" be added to the end of both paragraphs 1 and 2 to reflect the applicability of Draft Article 7.

159. With respect to paragraph 3, a number of members supported the proposal of the Special Rapporteur to add the words "*ratione materiae*" to the paragraph. However, the reasons for not including the words at first reading, explained in paragraph (13) of the commentary, were noted for its omission. It was also suggested to omit the words "*ratione materiae*" from both paragraphs 2 and 3, since referring to "immunity *ratione materiae* with respect to acts performed in an official capacity" might be viewed as tautological. Members also supported the proposal of the Special Rapporteur to clarify the applicability of immunity *ratione materiae* even after the cessation of immunity ratione personae for the troika, as an act in an official capacity in the commentary.

160. Members highlighted several points to be further developed in the commentary to Draft Article 6. It was proposed that the Commission add examples of measures of constraint precluded by immunity in the commentary. It was also suggested that further explanation of the implications of the inviolability of State officials on such acts of constraint would be helpful. Clarification that immunity from criminal jurisdiction also extended to immunity from measures of execution was also requested.

Final Form of the work of the Commission

161. Members noted the various possible final outcomes of the work of the Commission on the topic and the views of States on the question. Differing views were expressed as to whether the final outcome of the Commission's work should be decided at the present stage or after the consideration of the Draft Articles on second reading. Additionally, it was suggested that clarity and consistency in the Draft Articles and the commentaries should be a priority, while simultaneously recognizing that the Draft Articles involved two types of immunity.

162. Several members expressed their support for, or openness to, a recommendation to the General Assembly to negotiate a treaty on the basis of the Draft Articles. It was noted that such an outcome would be consistent with the previous recommendations of the Commission, especially in the field of immunity. Some members observed that a treaty would be necessary to give effect to the safeguards contained in Part Four. It was also recognized that proposing a treaty would not deprive the Draft Articles of their general relevance as both evidence of State practice and of the view of the Commission itself.

163. However, several members had differing opinions. A number of members were opposed to the negotiation of a new treaty. The political feasibility of negotiating a treaty was noted given the divergent position of States on this topic. References were made to the 2004 United Nations Convention on Jurisdictional Immunities and Their Property which was yet to enter into force and the 2001 articles on responsibility of States as pointers to the complexities surrounding negotiating a new treaty. It was felt that the question of treaty making on this topic could be left to a later date and such an approach would also facilitate development of the rules in actual practice.

C. Present Status and Future Work

164. A number of members welcomed the decision of the Special Rapporteur to conduct the second reading over more than one session.[77] While the timing difficulties faced by the Special Rapporteur were recognized, a number of members expressed regret that the Commission did not have before it a report on the full set of Draft Articles[78]. Some members proposed that, in the future, the deadline for Government comments and observations should be in August or September of the year preceding second reading, to allow time for translation and reflection.[79] The Special Rapporteur was encouraged to use informal methods to advance the work of the Commission on the topic during the intersessional period.[80] The importance of keeping the whole of the Draft Articles in mind throughout the second reading was underscored[81].

Concluding Remarks by the Special Rapporteur

165. In his summary of the debate, the Special Rapporteur extended his appreciation to the members of the Commission and welcomed the fruitful debate on the topic.[82] He noted the support of some members of the Commission for his approach to the second reading and highlighted the importance for the Commission to strike a balance in reaching a conclusion on its work on the topic. The Special Rapporteur shared his intention to follow the normal practice on second reading of refining the text of the Draft Articles adopted on first reading and considering modifications only for compelling reasons, that is, either on the basis of comments submitted by States or new developments in international law relevant to the topic. With respect to comments submitted by States prior to the Commission's adoption of the Draft Articles on first reading, the Special Rapporteur clarified that those comments had not been made based on the entire set of the Draft Articles and that the two former Special Rapporteurs had already taken them into account in their respective reports. Therefore, he suggested focusing on the comments submitted

[77] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 82 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.
[78] ibid 82.
[79] ibid 82.
[80] ibid 82.
[81] ibid 82.
[82] ibid 82.

by States since 2022, both in writing and made orally at the Sixth Committee. He acknowledged that recent developments in national jurisprudence related to the topic should be considered as appropriate.

166. The Special Rapporteur expressed his agreement with the view of members on the geographical diversity of State practice in the commentary adopted on first reading that the Draft Articles ought to be representative of the practice of States of all areas of the globe. He indicated that he was conducting research on the jurisprudence and the legislative and executive practice of various States, while noting that some of the developments were connected to Draft Article 7, which would be the focus of his next report. On Draft Article 7, he acknowledged comments that the provision was central to the consideration of the Commission of the topic on second reading. He stressed that the Commission would nevertheless have the opportunity to consider Draft Articles 7 to 18, as well as a complete set of revised Draft Articles and commentaries, before adopting them on second reading. In relation to the request for clarification on the distinction between progressive development and codification of international law, the Special Rapporteur cited paragraph (12) of the general commentary to the Draft Articles.

167. Lastly, the Special Rapporteur reiterated that the Draft Articles should have a unified outcome and that he saw merit in recommending that they be used as the basis for a treaty.

D. Observations and Comments by the AALCO Secretariat

168. The AALCO Secretariat places on record its appreciation for the Commission for its in-depth engagement with the topic since 2007. It notes the diligent efforts of Special Rapporteur Mr. Claudio Grossman Guiloff in preparing the first report that was subject to deliberations at the seventy-fifth session of the Commission. The Secretariat on this occasion also commends the efforts of previous Rapporteurs on this topic which have helped in refining our collective understanding of the complexities surrounding this topic.

169. The AALCO Secretariat notes the significance of this topic for the codification and progressive development of international law. While developments on this topic have taken place

through international judicial decisions, the Secretariat is of the view that it is essential to understand the views of States on the nuances of this topic. In this regard, consensus building should the basis of a future outcome on this topic and all efforts should be made to harmonize divergent views keeping in mind the views and aspirations of the Afro-Asian region in particular.

170. The AALCO Secretariat takes note of Chapter III of the advance report for the seventy-fifth session[83] which mentions the topic "Immunity of State Officials from foreign criminal jurisdiction" as one the topics, the Commission is expecting further comments and observations from Governments, by 15 November 2024. In this regard, the AALCO Secretariat encourages Member States to submit their views on Draft Articles 7 to 18, the draft annex of the Draft Articles as adopted on first reading at its seventy-third session (2022), and the commentaries thereto to the Commission in accordance with the timeline requested by the Commission for further progress on this topic.

[83] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 16 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 15 August 2024.

VI. SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

A. Background

171. At its sixty-ninth session (2017), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur. The General Assembly, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work. The Special Rapporteur submitted five reports from 2017 to 2022. The Commission also had before it, at the seventy-first session (2019), a memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic. Following the debate on each report, the Commission decided to refer the proposals for Draft Articles made by the Special Rapporteur to the Drafting Committee. The Commission heard interim reports and statements from the successive Chairs of the Drafting Committee on succession of States in respect of State responsibility at the sixty-ninth to seventy-third sessions (2017 to 2019, 2021 and 2022).

172. 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. 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. As a result of the change of the proposed 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. 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 its Chair.

B. Consideration of the Topic at the Seventy-fifth session

173. At the sixty-fifth session, the Commission re-established the working group, with Mr. August Reinisch as Chair. The working group held two meetings, on 20 May and 8 July 2024. At its 3694th meeting, on 26 July 2024, the Commission considered and took note of the report of the Working Group.[84] At the same meeting, the Commission, having considered the recommendations of the Working Group:

(a) decided to establish at its seventy-sixth session (2025) a Working Group on succession of States in respect of State responsibility for the purpose of drafting a report that would bring the work of the Commission on the topic to an end;

(b) decided that the report would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work; and

(c) decided to appoint Mr. Bimal N. Patel as Chair of the Working Group to be established at the seventy-sixth session of the Commission and recommended that the Chair be encouraged to prepare the draft report of the Working Group in advance of the next session, in close collaboration with interested members.

C. Report of the Working Group

174. The International Law Commission, at its 3621st meeting on 10 May 2023, decided to establish a Working Group on the topic "Succession of States in respect of State responsibility" and appointed Mr. August Reinisch as its Chair. The purpose of the Working Group was to consider the future of the work of the Commission on the topic, as the Special Rapporteur was no longer with the Commission. The Working Group held four meetings at the seventy-fourth session (2023). The Working Group decided to recommend that the Commission continue its

[84] UNGA, 'Succession of States in respect of State responsibility - Report of the Working Group' (12 July 2024) UN Doc. A/CN.4/L.1003.

consideration of the topic, while refraining, at that stage, from proceeding with the appointment of a new Special Rapporteur. It further recommended that the Working Group be re-established at the seventy-fifth session (2024) of the Commission, with the same open-ended composition, with a view to undertaking further reflection on the way forward for the topic and making a recommendation thereon, taking into account the views expressed, and the options identified, in the Working Group.

175. At its 3648th meeting, on 27 July 2023, the Commission took note of the oral report of the Chair of the Working Group, including the recommendations contained therein. On 20 December 2023, the Chair of the Working Group convened an online meeting of interested members of the Commission in order to discuss issues to be addressed by the Working Group. During that inter-sessional meeting, a number of issues were identified as requiring further reflection by the Commission. One prominent question was whether there existed sufficient State practice in the field and, in particular, whether the State practice identified by the Commission so far was sufficiently wide and representative in order to draw any conclusions about the existence of applicable rules of customary international law. In view of the usefulness of negotiated solutions among the affected States in any given situation, the question was raised as to whether such specifically tailored solutions could form the basis for the identification of rules of customary international law.

176. Members recognized that it might be necessary to develop more fully the necessity and possibility of distinguishing between a transfer of responsibility as such, and a transfer of rights and obligations arising from the responsibility of a predecessor State. The question appeared to be particularly important in view of what could be perceived as differences in the provisions considered by the Commission thus far with regard to rights, on the one hand, and obligations, on the other. It seemed appropriate to distinguish more clearly between what the Commission might consider to be codification and what would be progressive development of international law in the field of State succession with regard to State responsibility.

177. It also appeared necessary to devote further thought to the question of the extent to which a parallel might be drawn between the rules concerning succession to State debts and the

question of succession in respect of State responsibility. It seemed necessary to devote more attention to the principle of unjust enrichment. It also appeared that some of the Draft Guidelines provisionally adopted by the Drafting Committee required further clarification and harmonization. Finally, further reflection on the outcome of the Commission's work was considered necessary by the interested members, in particular, as regards the possibility of the Commission opting to prepare a final report covering the topic.

178. Further to the Commission's recommendation, adopted at its seventy-fourth session, a working paper was prepared by the Chair of the Working Group, with the assistance of interested members. It contained a procedural summary of the work on the topic to date, together with an outline of the issues to be addressed by the Working Group as identified in the inter-sessional meeting, as well as an indication of the options open to the Commission for its future work on the topic.

D. Work Undertaken at the Sixty-fifth Session

179. The Working Group on succession of States in respect of State responsibility was reconvened at the 3658th meeting, held on 29 April 2024. The Working Group held two meetings at the present session of the Commission, on 20 May 2024 and 8 July 2024, respectively. It had before it the working paper prepared by the Chair of the Working Group. The Working Group considered and approved its report at its second meeting.

180. The Working Group engaged in a discussion of the difficulties that would face the Commission in its further consideration of the topic, especially those identified in the working paper. Members highlighted the overall complexity and sensitivity of the topic. Many members recalled the lack of State practice relevant to the topic, which impeded the identification of rules of customary international law. A number of them noted that such State practice as had been identified was not consistent, and several noted that the practice from various regions of the world, particularly with regard to African and Asian States, had been insufficiently reflected. It was also recalled that much of the practice identified took the form of treaties between the States concerned, and members pointed to the difficulty in establishing the relationship between such

practice and rules of customary international law. Several members suggested that continuing study of the topic would require thorough consideration of the widest possible range of State practice.

181. Members also recalled a number of outstanding substantive aspects of the topic that the Commission had not yet addressed fully. Those included the questions of: whether it was responsibility or the rights and obligations that arose therefrom that would be transferred upon a succession of States; whether a parallel with cases of succession to State debts was appropriate; and the relationships between both the topic and the law concerning unjust enrichment, and the rules governing the legal consequences of internationally wrongful acts. It was noted that several delegations in the Sixth Committee had called on the Commission to distinguish more clearly between instances of codification and progressive development in its work on the topic. It was further advised that the Commission would need to approach such work cautiously.

182. The importance of ensuring consistency with the prior work of the Commission, in particular that on other aspects of the succession of States and the articles on responsibility of States for internationally wrongful acts, was emphasized. The need to assess the policy justifications for various legal solutions and the achievability of a universally applicable outcome was also raised. In the light of the issues and difficulties discussed, the Working Group also considered various possible ways forward to complete the work of the Commission on the topic. Members recalled that several States had expressed an interest in the conclusion of the work in a timely manner. A number of possibilities were considered.

183. One proposal was for the Commission to establish a working group to proceed with the further substantive study of the topic. It was noted that a number of delegations in the Sixth Committee had expressed interest in the continuation of work. Several members highlighted the possibility of additional research being undertaken into the practice of States, with a focus on those in Africa and Asia. It was also proposed that such a working group could examine outstanding substantive aspects of the topic. The report could also include a comprehensive and multilingual bibliography for the topic.

184. Another possibility raised was the establishment of a working group with the mandate to prepare a procedural report that could bring the work of the Commission to a close at its next session. It was suggested that the report could contain a detailed explanation of why the Commission was ending its work on the topic by surveying the difficulties encountered and the issues the Commission was not in a position to study. Several members expressed support for such outcome.

185. Members further discussed the incorporation of the provisions already worked out by the Commission and the Drafting Committee in the report of a possible working group. It was proposed that the Draft Guidelines could be simplified and incorporated into the report of such a working group, or simply reproduced in an annex. However, the need to treat the Draft Guidelines with care to avoid confusion as to how the Commission interpreted their status was highlighted.

186. It was noted that the Commission could also continue its work on the topic by proceeding to the appointment of a new special rapporteur. Such possibility did not attract significant support, as members considered that the time and resources of the Commission would be more efficiently used by undertaking work on other topics. It was also noted that the Commission could opt to discontinue its work simply by deciding not to pursue further its work on the topic and reflect such decision in its report. Such an option was not supported by members, many of whom emphasized the need to acknowledge and take into account the work achieved by the Commission and the former Special Rapporteur, Mr. Pavel Šturma, thus far.

187. In summing up the discussion in the Working Group, the Chair observed that the prevailing tendency of its members was in favour of a summary report that would describe the difficulties faced in the work on the topic but would not go into their substance, and would be prepared with a view to concluding the work on the topic at the next session of the Commission.

E. Future Programme of Work

188. In light of its discussions, the Working Group recommends that the Commission:

(a) decide to establish at its seventy-sixth session a Working Group on succession of States in respect of State responsibility for the purpose of drafting a report that would bring the work of the Commission on the topic to an end;

(b) decide that the report would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work; and

(c) decide that a Chair be appointed for the Working Group to be established at the seventy-sixth session of the Commission and that the Chair be encouraged to prepare the draft report of the Working Group in advance of the next session, in close collaboration with interested members.

189. After discussion of the options, the Chair of the Working Group observed that the prevailing view of its members was in favour of a summary report that would describe the difficulties faced in the work on the topic without going into its substance and that would be prepared with a view to concluding the work on the topic at the following session of the Commission. The Commission decided to establish a Working Group at the seventy-sixth session for the purpose of drafting a report that would bring the work of the Commission on the topic to an end and to appoint Mr. Bimal N. Patel as its Chair.

F. Observations and Comments of the AALCO Secretariat

190. As noted in the report of the Working Group, in response to the challenges encountered, the Working Group explored various possible approaches to complete the Commission's work on the topic. Following a discussion of the options with the members, the Chair of the Working Group noted that the majority of its members favoured a summary report. This report would outline the difficulties encountered in the work without delving into the details of the subject and would be aimed at concluding the work in the Commission's next session. Hence, as the Commission prepares to draw a conclusion to the topic of "Succession of States in respect of

State responsibility" after many fruitful reports of the Special Rapporteur, the Secretariat suggests the Member States to indulge in final discussions on this issue with a view to conclude this topic and to await the final report of the Working Group.

VII. SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

A. Background

191. At its seventy-first session (2019), the International Law Commission decided to include the topic "Sea-level rise in relation to international law" in its programme of work.[85] The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.[86] The Study Group discussed its composition, its proposed calendar and programme of work, and its methods of work[87]. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[88]

192. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic, which had been issued together with a preliminary bibliography.[89] At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[90] At its seventy-third session (2022), the Commission reconstituted the Study Group, and considered the second issues paper on the topic, which had been issued together with a preliminary bibliography.[91] At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at the seventy-third session.[92] At its seventy-fourth session (2023), the Commission reconstituted the Study Group, and considered the additional paper to the first issues paper on the topic, which had been issued together with a bibliography.[93] At its 3655th meeting, on 3 August 2023, the

[85] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 103 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 16 August 2024.
[86] ibid 103.
[87] ibid 103.
[88] ibid 103.
[89] ibid 103.
[90] ibid 103.
[91] ibid 103.
[92] ibid 103.
[93] ibid 103.

Commission considered and adopted the report of the Study Group on its work at the seventy-fourth session.[94]

B. Consideration of the Topic at the Seventy-fifth Session (2024)

193. At the seventy-fifth session, the Commission reconstituted the Study Group on sea level rise in relation to international law, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria.[95] In accordance with the agreed programme of work and methods of work, the Study Group had before it the additional paper to the second issues paper on the topic prepared by Ms. Galvão Teles and Mr. Ruda Santolaria.[96] A selected bibliography, prepared in consultation with members of the Study Group, was issued as an addendum to the additional paper[97]. The Study Group, which at the present session comprised 27 members, held 10 meetings, from 30 April to 9 May and from 2 to 8 July 2024[98].

194. At its 3694th meeting, on 26 July 2024, the Co-Chairs, Ms. Galvão Teles and Mr. Ruda Santolaria, introduced the report of the Study Group.[99] At the same meeting, the Commission took note of the report.[100] At its 3698th meeting, on 30 July 2024, the Commission considered and adopted the report of the Study Group on its work at the present session.[101]

Introduction of the additional paper to the second issues paper by the Co-Chairs

195. At the first meeting of the Study Group, held on 30 April 2024, the Co-Chair (Ms. Galvão Teles) noted that the purpose of the six meetings scheduled in the first part of the session was to

[94] ibid 103.
[95] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 103 <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 16 August 2024.
[96] ibid 104.
[97] ibid 104.
[98] ibid 104.
[99] ibid 104.
[100] ibid 104.
[101] ibid 104.

allow for an exchange of views on the additional paper to the second issues paper and any other matters related to the two subtopics under consideration. The outcome of the first part of the session would be a draft interim report of the Study Group, to be considered and complemented during the second part of the session. The draft report would then be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission.

196. At the first meeting of the Study Group, the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) made a general presentation of the additional paper to the second issues paper. It was noted that the topic "Sea-level rise in relation to international law" had generated increasing interest among members of the Commission and Member States. It was noted that States most affected by the phenomenon of sea-level rise were particularly active in highlighting the necessity of addressing the various challenges on this front and identifying legal solutions. Attention in this regard was drawn to the 2023 Pacific Islands Forum Declaration (Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change related Sea-level Rise) adopted by the leaders of the States and territories of the Pacific Islands Forum on 9 November 2023.

197. It was observed that given the seriousness of the issue, the Security Council, the General Assembly and various United Nations bodies had had addressed the topic of sea-level rise apart from the ILC. The topic was also under the consideration of international courts and tribunals like the International Court of Justice, the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights. The Co-Chair (Ms. Oral) presented the Study Group with an overview of events addressing the issue of sea level rise that had taken place in 2023. In particular, she recalled the meeting of the Security Council on 14 February 2023 on the subject of "Sea-level rise: implications for international peace and security", under the agenda item "Threats to international peace and security" observing that the Co-Chair of the Study Group, Mr. Aurescu had briefed the Council on the progress of the Commission's work.

198. The work of the General Assembly was also observed in this regard, with the Co-Chair (Ms. Oral) noting that an informal plenary meeting of the General Assembly on existential

threats of sea-level rise amidst the climate crisis was held on 3 November 2023. The General Assembly also plans to convene a high-level plenary meeting on 25 September 2024 to address existential threats posed by sea-level rise. The Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) indicated that the purpose of the additional paper was to supplement and develop the content of the second issues paper (2022) on the basis of suggestions and proposals made during the debate on that paper during the seventy-third session of the Commission.

199. Introducing the subtopic on statehood, the Co-Chair (Mr. Ruda Santolaria) reiterated that the phenomenon of sea-level rise posed existential threats to low-lying coastal States, archipelagic States, small island States and small island developing States on account of the possibility of their land surface getting totally or partially submerged or rendered uninhabitable. The additional paper analysed the following 2 subtopics:

- **The configuration of the State as a subject of international law and the continuity of its existence; scenarios linked to statehood in the context of sea-level rise and the right of the State to provide for its preservation; and eventual alternatives to face the phenomenon in relation to statehood.**

- **The protection of persons affected by sea-level rise.**

Summary of the exchange of views

200. Members of the Study Group expressed gratitude to the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) for a very well-documented and structured additional paper. Members of the Study Group reiterated the topic's relevance and importance for the international community in general and States directly affected by sea-level rise in particular. The urgency and gravity of the issue was also emphasized by some members noting that the phenomenon affected persons in vulnerable situations, as well as having the effect of placing persons in such situations. It was also highlighted that sea-level rise was a direct consequence of anthropogenic global climate change.

(a) Reflections on Statehood

- **General Reflections**

201. In introducing Part One of the additional paper, the Co-Chair (Mr. Ruda Santolaria) observed that while climate change-induced sea-level rise was a global phenomenon, it posed a particularly serious threat to small island developing States, whose land surface might be totally or partially submerged or rendered uninhabitable by rising sea levelsIn his view, there existed a strong presumption of continuity in the case of States whose land surface might be totally or partially submerged or rendered uninhabitable by rising sea-levels caused by climate change. Accordingly, the continuity of statehood was linked to security, stability, certainty and predictability, as well as to considerations of equity and justice, and, as such, served as a manifestation of the applicability of the principles of self-determination, protection of the territorial integrity of the State, sovereign equality of States, permanent sovereignty of States over their natural resources, the maintenance of international peace and security, and the stability of international relations and international cooperation.

202. Members of the Study Group discussed the central question concerning the continuity of statehood in circumstances where the land surface becomes totally or partially submerged or rendered uninhabitable by rising sea levels. They supported the approach taken by the Co-Chair noting that the conclusion drawn in the additional paper flowed from the debate held at the previous session of the Commission on the implications of sea-level rise for the law of the sea. It was also noted by some members that the protection of persons affected by sea-level rise was linked to the question of the continuation of statehood, in that the potential loss of statehood raised the spectre of statelessness. Reference was made to the 1928 Arbitral Award in the *Island of Palmas* case, which had placed emphasis not only on the rights of States and the creation of rights or entitlements, but also on duties with regard to the protection of certain key interests.

203. It was observed that the following claims exist to support the continuity of statehood including:

- that there existed an established positive international law rule on the point;
- that there could be flexibility in the application of a vague but still positive rule to address the point;
- that there existed reasons why developing international law in a certain direction would go with the grain of the legal system, particularly when invoking situations by analogy; and
- that they were taking no position on the existence or desirability of positive rules at all and were simply indicating a policy preference.

i. Creation of a State as a subject of international law and continued existence of the State

a. Distinction between the criteria for the creation of a State and those for its continuity

204. The Co-Chair (Mr. Ruda Santolaria) recalled that, when considering the legal basis for the continuation of statehood, the key reference point was article 1 of the Montevideo Convention on the Rights and Duties of States of 1933. It was noted that a distinction could be drawn between situations where the provisions of article 1 of the Montevideo Convention were applicable in order for the State to be considered a subject of international law and situations in which circumstances arose in relation to existing States in which one or more of the criteria of article 1 of the Montevideo Convention ceased to exist.

205. The Co-Chair observed that the Montevideo Convention did not address the question of the loss of statehood but included, instead, the right of each State to preserve its continued existence and independence. This position had been confirmed in the 2023 Pacific Islands Forum Declaration which presumes the continuity of statehood regardless of the impact of sea-level rise. The Study Group supported the position taken in the additional paper that the Montevideo

Convention criteria did not address the question of continuing statehood. It was suggested that a distinction could be drawn between the creation of a right and its continuation.

206. There was a view that the Montevideo Convention was not decisive on the issue of the continued existence of rights. It was observed that the object of the Montevideo Convention was the rights and duties of States, and not the question of statehood or the recognition of statehood. Thus, the issue was not whether the Convention applied to continuity of Statehood, but rather whether the Convention reflected customary international law on the continuity of statehood. State practice seemed to suggest that the Convention did not do so. A view was expressed that inhabitability of a territory does not necessarily impinge on the question of statehood as advances in science and technology can make previously uninhabitable territories habitable. Likewise, Article 121 of UNCLOS (in the law of the sea context) provides that rocks unable to sustain human habitation or economic life could on their own generate a territorial sea. Thus, there may not necessarily be connect between the habitability of a territory and the question of statehood.

207. The view was also expressed that the most important consideration was that States had the right to preserve their existence. A logical culmination of this argument was that the Montevideo Convention criteria applied only to the creation of a State and could not be applied *a contrario* to deny the continuation of a State's existence. At the same time, a view was expressed that the permanence of the situation facing States at risk because of sea-level rise could be distinguished from that of the temporary loss of territory. A similar view was expressed that the role of the recognition by other States of the continuity of statehood of a State whose land surface was submerged under the sea in part or in whole was important.

208. Reference was made to views of James Crawford, who had described statehood as being not simply a factual situation, but a legally circumscribed claim of right, specifically to the competence to govern a territory. It was also suggested that the Montevideo Convention criteria could be understood as reflecting a general requirement of effectiveness and not necessarily requiring the simultaneous fulfillment of the all the elements of statehood. The question before the Commission in the sea-level rise context was which of the two approaches to be adopted.

209. The viability of statehood also becomes an important issue in the context of sea-level rise. A view was expressed that it was important to establish criteria for the continuity of statehood in order to establish clarity where key elements of statehood ceased to exist permanently. It was noted that the application of the right of self-determination of peoples and right of each State to defend its territorial integrity and independence in the context of continuation of statehood was important since an understanding of these rights could constrain States from prematurely withdrawing recognition granted to a States whose land surface is submerged by rising sea levels.

210. The issue of consent for the continuation of statehood was also important. While consent as such is well-known concept in international law, it assumes added significance in the context of continuation of statehood in the sea-level rise context as the concept of voluntary extinction of States is practically unheard of since the adoption of the UN Charter.

b. Presumption of the continuation of Statehood

211. It was stated by the Co-Chair (Mr. Ruda Santolaria) that there existed a strong presumption of the continuity of statehood of States whose land surface could be partially or fully submerged by the sea or become uninhabitable because of sea-level rise caused by climate change. It was noted that this position was indicated in the second issues paper considered in 2022. The Study Group expressed its general support for the presumption of the continuity of statehood as the extinction of statehood would have deep implications on legal questions like statelessness, issues of marine resource management and validity of existing maritime boundaries which could lead geopolitical instability threatening international peace and security.

212. Also, international law did not envisage the possibility of the entire disappearance of international legal obligations as a consequence of anthropogenic developments for which small island developing States, in particular, held no responsibility. Terminating statehood solely because of the consequences of sea-level rise caused by climate change would be a profound injustice. The international community had a collective responsibility to support such States in preserving their territory and territorial integrity and safeguarding their people.

213. A differing view was also expressed that there was no general presumption of continuity of statehood in international law. Historically, States have ceased to exist. In the sea-level rise context, it was accordingly noted that continuity of statehood may be seen as a "presumption" and not necessarily as a "principle" as loss of statehood could be envisaged in extreme cases where both territory and population are lost. The Study Group was encouraged to stick to the narrow focus of the additional paper on the two categories of States that were vulnerable or susceptible to losing statehood because of sea-level rise. Those were the States whose land surface could be totally submerged, and the States whose land surface could be partially submerged or rendered uninhabitable by rising sea levels.

ii. Scenarios relating to statehood in the context of sea-level rise and the right of the State to provide for its preservation

214. In introducing Part One, chapter III, section B, of the additional paper, the Co-Chair (Mr. Ruda Santolaria) observed that it was important to emphasize the right of the affected State to preserve its existence. As had been discussed during the debate on the continuity of statehood, two scenarios were being envisaged. The first was where the land surface of the State concerned was affected by erosion, salinization and partial submergence, potentially becoming uninhabitable, despite only being partially submerged by the sea, due to the unavailability of a sufficient fresh water supply and thus resulting in the population having to move elsewhere within the territory of the affected State or migrating to another State or States. The second scenario was that of total submergence where the land surface of the affected State was completely covered by the sea.

215. During the ensuing debate, agreement was expressed with the assessment that the process was likely to be gradual and that a distinction could be drawn between the situations of partial and total submergence of the land surface. In both situations, affected States retained the right to provide for their preservation, which could take many forms. A view was also expressed that it was advisable to focus on the question of the legal consequences of the uninhabitability of a territory due to partial submersion owing to sea-level rise, which would occur before full submersion of the land surface.

216. Some members expressed agreement with the view taken in the additional paper that a State whose land surface had become totally submerged as a result of sea-level rise continued to exist as a State. This position was consistent with the discussions on the law of the sea aspects of the topic undertaken at the Commission's session in 2023. Another view was taken that it was more advisable to focus on both the notion of preservation of legal entitlements and the protection of certain interests that were worthy of legal protection. In doing so, it was important to go beyond a State-centred approach to the preservation of rights but also consider indigenous identities, languages and other related aspects that are concerned with legal norms that should be followed.

217. Agreement was also expressed with the view that it was essential for the Commission to focus on the duty of cooperation, whether as a general principle of law or as a rule of customary international law. Reference was made to the provisions on cooperation in the UNCLOS and the obligation to cooperate that had featured in some of the Commission's earlier work were also noted.

iii. Possible alternatives for addressing the phenomenon in relation to statehood

218. The Co-Chair (Mr. Ruda Santolaria) recalled the observation of the Secretary-General that the far-reaching effects of the phenomenon of sea-level rise on the legal and human rights spheres required innovative legal and practical solutions. In order to ensure that the nationals of a State affected by the phenomenon of sea-level rise who reside in other States have adequate assistance or protection and efficient access to certain basic services and documentation that would usually be provided by the affected State, it was necessary to strengthen assistance through consular offices in States where the largest number of individuals moving from that State were concentrated and bolster digital platforms connecting nationals of the State scattered around the world with the affected State.

219. It was noted that the sovereignty of the State over its territory should be preserved, including the land surface covered or not by the sea and the sovereign rights in its maritime zones, as well as the natural resources therein in favour of the present and future generations of

its population. It was explained that some of the options set out in the additional paper envisaged a State whose land surface had become uninhabitable or totally submerged by rising sea level nonetheless retaining its legal status, while other alternatives envisaged the State being integrated into another State, but preserving the core aspects of its identity and retaining a sufficient degree of autonomy and the authority to exercise certain powers despite becoming part of that other State.

220. With a view to respecting the self-determination of the peoples of the States and countries affected by the phenomenon, the formula used in each case should be subject to a consultation procedure with the population concerned.

221. During the ensuing discussion in the Study Group, it was noted that the progressive inability to perform State functions could present a critical challenge well before the land surface was totally covered by the sea. The question thus arose as to what would happen to the natural resources of a State that had lost its ability to exercise its functions, and how people could access the benefits of such resources in the future. It was suggested that the international community could assist with the restoration of territorialized statehood. As such, the Commission could envisage interim forms of administration that could assist affected States to recuperate the effectiveness required for the preservation of their statehood.

222. The view was expressed that, while the modalities outlined in the additional paper, such as land acquisition, association, confederation, federation, unification and ad hoc legal regimes offered feasible avenues for affected States, a more in-depth analysis was required. The reference in the additional paper to nation *ex situ* as a legal framework for States whose land surface was totally submerged was mentioned as a step towards addressing unprecedented challenges on account of sea-level rise. It was suggested that the emphasis should be placed on the interpretation and innovative application of existing treaties and arrangements, since it was not realistic to expect that an entirely new treaty, or even amendments to existing treaties, would be adopted to cover the issues under consideration by the Study Group.

223. A concern was also expressed that the Study Group was going beyond its mandate by proposing essentially political solutions, which were more appropriately considered by States. In particular, some members of the Study Group cautioned against making proposals that could prove difficult to implement (such as promoting the notion of a digital nation) or which raised sensitive political considerations (such as proposing the modification of laws relating to nationality). It was proposed that the Commission could, instead, focus on certain basic parameters, including the requirement of ensuring the consent of the affected peoples, proposing the adoption of bilateral, regional, or multilateral agreements and emphasizing the obligation to cooperate.

224. As regards the right to self-determination of indigenous peoples in particular, reference was made to article 4 of the United Nations Declaration on the Rights of Indigenous Peoples which referred to self-governance and autonomy as being the central element of self-determination. The question then was how to guarantee such autonomy in situations related to the detrimental impact of sea-level rise and how such rights were to be transferred to new States in which affected persons could find themselves.

225. In connection with the question of nationality, it was suggested, in contrast with the possibility of considering experiences of common citizenship such as in the European Union, that the Commission take into account its own prior work in the context of the articles on nationality of natural persons in relation to the succession of States. It was recalled that those articles, although applicable in a context different from sea-level rise, where there was a strong presumption of the continuity of statehood, operated under an imperative to avoid statelessness, and that the corresponding commentary provided interesting practical solutions, including the right to opt for the nationality of the predecessor State or that of the successor State, as well as the conclusion of international agreements between States to regulate the question of nationality with a view to avoiding statelessness.

(b) Protection of persons affected by sea level rise

226. Part Two of the additional paper, entitled "Protection of persons affected by sea-level rise" was deliberated at its fourth and fifth meetings, held on 7 and 8 May 2024.[102] The Study Group agreed with the conclusion contained in the additional paper that the current international legal frameworks that were potentially applicable to the protection of persons affected by sea-level rise were fragmented and mostly not specific to sea-level rise The Co-Chair (Ms. Galvão Teles) noted that the additional paper analyzed possible elements for the legal protection of persons affected by sea-level rise, inter alia, highlighting the different obligations of distinct duty bearers, the importance of combining a needs-based and a rights-based approach, as well as the importance of international cooperation. In terms of possible outcomes for the subtopic, the Co-Chair observed that elements identified in the additional paper could be either used for the interpretation and application of hard and soft-law instruments that were applicable mutatis mutandis to the protection of persons affected by sea-level rise, and/or could be included in further such instruments concluded at the regional or international levels.

227. At the fourth meeting, the Co-Chair (Ms. Galvão Teles) also observed that the list of the 12 elements for possible legal protection of persons, as proposed in the additional paper to the second issues paper, was mostly based on the findings of the second issues paper, and the discussions thereof in the Study Group. She noted that one additional element related to the protection of cultural heritage had been included at a later stage, with a view to the importance that had been given to cultural rights and cultural heritage in the 2023 Pacific Islands Forum Declaration. The 12 principles for legal protection of persons affected by sea-level rise were discussed as follows:

a. Human dignity as an overarching principle
b. Combination of needs-based and rights-based approaches
c. General human rights obligations

[102] ILC, 'Report of the International Law Commission on the work of its seventy-fifth session' (29 April–31 May and 1 July–2 August 2024) (Advance version of 12 August 2024) 117. <https://legal.un.org/ilc/reports/2024/english/a_79_10_advance.pdf> accessed 16 August 2024.

d. Different human rights duties and different human rights duty bearers
e. Protection of persons in vulnerable situations
f. Principle of *non-refoulement*
g. Guidelines in the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments
h. Applicability of complementary protection
i. Humanitarian visas and similar administrative policies
j. Tools for the avoidance of statelessness
k. International cooperation
l. Protection of the cultural heritage

C. Present Status and Future Work

228. In connection with the Study Group's future work and working methods, a concern was expressed that the scope of the subtopics was too broad and it was suggested that the number of questions under examination be reduced.[103] Several members supported the plan for the Study Group to consider a joint final report on the topic as a whole, in 2025, to be prepared by the Co-Chairs consolidating the work undertaken on the three subtopics, with a set of draft conclusions to be discussed by the Study Group.

229. In addition to the proposals voiced during the previous sessions, various proposals were made concerning the possible outcome of the Study Group's work, including drafting a framework convention on issues related to sea-level rise or seeking to introduce the sea-level rise dimension into the ongoing negotiations about the possible elaboration of a convention on the basis of the Draft Articles on the protection of persons in the event of disasters. It was proposed that the Study Group could finalize its mapping exercise, group the existing legal principles and indicate areas that were in need of further development. It was suggested that the views of the States most vulnerable to climate change should play an important role in defining the direction of the Study Group's future work.

[103] ibid 122.

230. Concerning the future work of the Study Group, the Co-Chair (Ms. Galvão Teles) stated that a joint final report on the topic as a whole, consolidating the work undertaken so far on the three subtopics, with a set of conclusions, would be submitted by the Co-Chairs for consideration of the Study Group at the Commission's seventy-sixth session (2025).

D. Observations and Comments by the AALCO Secretariat

231. The AALCO Secretariat seeks to highlight that a webinar on the topic "Rising Sea Levels and AALCO Member States: Perils and Protection under International Law" was organized by the Secretariat on 7 June 2022 for the benefit of Member States. Matters pertaining to the themes of statehood and protection of persons, *inter alia*, were deliberated by leading scholars and practitioners of international law including members of the ILC. On the issue of Statehood, the deliberations highlighted that efforts may be made by States to enter into maritime boundary agreements such that the Vienna Convention on the Law of Treaties (VCLT) may be invoked even if fundamental changes in circumstances take place and delimitation arrangements are not altered or modified on account of sea-level rise. Such agreements could have explicit provisions freezing existing maritime entitlements irrespective of changes in baselines and other geographical features. It was highlighted that AALCO was uniquely positioned to advance these discussions[104] and the Secretariat on this occasion notes its keenness to advance discussions on the implications of sea-level rise to questions of statehood in international law. On the issue of protection of persons from sea-level rise, it was observed that cooperation between States was of vital importance in the case of cross-border movement of people and questions pertaining to States offering temporary and permanent residences to people affected by sea-level rise in their territories. It was noted that cooperative practices of Asian and African countries in this regard was interesting to understand.[105] AALCO, in this regard could play a consultative role in facilitating discussions on the possibilities of enhancing cooperation measures to safeguard the protection of human rights of persons affected by sea-level rise especially in the context of sea-level rise resulting in mass movements of people across national frontiers.

[104] Report of the AALCO Webinar on Rising Sea Levels and AALCO Member States: Perils and Protection under International Law (The AALCO Secretariat, New Delhi 2022) 22.
[105] ibid 59.

232. The AALCO Secretariat welcomes the Commission's engagement with the topic "Sea-level rise in relation to international law" and notes its significance for the international community. In this regard, the Secretariat welcomes the additional paper to the second issues paper that was the subject of deliberations at the seventy-fifth session of the Commission and especially acknowledges the efforts of the Co-Chairs, Ms. Galvão Teles and Mr. Ruda Santolaria in succinctly articulating complex dimensions of this topic. The AALCO Secretariat is of the view the work of the Commission on the topic "Sea-level rise in relation to international law" in the backdrop of the deliberations on the additional paper to the second issues paper that specifically addresses two aspects namely, statehood and the protection of persons affected by sea level rise holds deep significance for AALCO Member States. In this backdrop, the Secretariat strongly encourages Member States to engage with the Commission with respect on their position on the aspects of statehood and protection of persons that were discussed at the Session.

VIII. NON-LEGALLY BINDING INTERNATIONAL AGREEMENTS

A. Background

233. The Commission, at its seventy-fourth session in 2023, decided to include the topic "Non-legally binding international agreements" in its programme of work and appointed Mr. Mathias Forteau as Special Rapporteur. Subsequently, the General Assembly, in paragraph 7 of its resolution 78/108 of 7 December 2023, took note of the Commission's decision to include the topic in its programme of work.

234. The inclusion of this topic in the Commission's agenda reflects its practical importance in contemporary international relations. In recent decades, there has been a proliferation of non-legally binding international agreements as States and international organizations increasingly rely on more flexible and informal instruments of cooperation compared to treaties. While such agreements are not legally binding, they often contain normative commitments that shape the behaviour of the parties involved. The growing use of non-legally binding agreements has given rise to various legal questions regarding their nature, effects, and relationship with other sources of international law.

235. By taking up this topic, the Commission aims to provide legal clarification on these issues based on an in-depth analysis of State practice, jurisprudence, and teachings. The goal is to offer practical guidance to States and international organizations without prejudice to their choice to utilize non-legally binding agreements.

B. First Report of the Special Rapporteur[106]

236. The Special Rapporteur, Mr. Mathias Forteau, presented his first report on the topic "Non-legally binding international agreements" at the seventy-fifth session of the ILC in 2024.

[106] ILC, First report on non-legally binding international agreements, by Mathias Forteau, Special Rapporteur, UN Doc. A/CN.4/772

The report aims to frame the general direction, scope, questions to be examined, and form of the final outcome, without proposing draft provisions at this stage.

237. The report highlights the practical importance of clarifying the legal status of the growing number of non-legally binding agreements in contemporary international relations. While not legally binding, these agreements often contain normative commitments that shape state behaviour. The goal is to provide legal clarification based on state practice, jurisprudence and doctrine, while preserving states' flexibility in using such agreements. The Special Rapporteur identified five key issues for the Commission to consider:

1) Ensuring the work draws from geographically representative materials
2) Retaining "agreements" in the topic title
3) Defining the scope to cover only "agreements", exclude certain categories, and address specific issues
4) Examining criteria to distinguish treaties from non-legally binding agreements, their regime, and potential legal effects; and
5) Determining the appropriate final outcome format.

238. He emphasized the need for diverse, representative study materials focused primarily on state practice. The report outlined previous related work by the Commission, the Institute of International Law, the Inter-American Juridical Committee, and the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe. In terms of available materials, the report noted the importance of examining non-legally binding agreements themselves, domestic regulations and guidance on their use, and states' legal positions regarding their nature, regime and effects under international law. Arbitral and domestic court jurisprudence and doctrine were also highlighted as relevant.

239. On terminology, while some states prefer "instruments" or "arrangements", the Special Rapporteur recommends retaining "agreements" in the title as it allows a clear delimitation of the topic. The term "non-legally binding" is well-established to distinguish from treaties. The scope should focus on agreements containing a normative component, excluding those merely

communicating facts or positions. Certain categories like unilateral acts of international organizations, inter-institutional agreements, and acts adopted at intergovernmental conferences require further consideration regarding inclusion. The work should concentrate on general international law aspects, not domestic procedures.

240. He invited Commission members to take positions on these issues in their plenary statements and emphasized the importance of diverse, representative study materials, especially State practice. The Special Rapporteur proposed requesting information from States, international organizations, and access to the Committee of Legal Advisers on Public International Law's (CAHDI) work on the topic.

241. This preliminary report comprehensively scopes the key issues, previous work, available materials, terminology and scope considerations to lay the groundwork for the Commission's future work on non-legally binding international agreements. It highlighted the topic's practical significance, identified key issues and questions to be examined, and proposed a way forward to clarify the legal aspects of these increasingly important instruments while preserving States' flexibility in their use. Significantly, the Special Rapporteur welcomed input from states and international organizations to ensure the study draws from representative practice in clarifying this increasingly important area of international law.

C. Consideration of the Topic at the Seventy-fifth Session (2024)

(a) General comments

242. Commission members generally welcomed the Special Rapporteur's first report and its focus on discussing general issues without proposing draft provisions at this preliminary stage. They appreciated the report's practical orientation and agreed with the goal of providing legal clarification on non-legally binding agreements without unduly encouraging or discouraging States' use of such instruments. Members emphasized the need to strike a prudent balance between preserving the flexibility and utility of less formal agreements while ensuring a degree

of legal certainty. They supported the Special Rapporteur's call to focus the Commission's work on the practical aspects rather than purely theoretical considerations.

243. There was broad agreement on the topic's unique practical importance in contemporary international relations. Members noted the proliferation of non-legally binding agreements and the legal questions raised by their growing use, which created a need for elucidation from the perspective of international law.

244. To ensure the study drew from representative practice, members stressed the importance of using diverse materials from various regions, with State practice as the primary focus. Examples were shared of national guidelines and State reliance on non-legally binding agreements. Members welcomed the Special Rapporteur's proposal to request information from States, international organizations, and the Committee of Legal Advisers on Public International Law (CAHDI).

(b) Scope of the topic

(i) "Agreements"

245. Diverging views were expressed on retaining the term "agreements" in the topic's title. Some members supported its use, arguing it properly described instruments resulting from an exchange or negotiation, as evidenced by the Vienna Convention's travaux préparatoires and other sources. They suggested the final output could clarify the various terminological approaches. Other members proposed alternatives like "instruments", "arrangements" or "understandings" to avoid confusion, since "agreements" is used for both binding and non-binding texts. Concerns were raised that "instruments" was too broad and "arrangements" carried specific meanings in certain contexts. It was proposed that the commentaries should clarify the title without prejudice to States' terminological choices in their own practice.

(ii) "Non-legally binding"

246. Some members welcomed the phrase "non-legally binding" for clearly distinguishing such agreements from treaties. Alternatives like "legally non-binding" or simply "non-binding" were also suggested. Clarification was sought on the implication that international law could apply to non-legally binding agreements, as this might be seen as transforming them into legally binding instruments. It was noted that being "governed by international law" was central to the Vienna Convention's definition of treaties.

(iii) Types of international agreements within scope

247. Members generally agreed the topic should:

- Focus only on international agreements between States, between States and international organizations, and between international organizations
- Cover written texts that are not treaties, not intended to be binding, but contain an agreement that may have a normative component
- Exclude treaty provisions lacking binding force as well as unwritten agreements
- Exclude resolutions and acts of international organizations as unilateral acts

248. Views differed on whether to include:

- Resolutions of intergovernmental conferences
- Inter-institutional or administrative agreements between sub-State entities
- Agreements involving rebel groups or unrecognized States

(c) Key issues to examine

(i) Criteria to distinguish treaties from non-legally binding agreements

249. Points raised by members:

- Clarifying what is meant by non-legally binding agreements is crucial, without presuming "agreement" means legally binding

- The parties' intention is the primary criterion, indicated by the text's wording
- Various objective factors like form and circumstances are also relevant
- A case-by-case approach weighing multiple elements is needed
- Presence of final clauses, dispute settlement, etc. is not determinative
- Applicable law and parties' legal status under international law are useful additional criteria
- Presumptions are unwarranted that agreements are binding or non-binding absent contrary evidence
- The Commission should avoid deciding if courts can override parties' expressed intentions

(ii) Regime of non-legally binding international agreements

250. Members agreed non-legally binding agreements are not governed by the law of treaties, though some treaty rules could apply by analogy. The term "regime" was seen as potentially confusing by implying international law rules govern their conclusion and operation. However, States concluding them remain bound by international law, e.g. *jus cogens* norms. Some validity issues from the Vienna Convention could be considered. Parties are bound by good faith. Legal effects may arise from international law rules on acquiescence, estoppel, abuse of rights, peaceful dispute settlement. In a conflict with a treaty, having the treaty prevail is not straightforward and conclusion circumstances matter. The Commission should avoid creating a parallel legal regime to the law of treaties.

(iii) (Potential) legal effects

251. Some members felt non-legally binding agreements could produce direct or indirect legal effects in certain circumstances, serving various roles in relation to sources of international law:

- Assisting treaty interpretation
- Evidencing customary international law or general principles
- Acting as subsidiary means to determine international law rules
- Serving as basis to define customary rules or treaty provisions

252. Others had reservations about considering them subsequent agreements in treaty interpretation or a form of international law, as that could affect State use by creating unintended obligations. The distinction between "legally binding force" and "legal effects" was deemed essential. The relationship between non-binding agreements and soft law was debated.

(d) Form of the final outcome

253. Members expressed a slight preference for draft conclusions over guidelines. The former are used for international law sources topics, the latter on treaty reservations and provisional application. Some suggested best practices, model clauses or typologies in addition to guidelines. Others felt that was inappropriate. Sketching an illustrative typology or categories of agreements was proposed as part of studying existing practice.

Concluding Remarks of the Special Rapporteur

254. The Special Rapporteur expressed gratitude for the enriching plenary debate, which identified areas of agreement, constructive ideas and suggestions, as well as some divergences. He carefully analyzed the arguments and concerns raised by members. The Special Rapporteur took note of the comments made regarding the criteria for distinguishing treaties from non-legally binding agreements, their potential legal effects, and elements of national practices that should be examined. Some proposals from his first report that received criticism would be reevaluated in light of the discussion.

255. Key takeaways from the debate included:

1) Members converged on the topic's great practical importance. The Commission should focus on the practical aspects and strike a prudent balance between preserving State flexibility and ensuring legal certainty, without being overly prescriptive.

2) Consensus existed on the need for representative study materials, with State practice as the primary focus. The Special Rapporteur welcomed support for his proposal to request information

from States at the current session and was open to asking international organizations at a later stage.

3) Terminology issues were heavily discussed, especially regarding "agreements", "regime" and "effects":

- "Agreements" should be retained in the topic title to properly describe the scope. "Instruments" could misleadingly imply coverage of any instrument type. "Arrangements" has specific administrative meanings in some systems.
- Contrary to some suggestions, only 10 States in the Sixth Committee preferred a term other than "agreements".
- Commentaries should precisely indicate "agreements" means a meeting of wills, without prejudice to their nature, effects or States' own terminology.
- "Legally" should be kept to show the international law perspective. Minor tweaks like "legally non-binding" could align the English version with others.
- "Regime" and "potential legal effects" were imprudent word choices not meant to imply a new legal framework. Alternatives like "implications" or "consequences" were noted.

4) The scope should exclude reasons for using non-legally binding agreements, unwritten agreements, non-binding treaty provisions, unilateral acts, and private party agreements.

256. Inclusion of international organizations was settled, but inter-institutional agreements required more definition, perhaps limiting to those relevant under international law. Members leaned towards excluding international organization acts, but were open to intergovernmental conference resolutions. The latter will be included going forward.

5) Members slightly preferred draft conclusions, seeing them as less prescriptive than guidelines. The French term "*lignes directrices*" was suggested if guidelines are chosen.

D. Present Status and Future Work

257. The Commission is still in the early stages of considering non-legally binding international agreements, having only received and debated the Special Rapporteur's preliminary first report at its seventy-fifth session in 2024. That report laid the groundwork by discussing the topic's general direction, scope, issues to examine, and final outcome format, without proposing any draft provisions.

258. Members generally supported the Special Rapporteur's proposed work program. Some suggested circulating a questionnaire on State practice, with legal effects considered only after responses are received. Several members endorsed the proposal to request information from States, international organizations, and access CAHDI's work.

259. Based on the plenary debate, the Special Rapporteur has mapped out the future programme of work. His second report will concentrate on refining the topic's scope and developing criteria to distinguish treaties from non-legally binding agreements, taking into account the comments and suggestions made by Commission members. Draft conclusions will be provisionally used in the next report, subject to States' views. Interest in model clauses and best practices was noted. Subsequent reports will delve into other key issues identified, such as the potential legal effects of non-legally binding agreements. An exact timeframe for completing the first reading has not been specified, as it will depend on the topic's progress.

260. The Commission will continue its work on the topic with the aim of providing legal clarification to States on these practically important issues surrounding non-legally binding international agreements, while maintaining a prudent balance between facilitating their use and ensuring legal certainty. The outcome is provisionally expected to take the form of draft conclusions, subject to the views expressed by States in the General Assembly's Sixth Committee.

E. Observations and Comments of the AALCO Secretariat

261. The AALCO Secretariat commends the International Law Commission for taking up the timely and practically significant topic of non-legally binding international agreements. As the Special Rapporteur has convincingly demonstrated in his first report, these agreements have proliferated in recent decades as States and international organizations increasingly rely on more flexible and informal instruments of cooperation compared to treaties. Yet their legal status, effects and relationship with other sources of international law remain underexplored.

262. The ILC's work on this topic is therefore much needed to provide legal clarification and certainty to States, while preserving the flexibility inherent in such agreements. The Secretariat appreciates the Special Rapporteur's emphasis on drawing from geographically representative State practice as the primary basis for the study. This will ensure that the perspectives and interests of Asian and African States are duly taken into account in the progressive development and codification of international law in this area.

263. The Secretariat notes the key issues identified by the Special Rapporteur for the Commission's consideration, including the scope of the topic, criteria for distinguishing treaties from non-legally binding agreements, the legal regime applicable to such agreements, and their potential legal effects. These are indeed the core questions that merit careful examination based on a thorough analysis of State practice, jurisprudence and doctrine.

264. In terms of the proposed scope, focusing on written agreements containing normative commitments between States and/or international organizations appears appropriate. The Secretariat would caution against an overly broad approach that blurs the line between agreements and other non-binding instruments like political declarations or institutional resolutions. At the same time, some flexibility may be warranted to study borderline cases like conference outcomes, depending on their specific characteristics.

265. Regarding the legal effects of non-legally binding agreements, the Secretariat believes this is a crucial aspect for the ILC to elucidate, given the practical implications. While such

agreements may not directly create obligations, they could potentially produce certain legal consequences, for example in interaction with other sources like treaty interpretation or customary international law. The Secretariat encourages the Commission to comprehensively examine the various ways non-legally binding agreements come into play in international legal discourse.

266. Finally, the Secretariat appreciates the Special Rapporteur's initiative to seek information from States on their practice concerning non-legally binding agreements. Obtaining diverse regional inputs will enrich the ILC's study. AALCO stands ready to facilitate engagement between its Member States and the Commission on this topic. Hosting a dedicated inter-sessional meeting or workshop could provide a valuable platform to share Asian and African State practice and perspectives.

267. The AALCO Secretariat looks forward to actively following and contributing to the ILC's valuable work on non-legally binding international agreements. Clarifying the legal aspects of these increasingly important instruments, while maintaining an appropriate balance between flexibility and certainty, will greatly benefit the international community. The Secretariat is confident that the Commission's final output, envisaged in the form of draft conclusions, will provide much-needed practical guidance to States and international organizations.

ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/DFT/62/S1
13 SEPTEMBER 2024

SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION

The Asian-African Legal Consultative Organization at its Sixty-Second Session,

Having considered the Secretariat Document No. AALCO/62/BANGKOK/2022/SD/S1,

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the Member States during the deliberations on "Selected Items on the Agenda of the International Law Commission",

Having followed with great interest the deliberations on the item reflecting the views of Member States on the work of the International Law Commission (ILC),

1. **Recognizing** the significant contributions of the ILC to the codification and progressive development of international law,

2. **Recommends** Member States to continue to contribute to the work of ILC, in particular by communicating their comments and observations regarding issues identified by the ILC on various topics currently on its agenda to the Commission;

3. **Requests** the Secretary-General to bring to the attention of the ILC the views expressed by Member States during the Sixty-Second Annual Session of AALCO on the Commission's agenda;

4. **Also requests** the Secretary-General to continue convening AALCO-ILC meetings in future; and

5. **Decides** to place the item on the provisional agenda of the Sixty-Third Annual Session.