Provisional

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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3640th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 18 July 2023, at 5 p.m.

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Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 5 p.m.

Cooperation with other bodies (agenda item 10) (*continued*)

Asian-African Legal Consultative Organization

Mr. Kamalinne Pinitpuvadol (Secretary-General of the Asian-African Legal Consultative Organization), welcoming the opportunity to address the Commission and strengthen the close and longstanding relationship between the two bodies, said that one of the statutory functions of the Asian-African Legal Consultative Organization (AALCO) was to study subjects on the Commission's agenda and forward the views of its member States to the Commission. The member States of the Organization normally met once a year: its annual sessions provided a vital platform for deliberations on the many dimensions of international law. At its fifty-ninth and sixtieth annual sessions, held in 2021 and 2022, respectively, many member States had highlighted the value of a strengthened and enduring cooperation between the Organization and the Commission. Such collaboration not only enriched understanding of the diverse aspects of international law, but also furthered mutual objectives. Member States invested considerable time in examining selected items from the Commission's agenda; robust discussions underscored the importance the topics held for Asian and African States. Moreover, the active engagement of Commission members at the Organization's annual sessions had greatly enhanced understanding of the Commission's current programme of work and the topics under its consideration. The insights shared by members of the Commission had equipped member States to engage more effectively in discussions on those topics, enriched their understanding of complex legal principles and contextualized them within the broad framework of Asian-African concerns.

The Organization was unique in being perhaps the only legal consultative body of its kind within the family of intergovernmental organizations. It had been established in 1956 as a tangible outcome of the historic Bandung Conference of 1955. The lessons of the Conference – friendship, solidarity and cooperation – had come to be known as the "Bandung Spirit", and the Conference had had a profound effect on how Asian and African States viewed the international legal order.

As an advisory body of legal experts, the Organization aimed to deal with problems pertaining to international law that member States referred to it and to promote the exchange of views and information on matters of international law of common concern to its 47 member States in Asia and Africa, focusing on the realization of the African-Asian perspective in the codification and progressive development of international law. Its agenda and activities evolved in line with the needs of its member States. The topics currently under consideration were: matters relating to the work of the International Law Commission; the law of the sea; the environment and sustainable development; expressions of folklore and their international protection; the status and treatment of refugees; violations of international law in Palestine and other territories occupied by Israel; legal protection of migrant workers; extraterritorial application of national legislation in relation to sanctions imposed against third parties; legal aspects of violent extremism and terrorism; establishing cooperation against trafficking in women and children; recent developments in the International Criminal Court; an effective international legal instrument against corruption; international law in cyberspace; the work of the United Nations Commission on International Trade Law and other international organizations in the field of international trade and investment law; the World Trade Organization as a framework agreement and code of conduct for world trade; managing global financial crises; human rights in Islam; and the peaceful settlement of disputes. Items could be placed on the Organization's work programme by a member State, on the initiative of the Secretary-General or in follow-up to work of the International Law Commission.

At the Organization's fifty-ninth and sixtieth annual sessions, views had been expressed on various topics on the agenda of the International Law Commission. The topic of immunity of State officials from foreign criminal jurisdiction was seen as a highly sensitive one that entailed a keen balancing act between the fundamental principle of sovereign equality and the urgent need to combat impunity for serious international crimes. Some member States had expressed reservations about draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction. They had insisted that the draft

article did not reflect the codification of customary international law and was not supported by State practice. They had suggested that the official's status, the nature of the official's duties, the gravity of the offence, and international law concerning immunity should be considered when determining immunity. Some had suggested that draft article 7 failed to respect the principle of immunity *ratione personae*, which was fundamental for the functioning of officials. Some had called for a more thorough study of the draft articles, in view of their complexity and sensitivity, and for the Commission to mediate divergent opinions on the topic before completing its first reading of the draft articles. Some had acknowledged that the concepts of immunity and jurisdiction often conflicted and that a careful balance was needed in determining the procedural and substantive aspects of such matters, as they had a political impact on relations between States.

In discussions at the sixtieth annual session on the topic "Protection of the environment in relation to armed conflicts", member States had acknowledged the customary and treaty laws prohibiting belligerents from causing unnecessary environmental damage during armed conflicts. Some had emphasized the need to adhere to the principles of proportionality, distinction and prohibition of unnecessary destruction. It had been noted that the draft principles on the topic were intended to apply to both international and non-international conflicts. Some States had expressed concerns over the different obligations of Governments and non-State actors; some had argued that non-State actors could not be expected to compensate for environmental damage but that such reasoning should not be an excuse for States to neglect their duties under international humanitarian law. The Commission's work on the topic reflected increasing global awareness of the issue and would contribute to the progressive development of relevant international law. Some States had asserted that the protection of the environment in armed conflicts had a strong basis in international law. They had appreciated the inclusion of principles applicable during armed conflict, underlining their importance in providing environmental protection comparable to the protection afforded to humans. However, they had objected to the use of the term "Indigenous Peoples" in draft principle 5, maintaining that their national policy did not recognize such a concept.

At the fifty-ninth annual session, member States had offered their insights on the topic of peremptory norms of general international law (*jus cogens*). Member States had appreciated the Commission's efforts to provide clarity on the identification and legal consequences of *jus cogens*. They had stressed the importance of ensuring that the draft conclusions and commentaries accurately guided States, national and international courts and other parties who might need to consider the existence of *jus cogens* norms. Some member States had requested clarity on whether conclusions, guidelines and similar documents were prescriptive or descriptive in nature and enquired about their status in international law. They had emphasized that any resolutions or acts conflicting with *jus cogens* norms, even if issued by the Security Council, should not impose obligations on States. Some had highlighted the importance of clarifying how *jus cogens* norms were identified. Some member States had agreed with the Special Rapporteur that there was insufficient State practice on *jus cogens* and praised the balance he had struck between theory and practice. They had requested further clarification on draft conclusion 3, highlighting the need for clear identification standards. They had also debated the existence and definition of regional peremptory norms, and agreed with the Commission that regional *jus cogens* did not exist. While acknowledging the value of the draft conclusions, member States had drawn attention to some controversial areas, such as conflicts between Security Council resolutions and *jus cogens*, and the non-exhaustive list of *jus cogens* norms annexed to the draft conclusions.

At both the fifty-ninth and sixtieth annual sessions, member States had provided their comments on the topic "Succession of States in respect of State responsibility". Member States had generally supported the Commission's work on the topic. Emphasis had been placed on the importance of agreements between the parties concerned in addressing issues of State responsibility following succession. The questions of whether State practice was sufficient to establish universal rules on the matter and whether paragraph 2 of draft guideline 1, on the scope of the draft guidelines, accentuated their auxiliary nature had been raised. The lack of State practice and the theoretical nature of the topic had both been highlighted. Member States had noted that the principle of non-succession applied generally, with exceptions under specific circumstances such as when the successor State agreed to

share the responsibility of the predecessor state. Priority should be given to agreements between States: the need for negotiations to occur freely and within an appropriate time frame had been highlighted. Concerns had been expressed about insufficient State practice on the topic to justify codification; it had been suggested that the Commission should establish whether there was enough State practice to recognize certain general principles of law. Some States had noted the need to address the complexities arising when there was a succession of States involved in wrongful acts. Some States had questioned the automatic succession and "clean slate" theories: their preference was clearly for a "softer" outcome, such as draft guidelines or conclusions, rather than a treaty or agreement.

On the topic "General principles of law", also discussed at both annual sessions, some member States had suggested that principles recognized only by a small number of countries should not be considered "common principles". Emphasis had been placed on the sources of international law, and it had been suggested that general principles of law should be considered a supplementary source, rather than a subsidiary or secondary one. Some member States had agreed with the Commission's proposed formulations for draft conclusions 4, 5 and 6 on the topic. However, concern had been expressed over draft conclusion 3 (b), while the need for caution on draft conclusion 7 had been emphasized. The Commission's efforts to replace the term "civilized nations" with "community of nations" had been applauded. In 2022, member States had commended the third report of the Special Rapporteur and acknowledged the recent decisions made by the Commission. They had noted that the inclusion of the topic in the Commission's long-term programme of work was significant for the progressive development of international law. Member States had considered the report more balanced than previous ones on the topic, with its systematic discussion of the functions of general principles of law, and had looked forward to further work by the Commission, highlighting the need for a diverse analysis of the world's legal systems and more consideration of Asian law in the Special Rapporteur's future reports, along with comprehensive analysis, deliberation and inclusion of the secretariat's observations and comments. Some States had expressed concern about the inclusion of the concept of general principles formed within international law, questioning whether such principles could serve as a category of general principles of law as outlined in the Statute of the International Court of Justice. They had suggested that the Commission should examine the issue more fully. While some States had pointed to a lack of theory and practice to support the existence of general principles of law formed within the international legal system, the need for further discussion on the topic had been highlighted. Some States had underscored the complementary role of general principles to other sources of international law and hoped to see a methodical approach to the origin and creation of a general principle.

The topic "Sea-level rise in relation to international law" had likewise been discussed at both the fifty-ninth and sixtieth annual sessions. At the fifty-ninth annual session, member States had highlighted the importance of the issue of sea-level rise for maritime law and the rights and interests of countries, particularly the survival of small island developing countries and low-lying countries. Some States had stressed the importance of reflecting the positions and concerns of all countries in the study, avoiding premature conclusions, and respecting the mandate of the Commission's Study Group on the topic. They had also emphasized the need to address issues of sea-level rise in the context of the law of the sea, taking into account the balance of rights and obligations stipulated in the United Nations Convention on the Law of the Sea. Member States had acknowledged the challenges posed by sea-level rise and highlighted its disproportionate impact on small island developing States. The impact on territories, economies, food security, health, education, cultures and livelihoods had also been highlighted. Member States had advocated reducing the vulnerability of States and strengthening their resilience to climate change, while believing that any approach to the topic should be based on the principles of equity and fairness. The international community had been encouraged to seek an acceptable solution to the international legal dilemma relating to baseline and maritime boundaries impacted by sea-level rise.

At the sixtieth annual session, some member States had emphasized the need for caution when considering the presumption of continued statehood for States directly affected by sea-level rise, highlighting the implications it might have for the criteria set out in the 1933 Convention on Rights and Duties of States. Some had also raised concerns about the ambiguous effects under international law of some affected States' initiatives to construct

artificial islands as a means of preserving their statehood. They had suggested that future obligations for the protection of persons affected by sea-level rise should be based on several factors, including the principle of common but differentiated responsibilities, the national capacity of non-affected States, humanitarian principles, and case-by-case evaluations. Some member States had emphasized the need to maintain certainty, security and predictability and to preserve the balance of rights and obligations in the face of changes to the natural landscape caused by sea-level rise. They had insisted that such changes should not affect existing maritime boundary agreements and affirmed their respect for the charts or lists of geographical coordinates of baselines deposited under the United Nations Convention on the Law of the Sea. They had also welcomed the idea of further work on the topic, particularly in relation to issues of statehood and the protection of people affected by sea-level rise. Member States had reaffirmed the pivotal role of the United Nations Convention on the Law of the Sea in dealing with issues emerging from sea-level rise, including the steadfast belief that maritime boundaries should not change as a result of the effects of sea-level rise. The Commission's Study Group on the topic had been encouraged to incorporate aspects of international environmental law into its work, and it had been emphasized that States needed to fulfil their environmental commitments in order to cope effectively with sea-level rise in the long term.

Regarding the topic "Provisional application of treaties", at the fifty-ninth annual session a member State had suggested a possible rule of construction that a treaty should not be considered provisionally applicable unless it was expressly and categorically stated in the treaty text or other relevant instrument. Such a suggestion aligned with that State's national practice and respected the realities of republican States, where treaty negotiation fell within the purview of the executive authorities but foreign policy powers were shared with other governmental bodies. Another State had emphasized that the provisional application of treaties, as stated in article 25 of the Vienna Convention on the Law of Treaties, did not impose any obligation on States, thereby ensuring that it did not restrict their future conduct concerning a treaty provisionally applied. Some reservations to draft guideline 6 of the Commission's Guide to Provisional Application of Treaties had been noted. It had also been underscored that there were differences between the provisional application of a treaty and accession to a treaty, as illustrated by the distinct characteristics of the provisional application of treaties. It had therefore been suggested that draft guideline 8, which defined a responsibility regime, contradicted the nature of the provisional application regime and could undermine the willingness of States to apply treaties provisionally.

Regarding the topic "Protection of the atmosphere", at the fifty-ninth annual session, member States had acknowledged the valuable contribution of the Special Rapporteur and the Commission in completing the draft guidelines on the topic. Member States had, in principle, applauded the Special Rapporteur's sixth report and viewed it as a step in the right direction, though some had raised concerns over the fact that the draft guidelines excluded the transfer of funds and technology, including intellectual property, to developing countries. Such an exclusion, they had argued, neglected a fundamental principle of international environmental law, making the draft guidelines incomplete and constituting a setback for that field of law. Some States had supported the replacement of the term "pressing concern of the international community" with "common concern of humankind", in line with the Paris Agreement. Other States had stressed the paramount importance of international cooperation in law enforcement to deal with environmental offences.

At both the fifty-ninth and sixtieth annual sessions, appreciation had been expressed for the diligent work of all Special Rapporteurs and the Commission in general. The Asian-African Legal Consultative Organization recognized the importance of the topics under consideration by the Commission, which represented pressing issues faced by the international community, and would continue to support its work.

The Organization's secretariat had shown commendable proactiveness in engaging with its member States on topics featured on the Commission's agenda. Recently, as an initiative to facilitate knowledge exchange and cooperation, the secretariat had successfully organized two significant webinars involving an impressive assembly of panellists from various legal domains. The first, held in June 2022, on "Rising Sea Levels and AALCO Member States: Perils and Protection under International Law", marked the Organization's

first foray into discussions on a topic that the Commission had recently incorporated into its programme of work. The panellists had included himself, Ms. Oral and Ms. Galvão Teles. Several representatives of member States had participated. Following the webinar, the Organization's secretariat had compiled and published the proceedings, providing a valuable resource for member States and others.

The second webinar, held in April 2023 and entitled "General Principles of Law and AALCO Member States", had attracted more than fifty participants from member States and academia. Mr. Vázquez-Bermúdez, the Commission's Special Rapporteur on the topic of general principles of law, had been a panellist, providing an overview of the draft conclusions adopted by the Commission and offering critical insights into the topic. A comprehensive analysis of the webinar, including presentations, discussions and recommendations, was being compiled for release later in 2023.

Building on the success of the webinars, the Organization hoped to plan more outcome-oriented activities with the Commission, in view of the shared need to increase awareness of the Commission's work among States in Africa and Asia. The intention was to create platforms that allowed for a deeper understanding of the Commission's work and to foster more meaningful interactions with the Organization's member States.

It would be helpful for the Organization to know what expectations the Commission had of it. In answering that question, it would be important to consider the Organization's mandate. It had a pivotal role as a bridge between its member States and the Commission, facilitating dialogue and ensuring the flow of relevant information, which involved assisting the Commission by soliciting and collecting State practice from its members. To optimize the process, constructive ideas from members of the Commission would be very welcome.

Among other initiatives, the Organization intended to establish informal working groups on matters relating to the work of the Commission, which would be particularly beneficial for the study of topics on the Commission's agenda. Such a model had already been used in considering and formulating responses to the Commission's work on the identification of customary international law. The planned working groups would enable the Organization to play a more proactive role by identifying and suggesting topics on the Organization's work programme that were also of interest to the Commission, providing an opportunity for the two bodies to develop common topics within their respective programmes of work. To that end, he invited members of the Commission to participate in the Organization's sixty-first annual session, to be held in Indonesia later in 2023.

Mr. Huang said that, since its founding, the Asian-African Legal Consultative Organization had remained true to the Bandung Spirit, dedicating itself to fostering exchange and consultation on international law among Asian and African States and representing their aspirations in shaping the development of international law. It had emerged as a regional international organization with unique influence in the field of international law and had been active in offering comments and recommendations to the Commission on pertinent issues, which was crucial in enabling the Commission to better incorporate the perspectives of Asian and African States into its work. Consultations among its member States had led to the development of important concepts of international law, including the five principles of peaceful coexistence and the principle of common but differentiated responsibilities. Such principles had significantly enriched the fundamental principles of international law and stood as an enduring contribution to the discipline by Asian and African States. In view of the increasingly critical role that the Organization looked set to play in facilitating the participation of Asian and African States in enhancing democracy and the rule of law in international relations, the Commission should place greater importance on close cooperation with the Organization. He looked forward to more in-depth exchanges between the two bodies.

China had maintained good cooperation with the Organization, with a particular focus on enhancing capacity-building for Asian and African States in the realm of international law. As chair of the steering committee for the cooperation programme between China and the Organization and a member of the Organization's Eminent Persons Group, he was committed to furthering that cooperation and hoped that other Commission members would

lend their support to the programme, in the interests of promoting the development of international law and the rule of law.

As a major platform for Asian-African legal exchanges and cooperation, the Asian-African Legal Consultative Organization had borne witness to the endless efforts by countries in the region to secure a fair and equitable international order and achieve national development. Asian and African States made up more than half of the members of the United Nations, and their voice was heard worldwide. Generally speaking, however, their participation in international conventions was considerably lower than in other regions. Of the 16 conventions concluded on the basis of draft articles adopted by the Commission, five Asian and African States had yet to participate in any of them, while six States had participated only in the Vienna Convention on Diplomatic Relations. Matters were improving, but there was still much progress to be made. He wondered what lay behind such low participation rates and how wider acceptance of international conventions among Asian and African States could be encouraged. The Organization might wish to consider that issue.

Mr. Jalloh, while welcoming the work done by the Organization in studying topics on the Commission's programme of work, expressed concern about the lack of input from African and Asian States on important topics such as peremptory norms of general international law (*jus cogens*). By the time the draft articles on that topic had been adopted on first reading, only South Africa and Japan, among the countries in the two regions, had submitted written comments. The existence of an expert group within the Organization to consider and offer views on the Commission's output was therefore particularly useful. Consideration should be given to how to amplify the Organization's role, such as through briefings for representatives of African and Asian States at United Nations Headquarters in preparation for discussion of the Commission's annual report to the General Assembly in the Sixth Committee. The various Special Rapporteurs within the Commission were keen to take account of the views of States from all regions; measures to overcome difficulties and facilitate participation by African and Asian States would therefore be welcome. Further cooperation between the Organization and the Commission, including intersessional briefings by the Special Rapporteurs, might promote wider engagement in the Commission's work.

Mr. Asada, expressing particular appreciation for the outreach activities carried out under the bilateral agreement between the Organization and his university, Doshisha University, asked how the Organization managed its relationship with the African Union Commission on International Law, given the potential for geographical overlap between their respective mandates. No other similar bodies faced such a challenge. Did they cooperate or divide work when dealing with matters of international law? He also wondered how the Organization's activities could be promoted more widely among States and international lawyers in the two regions.

Mr. Kamalinne Pinitpuvadol (Secretary General of the Asian-African Legal Consultative Organization) said that, after several decades of intense activity, with much support from the United Nations and other bodies, momentum within the Organization had seemed to decline from the 1980s onwards. Other international organizations had come into being; maintaining high levels of participation across the board was challenging for Asian and African countries. The Organization's secretariat would consider what could be done to improve the situation. Cooperation with the Commission and other bodies would remain important, though the Organization's capacity for promoting specific initiatives relating to the work of Special Rapporteurs was limited. When working with the African Union Commission on International Law, the Organization focused on adding value. In addition to attendance at each other's annual sessions and online meetings, some joint events were organized. Consideration was being given to how cooperation on codification and progressive development could be further enhanced.

With regard to raising awareness of the Organization's activities, efforts were being made to promote its work through academic institutions, including through memorandums of understanding with universities and international organizations. Its secretariat operated an internship programme for students from member States.

Mr. Fife, emphasizing the importance of the Organization's work for codification and progressive development, said that further outreach and information-sharing efforts would be welcome. The low rate of participation by African States might be remedied through enhanced cooperation with the African Union Commission on International Law and other forums, including through electronic and hybrid means.

Mr. Patel said that the Ministry of External Affairs of India had supported a capacity-building workshop on Asian and African treaty law and practice hosted by Rashtriya Raksha University in April 2023, bringing together participants from many countries. The Sixth Committee had been discussing the international treaty framework for several years, especially in relation to the implementation of Article 102 of the Charter of the United Nations. By covering topics that were on the agenda of the General Assembly, the Organization's outreach work with academic institutions contributed directly to the work of the Commission. In terms of what expectations the Commission had of the Organization, efforts to increase awareness among Governments about the Commission and its work would help to ensure that international law could become truly universal in content and approach. The Organization could also take the initiative in suggesting topics for inclusion in the Commission's programme of work. There were plans to hold capacity-building events involving collaboration between the Organization and the United Nations Library and Archives at Geneva, in collaboration with the Codification Division.

The Chair said that efforts would be made to arrange activities, including potentially in the intersessional period, to further cooperation between the Organization and the Commission.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair, drawing attention to a revised programme of work for the remainder of the session and outlining the proposed changes, said she took it that the Commission agreed to adopt the revised programme of work.

It was so decided.

The meeting rose at 6.10 p.m.