

**VIII. SUMMARY RECORD OF
THE THIRD GENERAL
MEETING
HELD ON TUESDAY, 3RD JULY
2007, AT 3:50 PM**

Her Excellency Mrs. Brigitte Sylvia Mabandla, President of the Forty-Sixth Session in the Chair.

**A. Report on the work of the
International Law
Commission at its Fifty-
Eighth Session**

1. **Amb. Reza Tabatabaei Shafiei, Deputy Secretary-General of AALCO** introduced the item on the topic contained in the Document No. AALCO/46th /CAPE TOWN SESSION/2007/S 1. At the outset, he congratulated those who had been elected to the International Law Commission (hereinafter referred to as the Commission or ILC) from AALCO Member States. He welcomed the Members of the ILC Hon'ble Mr. Amos Wako and Mr. Narinder Singh who were present and informed that AALCO and the ILC had a long-standing tradition of being represented at each other's Annual Sessions. He said that there were nine topics on the agenda of the fifty-eighth session of the Commission.

2. He informed that with a view to providing Member States with adequate time for focused deliberations on the work of the International Law Commission, the AALCO Secretariat presented its report with certain modifications to the previous format. One section provided a brief summary of some of the topics on the agenda of the ILC. These were: Reservations to Treaties, Diplomatic Protection, Unilateral Acts of States, International Liability for Injurious Consequences

arising out of Acts not Prohibited by International Law, Responsibility of International Organizations and Fragmentation of International Law. Another section contained a relatively elaborate overview of the work of the Commission on three topics. These were: Shared Natural Resources, Effects of Armed Conflicts on Treaties and the Obligation to Extradite or Prosecute (*aut dedere aut judicare*).

3. He said that this division was made keeping in view the progress of the work of the Commission on these items. Therefore, Member States were requested to focus on these three topics during their deliberations at the Forty-Sixth session of AALCO. He further said that the Secretariat would nevertheless welcome any comment on other topics, which could enrich the work of the ILC in its coming session. He briefly presented the work of the Commission at its fifty-eighth session.

4. On the topic 'Reservations to Treaties', the Commission considered the second part of the Special Rapporteur's tenth report and referred to the Drafting Committee sixteen draft guidelines dealing with the definition of the object and purpose of the treaty and the determination of the validity of reservations. The Commission also adopted five draft guidelines dealing with the validity of reservations, together with commentaries. In addition, the Commission reconsidered two draft guidelines dealing with the scope of definitions and the procedure in case of manifestly invalid reservations which were previously adopted, in the light of new terminology.

5. On the topic 'Diplomatic Protection', the Commission considered the seventh report of the Special Rapporteur and subsequently completed the second reading on the

topic. The Commission decided to recommend to the United Nations General Assembly the elaboration of a convention on the basis of the draft articles on Diplomatic Protection.

6. On the topic 'Unilateral Acts of States', the Commission considered the ninth report of the Special Rapporteur and adopted a set of ten guiding principles, together with commentaries, relating to unilateral declarations of States capable of creating legal obligations and recommended the guiding principles to the attention of the General Assembly.

7. On the topic 'International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law', the Commission considered the third report of the Special Rapporteur and subsequently completed the second reading on the topic. Further, the Commission decided to recommend to the General Assembly to endorse the draft principles by a resolution and urge Member States to take national and international action to implement them.

8. On the topic 'Responsibility of International Organizations', the Commission considered the fourth report of the Special Rapporteur and adopted fourteen draft articles, together with commentaries; dealing with circumstances precluding wrongfulness and with the responsibility of a State in connection with the act of an international organization.

9. On the topic 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', the Commission considered the report of the Study Group and took note of its forty-two conclusions, which it

recommended to the General Assembly for its attention.

10. On the topic 'Shared Natural Resources', the Commission referred nineteen revised draft articles to the Drafting Committee and subsequently adopted on first reading a set of draft articles on the law of transboundary aquifers, together with commentaries. The Commission also requested written submission of comments from governments on draft articles on the topic. Therefore, he requested Member States to submit their comments to facilitate the work of the Commission.

11. On the topic 'Effects of Armed Conflicts on Treaties', the Commission considered the second report of the Special Rapporteur. On the topic 'Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', the Commission considered the preliminary report of the Special Rapporteur.

12. While concluding, he drew the attention of delegates to the information requested by the Commission on other agenda items. He said that the information provided by Member States would be of significant help to the Commission in formulating its work. The feedback and information on state practice of AALCO Member States could be of immense help in enabling the Commission to take into consideration the views of different legal systems. Therefore, he requested that delegates submit specific comments and observations on the agenda items to facilitate the work of the Commission.

13. **Mr. Narinder Singh, Member of the International Law Commission** made a statement on behalf of the International Law Commission. On behalf of the

Chairman of the Commission and its entire membership, he conveyed best wishes for a successful session. He said that as evidenced by the provisions of the Commission's Statute and as often acknowledged in its annual reports, the Commission attaches great importance to its cooperation with other bodies concerned with international law, including its progressive development and codification. Following its precedence, the General Assembly vide its Resolution 61/34 of December 2006, encouraged the Commission to further strengthen this form of cooperation. The relationship between the Commission and AALCO spanned many years. Not only did the two bodies attend each other's annual meetings but also, over the years, eminent personalities from AALCO member States have served the Commission in various capacities with distinction.

14. In his statement he focused on the activities of the Commission since last year. He said that this year's session of the Commission was the first of the new quinquennium, which followed the election of its members by the General Assembly of the United Nations last year. 16, of its 34 members, almost half of the curatorial were new. The first part of this year's session had already been completed which met from 7 May to 5 June and the second segment of the Session would commence later this July until the second week of August. The new Commission began its work in the wake of a successful completion of five years of fruitful work in the progressive development and codification of international law. He underlined that the year 2006 saw the fruitful completion of four projects. Firstly, the Commission concluded the second reading of the draft articles on

diplomatic protection and it recommended to the General Assembly on the elaboration of a convention.

15. Secondly, the Commission completed the second reading of the draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The adopted draft Principles, which was completed, dealt with liability aspects, thus concluding the work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". The Commission recommended that the Assembly endorse the draft Principles through a resolution and urge States to take national and international action to implement them. He recalled that in 2001, the Commission had already completed the prevention aspects on the topic by adopting draft articles on Prevention of transboundary harm from hazardous activities and the elaboration of the Convention was recommended to the General Assembly. The Assembly took note of these draft articles without taking further action. Pursuant to its resolution 61/36, the General Assembly would address both aspects of the topic at its session this year.

16. Thirdly, the Commission adopted Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, thus completing its work on "Unilateral acts of States".

17. Fourthly, the Commission completed its work on "Fragmentation of International Law: Difficulties arising from diversification and expansion of international law", by taking note of the report of the Study Group and its 42 conclusions. He noted that while adopting the Guiding

Principles and taking note of the conclusions, the Commission showed its versatility regarding the various forms that its work product could take. The consideration of fragmentation of international law evidenced the penumbra of topics that the Commission would probably have to take up as it attempted to address the challenges of international law in the Twenty-First Century.

18. He informed that in addition to completing these four topics, the Commission continued its work on the various topics on its agenda and in particular adopted on its first reading draft articles on the law of transboundary aquifers consisting of 19 draft articles, together with commentaries thereto; and decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the United Nations Secretary-General, to Governments for comments and observations. Such comments and observations would be submitted to the Secretary-General by 1 January 2008. It also decided to include five new topics on its long term programme, namely (a) Immunity of State officials from foreign criminal jurisdiction; (b) Jurisdictional immunity of international organizations; (c) Protection of persons in the event of disasters; (d) Protection of personal data in the transborder and flow of information; and (e) Extraterritorial jurisdiction. It was anticipated that the Commission would include some of these topics in its current programme of work. He stated that the Commission had already decided to include the topic 'Protection of persons in the Event of Disasters' and had appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur for the topic.

19. Further he focused on the substantive part of the current programme of work of the Commission, which consisted of six topics. He said that the oldest on the agenda was "Reservations to treaties". Thus till date the Commission had considered 11 reports by the Special Rapporteur, Mr. Alain Pellet, and had adopted more than 75 guidelines on the topic. In the first part of this year's session, the Commission examined part of the 10th report, as well as the 11th report. The 12th report would be considered in the second part of the session. He said that the Commission also devoted its time for the Drafting Committee considering the draft guidelines dealing with the definition of the object and purpose of the treaty and addressing various kinds of reservations, which would assist in elucidating the notion of incompatibility with the object and purpose of the treaty. Thus, so far nine guidelines had been adopted on this topic.

20. He further reported on the topic "Shared Natural Resources" which was included in the agenda of the Commission in 2002. Mr. Chusei Yamada was appointed as Special Rapporteur and he indicated his intention to deal with confined transboundary groundwaters, as well as oil and gas in the context of the topic, following a step-by-step approach beginning with groundwaters. As already noted, the Commission adopted, on first reading, a text on transboundary aquifers last year. At its present session, the Commission had before it the fourth report of the Special Rapporteur. The report essentially addressed the question of the relationship between the work on transboundary aquifers and future work on oil and gas. The Special Rapporteur proposed that the

Commission should proceed with the second reading of the draft articles on the law of transboundary aquifers in 2008 and also to delink the topic from any future work on oil and gas. This recommendation had been largely well received by the Commission, which was now working, through a Working Group, chaired by Mr. Enrique Candiotti, on a possible questionnaire on oil and gas for circulation to Governments.

21. He further informed that the topic "Expulsion of aliens" had been on the agenda of the Commission since 2004. The Special Rapporteur, Mr. Maurice Kamto, had so far submitted three reports. In his preliminary report, he proposed a general approach to the topic and a preliminary work plan, which were positively received by the Commission and by the Sixth Committee of the United Nations. According to the comprehensive approach chosen, the Special Rapporteur intended to examine the rules applicable to the expulsion of aliens in general as well as the rules governing the expulsion of specific categories of aliens such as refugees, stateless persons and migrant workers. The second report, which was considered by the Commission during the first part, proposed draft articles on scope and on use of terms, which had since been referred to the Drafting Committee. The third report, in which the Special Rapporteur began the examination of the general rules governing the expulsion of aliens, would be considered later in the second segment.

22. He said that the topic "Effects of armed conflicts on treaties" had been on the Commission's current programme since 2004. The Commission, this year, had before it the third report of the Special

Rapporteur, Mr. Ian Brownlie. The report focused on a set of draft articles, which the Special Rapporteur had proposed for the Commission's consideration. Following the consideration of the report, the Commission decided to establish a working group under the chairmanship of Mr. Lucius Caflisch to consider certain questions that had arisen during the debate. It was anticipated that the working group would meet during the second part of the session.

23. Following the completion of a set of draft articles on second reading, on "Responsibility of States for internationally wrongful acts" in 2001, the Commission in 2002, decided to include the topic "Responsibility of international organizations" in its programme of work. The Special Rapporteur, Mr. Giorgio Gaja, had since then presented five reports, in which he followed the general pattern of the articles on State Responsibility. Thus the bulk of the 30 draft articles so far provisionally adopted by the Commission corresponded to a large extent to those constituting Part One of the articles on State Responsibility. He said that there was no compelling reason to consider that solutions that apply to States would not generally apply to international organizations in matters concerning general principles of responsibility, attribution of conduct, breach of an international obligation or circumstances precluding wrongfulness. At the same time, last year, the Commission adopted specific provisions, which find no equivalence in its articles on State responsibility. These concern, in particular, draft articles 25 to 30, which were devoted to the responsibility of a State in connection with the act of an international organization. In the fifth report, which would be considered in the second segment of the current

session, the Special Rapporteur had addressed issues relating to the content of the international responsibility of an international organization. The 14 draft articles introduced in the report closely followed the equivalent provisions in Part Two of the text on State responsibility. They dealt with some general principles, reparation for injury and serious breaches of obligations under peremptory norms of general international law.

24. He also reported on the topic 'the obligation to extradite or prosecute (*aut dedere aut judicare*)', which was included on the agenda of the Commission in 2005. Last year, the Special Rapporteur Mr. Zdzislaw Galicki submitted a report containing a preliminary set of observations concerning the substance of the topic, marking the most important points for further consideration and including a preliminary plan of action for the Commission's future work. Following the debate, the Commission requested information from Governments on practice, including international treaties containing the obligation to extradite or prosecute and reservations made to those treaties, on domestic legal regulations and national judicial practice in the field, and on the crimes or offences to which the principle of the obligation *aut dedere aut judicare* was applied in the legislation or practice of States. The Special Rapporteur had since submitted his second report, which would be considered by the Commission in the second part of the session.

25. He further pointed out as to how the Commission relied on the cooperation that it received from Member States at various stages of the consideration of topics on its programme of work. Such cooperation could take different forms. It might be

at the beginning of the consideration of the particular topics. This might take the form of responding to requests for information on State practice or legislation or responding to a questionnaire. Or, it might be by way of commenting on the progress made by the Commission on given topics in the debates of the Sixth Committee or fora such as AALCO. It might crucially be in the form of written comments submitted upon the completion of the first or second reading texts. At all these stages the Commission valued the responses and comments of all States. He said that unfortunately, quite often the responses and comments received were few and unevenly spread in terms of comments received, in particular from the developing countries. He underlined that AALCO could play an important role in considering ways in which it would encourage its members to participate more actively in this important endeavour.

26. The **Delegate of the Islamic Republic of Iran** appreciated the distinguished Representative of the International Law Commission for his diligent report. He also appreciated all the distinguished Rapporteurs and members of the Commission for their hard work and their outstanding contributions to the work of the Commission.

27. He said that although his delegation was interested in all the topics studied by the Commission, he would make a few comments on the work of ILC during its Fifty-eighth session held in 2006, regarding the topics on Diplomatic Protection, Responsibility of international organizations and effects of armed conflicts on treaties.

28. The draft Articles on Diplomatic Protection were concerned only with the rules governing the circumstances in which diplomatic protection might be exercised and the conditions that must be met before it could be exercised. They did not seek to determine the ways through which a person might acquire the nationality of a State. Also it had not been the Commission's mandate to enumerate the factors establishing nationality.

29. In the draft Article 4, the Commission had eloquently stated the right of States to determine who their nationals were. He said that his Delegation believed that States, in exercising this right, should avoid adopting laws, which increase the risk of dual nationality, multiple nationality or statelessness.

30. Regarding draft Article 7, he said that determination of nationality of a person was a predominant one and a subjective question too. There were no objective criteria for such determination as confirmed by the Commission in Paragraph 5 of the commentary to the Article. There were no decisive factors, to be taken into account in deciding which nationality was predominant. This Article was not based on customary international law. It was, rather, a premature step for progressive development of International law. In his Delegation's opinion, customary international law recognized the rule of non-opposability of the diplomatic protection against a State in respect of its own nationals.

31. He informed that the report of the Commission had invoked the awards of the Iran-United States Claims Tribunal as recent sources for demonstration of the evolution of the rules of international law in the field of diplomatic protection. He said that as

reiterated before, they did not share this opinion. The awards of the majority of that arbitration body in dual nationality matters concerned principally; the Law of Treaties and the interpretation of the Algerian Declaration signed by two Governments in 1981 rather than diplomatic protection. Moreover, most disputes before this tribunal including all of those brought by claimants having dual nationality involve a private party on one side and a Government or a Government-controlled entity on the other, and many involved primarily; issues of municipal law and general principles of law. Consequently, the inclusion of such a controversial Article in the final text yielded in depriving more interested States from approving the outcome instrument on this topic.

32. Extending diplomatic protection to corporations as mentioned in chapter III in most cases was not necessary as the circumstances in which the corporations perform their activities and the procedures for settlement of disputes was largely regulated by the bilateral and multilateral treaties signed between and among States.

33. About the undue delay referred to in Article 15 Subparagraph (b), he believed that sluggish proceeding might not *ipso facto* be considered as a reason for the exception of the exhaustion of local remedies. In some countries, due to various unavoidable grounds, judicial proceedings were more time-consuming in comparison to other countries. The Judicial authorities of a State could not and should not treat their own citizens and foreign nationals differently while rendering justice, as equity before the law and non-discrimination principles were generally accepted.

34. The Delegate appreciated Mr. Giorgio Gaja, the Special Rapporteur on Responsibility of international organizations for his fourth report (A/CN.4/564 and add.1 and 2), which was considered by the Commission in its Fifty-eighth Session. He said his delegation would like to offer some comments on draft articles of Chapter V (Articles 17-24) on circumstances precluding wrongfulness, and address one of the key questions raised by the Commission under this topic.

35. He said that although the Special Rapporteur had pointed out in paragraph 5 of the report that the present analysis followed the general pattern adopted in the articles on responsibility of states under the heading "circumstances precluding wrongfulness", he said that his Delegation believed that, in spite of some similarities, the position and functions of the international organizations and States should be differentiated in general. Accordingly, circumstances precluding wrongful acts of the State and that of the international organizations should be distinguished from each other.

36. On draft article 17, he raised a question on the elements constituting "valid consent". Validity of the consent of a State or an international organization should be based on their will and without any pressure and/or violation of its sovereignty and independence. It went without saying that every consent should be principally taken as valid. Also it was significant to determine the limits of consent in an objective manner.

37. Considerable inconsistencies exist in the section on "self-defense" which should be corrected; for example, draft Article 18 did not completely reflect the content of

paragraphs 15-17 of the report. He said that his Delegation was of the view that a clear distinction must be made between "self-defense" and "lawful use of force" in reasonable implementation of the purposes of a given mission. Furthermore, draft article 18 appeared to be limited to self-defense as used in Article 51 of the United Nations Charter. In fact the latter Article was exclusively related to States and it didn't concern international organizations in any way. To put it in another way, the draft article on self-defense seemed to contain elements of progressive development of International law, since no one had ever mentioned or suggested that customary law referred in any way to the activities of international organizations. Given that, the reference, even indirectly, to Article 51 would not be necessary.

38. As regards the principle of necessity, draft article 22 articulated an overall approach that necessity might not be invoked by international organizations for precluding the wrongfulness. However, in their view, there were ambiguities in some terms such as "essential interest" or "international community". In other words, the Special Rapporteur's elaboration in paragraphs 35-42 could not give any objective definition to or decisive factor for determination of the above said concepts.

39. He said they agreed with the Commission in draft article 23 on compliance with peremptory norms of international law. Having considered peremptory norms as obligatory norms, international organizations should comply with them.

40. About the first question on paragraph 28 of the ILC report, he said they were of the view that, when an

organization was not in a position to provide compensation to the injured party for its internationally wrongful act, the States parties to the concerned organization, to the extent affecting the decision resulting in the wrongful act, should try to offer the due compensation, taking into account the respective rules and regulations of the organization. Further he said that their response was of a preliminary nature.

41. As regards the topic "Effects of armed conflicts on treaties", he commended the Special Rapporteur, Mr. Ian Brownlie, for the second report (A/CN.4/570).

42. On the report and seven draft Articles presented by the Special Rapporteur, his Delegation made a few comments: First of all, he said that it should be noted that there were several conventions and legal instruments which were related to the present topic such as, the 1969 Vienna Convention on the Law of Treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the Commission at its fifty-third session (2001). Given that, the Commission's mandate in this regard, was to supplement the existing international instruments.

43. He stated that they approved the point made by Special Rapporteur in Paragraph 4 of his second report, generally supported by States, that the topic was not part of law relating to the use of force. He believed, rather, that the topic was in the realm of several domains of international law, including law of treaties, international humanitarian law, state responsibility and self-defense.

44. Non-international armed conflicts, he said, might adversely affect the ability of the concerned States to fulfill their treaty obligations. However, due to the purposes of the present topic, the inclusion of internal conflicts in draft Article 2 Subparagraph (b) would broaden the scope of the term "armed conflict". It was noteworthy that draft Articles on Responsibility of States for Internationally Wrongful Acts had provided provisions in this regard in Chapter V relating to circumstances precluding wrongfulness.

45. The issue of military occupation and its effects of the treaties was a subject on which they appreciated the Special Rapporteur to pay attention to his drafting. However, it was not something to be covered in the definition of term "armed conflict".

46. He said they confirmed the inclusion of intention referred to in draft Article 4. The intention of the State parties to a specific treaty at the time of its conclusion was a fundamentally important factor in determining the validity of a treaty in case of an armed conflict. The intention of parties at the time when the treaty was concluded might be understood through the text of the treaty including its preamble and annexes, and also from *travaux préparatoires* of the treaty and circumstances of its conclusion.

47. The indicia of susceptibility to termination or suspension of treaties in case of armed conflict in draft Article 4, did not make any distinction between the State resorting to unlawful use of force contrary to the Charter of United Nations and the State which exercised the inherent right of self-defense. To put the State using force unlawfully and the State defending

itself on an equal footing would be tantamount to recognizing an unlawful act. As the Institute of International Law had rightly put in Article 7 of the resolution adopted on 28 August 1985 about "The Effects of Armed Conflicts on Treaties", the States should be entitled to suspend, in whole or in part, the operation of a treaty that was incompatible with their inherent right of self-defense. Such a distinction should be taken into account in the whole draft articles.

48. He said that it was their firm belief that the integrity and continuity of international treaties were the two basic principles of law of treaties that should be taken into account in dealing with the present topic. That is why they insisted that the draft Article 6 should be sustained. He said they took note of the Special Rapporteur's proposal to delete the draft Article 6 from the proposed set of draft Articles. However, he said they believed that the Article could either be saved intact or incorporated into draft Article 4 while redrafting it.

49. With regard to draft Article 7, the enumerated categories of treaties might be re-examined with a view to extracting common criteria for determining the treaties that should be continued in operation during an armed conflict. One such criteria was *erga omnes* obligations; treaties that encompass *erga omnes* obligations of States should be sustained during and after armed conflict and could not be suspended or terminated in such a case. Therefore, he said that they proposed this to be inserted in the draft Article 7.

50. The **Delegate of the Republic of Korea** made a few observations on the responsibilities of international organizations. He expressed his delegation's strong support for the

activities of the International Law Commission (ILC) on the responsibilities of international organizations. Successful completion of this work would be comparable to the Commission's accomplishments in the Vienna Conventions on the Law of Treaties, which established a single system of inter-State treaties, as well as treaties allowing for the participation of international organizations. In particular, the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 created a uniform regulation of treaties and became exemplars of the progressive development and codification of international law. He was of the opinion that the final draft articles on State Responsibility in 2001 should be viewed in this greater context. Rules on the responsibility of international organizations were essential to establishing a comprehensive framework for the law of international responsibility. Their adoption would mark a continuation of the ILC's successes in establishing a system of law for treaties.

51. Second, the responsibilities of international organizations and State responsibility were the two pillars of international responsibility for internationally wrongful acts. He believed that the responsibilities of States and international organizations vis-à-vis internationally wrongful acts should be determined within a basically uniform system, analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. Hence, he said, we must adhere to the basic framework of common

headings and provisions, paralleled by revisions to and additions of provisions reflecting the distinctive qualities of each international organization. The four reports on the responsibility of international organizations preserve this primary structure, but he said, we could not rule out the possibility that this uniformity might eventually be undermined. He urged the ILC to be aware of this possibility and do its best to avoid it.

52. He stated that, given the uniqueness of international organizations, which possess independent legal personalities, the elaboration of international responsibilities was by no means a simple task. The difficulty was all the greater if a State happened to be associated with a particular act by an international organization. This topic was dealt with in Articles 25 to 30, under the heading "State Responsibility of a State in Connection with the Act of International Organizations". If an act was attributed to an international organization and a State was associated with that act, there needed to be a fundamental review of whether to approach the act as part of the responsibilities of international organizations or of States.

53. The **Delegate of Japan** spoke on three topics on the current agenda of the Commission. These were; Shared natural resources, Effects of armed conflicts on treaties and the Obligation to extradite or prosecute.

54. On the topic of "Shared natural resources" he said his government welcomed the timely completion of the first reading of the set of 19 draft articles on the law on transboundary

aquifers by the Commission last year and could generally support the principles embodied in these draft articles.

55. While awaiting the written submission of comments and observations on the draft articles and their final form from governments by January 1, 2008, the Commission considered during the first part of its session this year the fourth report of the Special Rapporteur in document A/CN.4/580 which was devoted only to the aspect of relationship between the work on transboundary aquifers and the possible future work on oil and natural gas that were generally perceived to be included in the topic of shared natural resources. The report dealt with similarity and dissimilarity between aquifer on one hand and oil and natural gas on the other not only from the point of scientific and technical features but also those of political, economic and environmental aspects. It summarized that though there existed close similarity between the physical feature of non-recharging aquifer and that of reservoir rock of oil and natural gas, the similarity between groundwater on one hand and oil and natural gas on the other, ended there and they were different in all other aspects.

56. He said that his government was pleased to learn that the Commission had endorsed the recommendations of the Special Rapporteur and would proceed with the second-reading of the draft articles on the law of transboundary aquifers next year and would endeavour to complete the second-reading as expeditiously as possible independently from the possible future work on oil and natural gas.

57. He further highlighted particularly important characteristic of groundwater. Fresh water was the life-supporting resource vital for the human-being for which no alternative resource existed. Water was also a vital resource for hygienic living of the human being. In addition, water was the essential ingredient of natural eco systems and of organic life on the planet earth. We might be heading for the possible global water crisis. Hundreds of million people, in particular in the developing world might suffer from the shortage of clean and sanitary fresh water. It was an urgent task to formulate an international legal framework for international cooperation of reasonable and equitable management of water resources and avoid international disputes on water. From these points of view, the Commission's work on the law of transboundary aquifers was indeed important.

58. He said that all the members had big stakes in the project. In order to have their views reflected in the Commission's second reading, the Member Governments of the AALCO were required to submit their comments by January 1, 2008 to the Secretary-General of the UN. He said that he had a message from the Special Rapporteur, Mr. Chusei Yamada. He hoped that, in formulating their comments, they would kindly refer to the draft articles and the commentaries thereto in pages 192 to 245 in Chapter VI of the Report of the International Law Commission of 2006 in document A/61/10. He said the Special Rapporteur would always be available to answer any question or clarification. He said he should be happy to act as intermediary between the Delegates and the Special Rapporteur.

59. Further he said that the topic of "Effects of armed conflicts on treaties" had been on the agenda of the Commission since 2004. Three reports were submitted by the Special Rapporteur. The contents and the draft articles proposed in the reports remain almost unchanged. He said that his government regretted that the Commission was not able so far to conduct in-depth study of the topic. The question of the effects of armed conflicts on treaties was an unsettled and unclear area of international law. The Vienna Convention on the Law of Treaties made it clear by its Article 73 that it shall not prejudice the question. Accordingly, expeditious formulation of draft articles that would provide practical guidelines to make a decision whether a particular treaty continued to operate as a whole or in part in time of an armed conflict was called for.

60. He said that his government recognized that the question of effects of armed conflicts on treaties was an extremely difficult one. The doctrines and State practices before the Second World War was no longer much relevant. States had abandoned the traditional warfare and shifted towards armed conflicts under the cover of police action, self-defense or humanitarian intervention. On the other hand, there were emerging and expanding legal regimes, such as human rights and environment that were required to be operative also in armed conflicts. He said that they expect the Commission to engage in practical analysis of the treaties of various categories in the newly established Working Group.

61. On the topic of "The obligation to extradite or prosecute (*aut dedere aut judicare*)" the Delegate said that the Commission had so far only a preliminary report of the Special

Rapporteur last year and it would be premature to offer substantive comments before the Commission embarked on formulating draft articles. However, he said that his government felt that we must take a cautious approach, recognizing the treaty basis in force of the obligation to extradite or prosecute. While it was important to establish international network not to allow safe haven to offenders of serious international crime, we must bear in mind the cardinal principles well established in criminal justice. These principles were relevant, for instance, to constraints on extradition based on sovereign criminal jurisdiction of the requested State and the human right of the accused, to avoid miscarriage of trial and to the independence of prosecution which would require more guarded formulation, namely to “submit the case to the competent authorities for the purpose of prosecution” as opposed to an outright “obligation to prosecute”.

62. The **Delegate of Kenya** extended Kenya's appreciation to all AALCO Member States for supporting the candidates from Member States during the recent election of members to the International Law Commission (ILC). He reminded that Kenya requested support from AALCO member States during its Forty-Fifth Session in New Delhi and because of the support from AALCO Member States, Attorney-General of Kenya Honourable Mr. Amos Wako was elected as one of the Members of the ILC. He said they were very grateful for this support. He said that the support and unity of purpose from AALCO Member States also made it possible for the election of other candidates from amongst its members.

63. He expressed the view that the continuing importance of the codification and progressive development of international law was recognized under Article 13 of the Charter of the United Nations. Under Article 20 of its Statute, the ILC was required to prepare drafts in the form of articles and to submit them to the UN General Assembly together with a commentary containing an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine; together with the conclusions defining the extent of agreement on each point in the practice of States and in doctrine, and divergences and disagreements which exist, as well as arguments invoked in favour of one or another solution.

64. He said that the substantive agenda of the 59th Session of ILC was relevant to all AALCO Member States. He said, thus, it was important therefore that AALCO member States participate fully and actively in the deliberation of these topical issues in order to ensure that their views and concerns were taken on board during the codification of international law. He said that AALCO offered a forum in which Member States could examine these topics in depth through incisive debates. This in turn would lead to better understanding of the issues common to all Member States with a view to articulating the same at the global forum.

65. He said that his country therefore encouraged all Member States not to sit on the sidelines as important international instruments were drafted that would eventually affect all our countries. He urged the AALCO Secretariat to intensify collaboration with relevant international bodies to organise

regional seminars and discussions on the topical issues under consideration of the ILC.

66. The **Delegate of Malaysia**, on behalf of her delegation, expressed Malaysia's appreciation to the AALCO Secretariat for the comprehensive report prepared on the matters relating to the work of the International Law Commission (ILC) at its Fifty-eighth session, as well as the Statement presented by the Representative of the ILC.

67. She informed that during the last Sixth Committee Session of the United Nations General Assembly, Malaysia had participated in the discussion on the agenda item pertaining to the Report of the ILC on the work of its Fifty-eighth Session. Amongst the nine topics that were deliberated under this agenda item, Malaysia delivered its comments on three topics, namely "Shared Natural Resources", "Effects of Armed Conflicts on Treaties" and "the Obligation to Extradite or Prosecute".

68. The Delegate made some general comments on the topics and related issues. She said that in relation to the topic of "Shared Natural Resources" Malaysia reiterated its comments as expressed during the Sixth Committee Session which were reflected in the AALCO Secretariat's comprehensive report on the work of the ILC at its Fifty-eighth Session and as expressed at AALCO's Forty-Fifth Session in New Delhi.

69. The Delegate said that Malaysia took note that the AALCO Secretariat had outlined three issues in respect of the topic of "Effects of Armed Conflicts on Treaties" for focused considerations of the Member States. She said that in this regard,

Malaysia reiterated its comments made at the last Sixth Committee Session on the issue of the "Inclusion of Situations of Non-International Armed Conflicts and Military Occupation" as reflected in paragraph 89 of the AALCO Secretariat's Report.

70. Further the Delegate said that on the issue of *Ipsa Facto* Termination or Suspension, Malaysia had commented during the last Sixth Committee Session that it opposed the Rapporteur's proposal to replace "ipso facto" with "necessarily", on the ground that "necessarily" was less incisive. Malaysia also agreed that the Draft Articles should not rule out the possibility of automatic suspension or termination in appropriate cases. Although Malaysia acknowledged the difference between the concept of termination and suspension, Malaysia viewed that the exigencies of particular situations might render difficulties in any attempt to identify or apply the two concepts.

71. She informed that with regard to the issue of the Relationship with other Branches of International Law, Malaysia's position was in line with the principle enunciated by the International Court of Justice, in its advisory opinion on the Legality of the Threats of Use of Nuclear Weapons, to the effect that while certain human rights and environmental principles did not cease to apply at the time of armed conflict, their application was determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which was designed to regulate the conduct of hostilities. Malaysia was also of the position that to allow *lex specialis* to expressly override or apply during situations of armed conflict was accepted provided that such *lex specialis* included not just international humanitarian law treaties

but also any bilateral treaties concluded between the parties to the conflict.

72. On the topic of “The Obligation to Extradite or Prosecute”, the Delegate said that Malaysia noted the current study undertaken by the ILC to determine the practices of States pertaining to this obligation. Malaysia observed that currently the obligation would arise out of a treaty or domestic legislation and as such, this obligation would exist upon States if the State choose to bind itself either under treaty or domestic law regime. She said that in Malaysia’s case, such obligation was governed by its domestic law in the form of the Extradition Act 1992. As the deliberation of this topic was ongoing, the delegate of Malaysia expressed its support to the efforts of the ILC to continue its study on States practices.

73. She underlined that Malaysia also supported the proposal for a thorough and detailed analysis of the link between *Aut Dedere Aut Judicare* and the principle of Universal Jurisdiction. Malaysia noted and supported the study of ILC on certain types of offences in relation to which these obligations arise, namely international crimes.

74. The Delegate pointed out that with regard to the study of the ILC to include the obligation of “triple alternative”, wherein the surrender of offenders to international tribunals or ICC would take place. She said that at this juncture, Malaysia had reservation on the proposal to introduce the “triple alternative” doctrine as there was no provision in their domestic law providing for such practices. The Delegate concluded that in view of the preliminary stage of the study and without prejudice to a final decision on

its legal form, Malaysia stated that it supported the proposal to formulate draft rules concerning the concept, structure and operation of the obligation.

75. The **Delegate of the People’s Republic of China** expressed his appreciation to the AALCO Secretariat for their work in preparing the Report on the work of the Fifty-eighth Session of the International Law Commission. The Delegate noted that as regards the topic of State Responsibility for Internationally Wrongful Acts, the UN General Assembly would review the issue at its 62nd Session. It was a complex issue, which concerned immediate interests of every State. He suggested a cautious approach at the time of negotiating the Convention. Resolution 59/35 had requested the UN Secretary-General to collect information on relevant practice, so that States could study the information carefully before deciding upon further action.

76. On the topic “Diplomatic protection”, his delegation welcomed the adoption of 19 draft articles on diplomatic protection on second reading by the ILC at its fifty-eighth Session. In their view, the draft articles had summarized and further developed international law, and they were generally satisfied with the draft articles. Their Delegation had also taken note that some elements of the draft were not yet corroborated by State practice. His Delegation was of the opinion that time was not ripe now to adopt a legally binding legal instrument based on those draft articles.

77. On the topic of loss in case of transboundary harm arising out of hazardous activities, China welcomed the adoption of the draft principles on

second reading by the ILC at its Fifty-eighth Session. They agreed in principle that the draft articles should not be legally binding. The outcome of the work could take soft law form as declaration, guiding principles or model law.

78. On the topic "Responsibility of international organizations", they welcomed the draft articles on "circumstances precluding wrongfulness" or the "waiver article" by the ILC at its Fifty-eighth Session. The delegation in general endorsed the draft articles and at the same time, believed that the Member States that had exercised the key influence on the international organization to commit wrongful acts should be held accountable for such acts and the responsibility due from Member States should not be shifted simply to International Organizations. International Organizations should not use the term "necessity" as an excuse for waiver of its responsibility. An International Organization and its Member State should be held responsible jointly for the wrongful acts, which the former authorizes the latter to commit.

79. On the topic of "Reservation to Treaties", his delegation noticed that the ILC had adopted around 70 draft Articles and the commentary on that topic since it put that topic onto its agenda in the Forty-sixth Session of ILC in 1994. It was a significant contribution to the codification and progressive development of international law. They appreciated the outstanding work of the Commission and the Special Rapporteur. At the first half of the Fifty-ninth Session, the Drafting Committee discussed key issues such as the validity of treaty reservations incompatible with the object and purpose of the treaty, vague

reservations, reservation contrary to customary international law rules, and to a rule of *jus cogens*, reservation made according to domestic law, and reservation to treaties on human rights or treaties on disputes settlement. His delegation held the view that sovereign states have the right to make reservations, which was stipulated by the Vienna Convention on Law of Treaties. Forbidding reservations was only an exception to the general rule of allowing reservations. The practice of restricting reservations in certain regions cannot be universally applied. There should be a balance between the legal security of treaty relations and the freedom to conclude treaty.

80. Concerning the topic of "Expulsion of aliens", his delegation noticed with appreciation that at the recently concluded first half of the Fifty-ninth Session of the ILC, the Special Rapporteur submitted the second report including two draft articles on the scope of application of the draft and definition of expulsion of aliens. His delegation believed that there should be a balance between rights of States to expel and protection of rights of aliens. He stated that illegal immigrants also should be covered by that draft article.

81. As regards the topic of "Effects of armed conflicts on treaties", his delegation believed that the "armed conflicts" in the draft should be limited to "international armed conflicts". "Treaties" specified in the draft articles should cover the treaties concluded by states and international organizations. While judging whether a treaty was suspended or terminated because of armed conflicts, one should take into consideration the intention of state signatories at the time of concluding the treaty, the implementation of the treaty, the situation after the outbreak

of armed conflicts and the nature, purpose and the object of the treaty. In their view, the legitimacy of the use of force affected treaty relations, and that issue should be further studied.

82. On the topic of "The obligation to extradite or prosecute", his delegation agreed that the study should focus on the codification of international law, with the aim to strengthen the obligation to international cooperation and fight transnational crimes.

83. With regard to the topic of "Shared natural resources", his delegation welcomed the adoption by the ILC of the draft articles of "The Law of Transboundary Aquifers" on the first reading at its fifty-eighth Session. Study of the topic of the utilization and preservation of transboundary resources was of great importance to States. In their view, it was better not to prejudge the final form of the draft articles at the present stage, and the ILC should be cautious regarding the study of oil and natural gas.

84. In conclusion, the delegate observed that the ILC had been playing an important role in the codification and progressive development of international law. Their Government would continue to pay close attention to and support the efforts of the ILC in that field.

85. The **Delegate of the Republic of Indonesia** observed that the International Law Commission had been playing an important role in progressively developing and codifying international law. He made remarks on some issues relating to Diplomatic protection, Effects of armed conflicts on treaties and Expulsion of aliens.

86. He said that his delegation attached great significance to "Diplomatic protection", since it might be employed as a means to advancing the protection of human rights. The Commission had before it the Special Rapporteur's sixth report dealing with clean hands doctrine. In the context of diplomatic protection the doctrine was invoked to preclude a State from exercising diplomatic protection if the national it sought to protect had suffered an injury as a consequence of his or her own wrongful conduct. Indonesia welcomed the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles of Diplomatic Protection.

87. On the topic "Effects of Armed Conflicts on Treaties", the Delegate commented on three particular aspects of the draft articles presented by the Special Rapporteurs, namely; draft articles 2 (b), 3, and 4. Referring to draft article 2 (b) which defined the term "armed conflict", the Delegate observed that it might be better to have one and a broader comprehensive definition and must be left to the one who applies the draft article, the task of determining on a case by case basis. He also noted that a possible way around this special issue might be to adopt a simpler formulation, stating the articles applied to armed conflicts whether or not there was a declaration of war.

88. On draft article 3, on the termination or suspension of a treaty during an armed conflict, he said that it appeared that armed conflict usually led to the suspension of treaties between States. The parties to an armed conflict were not obviously in a position to comply with the rules of a treaty concluded with the actual or

former enemy. In this regard, he believed that a general principle of continuity in such cases sounded rather unrealistic.

89. He pointed out that in draft article 4, the Special Rapporteur's had elevated the "intention" of the parties as the main criterion for the determination of suspension or termination of the treaties. He stated that Indonesia considered that there was a need to examine the question of intention further, as well as other possible criteria's. He suggested that the Commission should particularly consider other criteria, which should be determined in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties as well as the nature of the armed conflict.

90. On the topic of "Expulsion of Aliens", he said that his delegation believed that the topic was particularly relevant in the contemporary world where globalization had made transboundary movement of people more intensive. The topic also raised important questions of international law, particularly of human rights law, and treaty based judicial and other monitoring bodies had elaborated a series of human rights principles and standards that could apply in relation to it. Indonesia shared the opinion of the Special Rapporteur that a State's right to expel aliens was a right which was inherent in the sovereignty of that state, but that this right could not be considered absolute. Furthermore, he believed that the Commission should be further encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law both at the global and regional levels as well as of national laws and practice.

91. The **Delegate of Thailand**, during his presentation, while reaffirming the instrumental role played by the ILC in the codification and the progressive development of international law, stated that it was essential that the Asian-African perspectives on important legal issues be brought to the attention of the Commission. He said that Thailand was therefore pleased that AALCO continued to attach great importance to its traditional and longstanding relationship with the Commission. Moreover, Thailand wholeheartedly supported AALCO's participation in the ILC sessions and the holding of joint meetings between AALCO and the Commission.

92. He appreciated that Thailand's views expressed at the Sixth Committee of the United Nations General Assembly at its Sixty-first session in 2006, had been concisely recorded in the Secretariat's report. Given that the obligation to extradite or prosecute was an important matter which was recently brought back to the international community's attention, after it had been largely forgotten for more than half a century since its first appearance on the provisional agenda of the ILC's first session in 1949, the Delegate expressed their views on this matter.

93. He said that it was important that States incorporate offences of international character and transnational crimes to be extraditable offences under their domestic laws. Furthermore, a more harmonized approach should be adopted when considering requests for international legal cooperation, whether for extradition or mutual legal assistance. Double criminality and the political offence exceptions should be applied

resiliently in a way that did not impede international cooperation and the application of emerging norms of customary international law.

94. He said that it was recognized that mutual legal assistance and extradition legislation were necessary tools for an effective international legal cooperation. In this regard, he drew other delegates' attention to the remarkable achievement of the Association of South East Asian Nations (ASEAN) in concluding the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters which had established a strong foundation for the ASEAN member countries to efficiently cooperate with one another in terms of collection of evidence, prosecution and resulting proceedings. This, thus, reaffirmed ASEAN's strong intention to achieve complementarity between different legal systems in order to help serve the objective of the obligation to extradite or prosecute.

95. He underlined that Thailand was also of the view that a major obstacle to achieving the objective of the obligation to extradite or prosecute was the lengthy extradition proceedings in some countries. This might result in the expiry of the statute of limitation for the prosecution of the alleged offender, which consequently would bar the requesting State to institute its own legal proceedings or to submit the case to the requested State for prosecution. Accordingly, international community should endeavour to set standards for the conduct of extradition proceedings with a view to expediting the process.

96. He further mentioned that in addition, the alleged offenders' rights to due process of extradition should be ensured given that the extradition hearing did not have the purpose to

consider the conviction but rather to surrender the alleged offender to be prosecuted in the Requesting country.

97. While concluding, he underlined the importance of the international cooperation in the enhancement of the extradition process and assured Thailand's best efforts toward the same.

98. The **Delegate of the Republic of South Africa** supported the work of the International Law Commission with regard to the topic of diplomatic protection. He, however, said that the scope of draft Article 19 (the rule on the exhaustion of local remedies, actions or procedures other than diplomatic protection and recommended practice) was of great concern. He said that South Africa expressed the hope that draft Article 19 would be excluded from the set of draft articles, whilst bearing in mind that it was the consistent practice of his country to respond to legitimate requests for diplomatic protection from South African nationals abroad.

99. In relation to the Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities, He informed that South Africa welcomed the adoption of the Draft Principles by the ILC. In their view, the Draft Principles and the strict (but limited) liability imposed on the operator of hazardous activities, advance the development of international law, not only in environmental law, but also relating to sustainable development.

100. With regard to the ILC's consideration of the topic of Shared Natural Resources and preparation of draft articles in relation thereto, he said that South Africa was of the view that

the social and economic importance of groundwater in South Africa was of great importance and would play a pivotal role in the future. He said his Government would comment on the draft articles by the set deadline, namely, 1 January 2008.

101. The Delegate observed that South Africa supported the work of the Commission on the topic of Unilateral Acts of States. They supported the codification of the topic as a means of providing the international community with guidelines concerning the extent to which States might be considered bound by their own voluntary commitments. The elaboration of a legal regime applicable to such acts would contribute to the clarification of the legal effect of certain unilateral acts and thereby enhance certainty and stability in international relations. In order to be proactive on the issue, the Commission might have to consider limiting its scope by concentrating on certain categories of acts, rather than to proceed on the codification of "Unilateral Acts of States" in general.

102. The Delegate underlined that South Africa supported the work of the Commission with regard to the topic of reservations to treaties, but admittedly did not always actively participate in the debate. In view of the complexity of the issues involved they would prefer that the position in the Vienna Convention be maintained, namely that it was the prerogative of the Signatory States to accept or reject the reservation and this was a sovereign decision for each State to determine. If Signatory States did have queries regarding the validity of the reservation these could be raised through the diplomatic channel.

103. In respect of the Commission's work on the 'The Obligation to

Prosecute or Extradite', the Delegate supported the ILC's general preference to adopt a cautious approach and said that the scope of the topic should be limited to the objective of the obligation to extradite or prosecute, namely, to reduce the cases of impunity for persons suspected of having committed international crimes by depriving them of "safe havens".

104. He said that South Africa welcomed the ILC's work on the topic of "Fragmentation of International Law". He said that they were in agreement that the increase in the scope of international law and its somewhat fragmented expansion, which had both positive and negative aspects. The ILC should be commended on its insightful conclusions in dealing with the fragmentation of international law. Whilst the study did not attempt to address possible solutions in the prevention of the fragmentation of international law, the study did explore rules of interpretation and the Vienna Convention on the Law of Treaties to solve better the consequences of the fragmentation of international law.

105. The **Delegate of Arab Republic of Egypt**¹ thanked the Deputy Secretary-General of AALCO **Amb. Reza Tabatabaei Shafiei** and the Representative of the International Law Commission **Mr. Narinder Singh** for their report. He underlined the work of the International Law Commission. He further pointed out that some of the works of the ILC had not taken the shape of legal instruments. He opined that AALCO should further strengthen the existing cooperation with the ILC. He suggested that AALCO could organize

¹ Statement delivered in Arabic. Unofficial translation from the Interpreter's version.

workshops on topics that were referred to the United Nations General Assembly by the ILC.

The Meeting was thereafter adjourned.