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

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

I. SUMMARY OF THE WORK OF THE INTERNATIONAL LAW COMMISSION (ILC) AT ITS SIXTY-FOURTH SESSION

A. BACKGROUND

1. The International Law Commission (hereinafter referred to as "ILC" or the "Commission") established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-fourth session from 7 May to 1 June and 2 July to 3 August 2012 at Geneva. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission at its Sixty-Fourth session on 25 July 2012[1]. He briefed the Commission on the activities of AALCO. An exchange of views followed.

2. The Commission consisted of the following members (2012):

3. **Mohammad Bello Adoke (Nigeria); Ali Mohsen Fetais Al-Marri (Qatar);** Lucius Caflisch (Switzerland); Enrique J.A. Candioti (Argentina); Pedro Comissário Afonso (Mozambique); **Abdelrazeg El-Murtadi Suleiman Gouider (Libya);** Concepción Escobar Hernández (Spain); Mathias Forteau (France); Kirill Gevorgian (Russian Federation); Juan Manuel Gómez-Robledo (Mexico); **Hussein A. Hassouna (Egypt); Mahmoud D. Hmoud (Jordan); Mr. Huang Huikang (China);** Marie G. Jacobsson (Sweden); **Maurice Kamto (Cameroon); Kriangsak Kittichaisaree (Thailand);** Ahmed Laraba (Algeria); Donald M. McRae (Canada); **Shinya Murase (Japan);** Sean D. Murphy (United States of America); Bernd H. Niehaus (Costa Rica); Georg Nolte (Germany); **Ki Gab Park (Republic of Korea); Chris M. Peter (United Republic of Tanzania);** Ernest Petric (Slovenia); Gilberto Vergne Saboia (Brazil); **Narinder Singh (India);** Pavel Šturma (Czech Republic)**; Dire D. Tladi (South Africa);** Eduardo Valencia-Ospina (Colombia); Stephen C. Vasciannie (Jamaica); **Amos S. Wako (Kenya); Nugroho Wisnumurti (Indonesia)**; and Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland).

4. The Commission elected **Mr. Lucius Caflisch (Switzerland)** as Chairman of the Sixty-fourth session of the ILC.

5. There were as many as nine topics on the agenda of the aforementioned Session of the ILC. These were:
(i) Expulsion of aliens
(ii) Protection of persons in the event of disasters

[1] The text of this statement is annexed as Annex I to this Report.

(iii) Immunity of State officials from foreign criminal jurisdiction
(iv) Provisional application treaties
(v) Formation and evidence of customary international law
(vi) Obligation to extradite or prosecute (*aut dedere aut judicare*)
(vii) Treaties Over Time
(viii) The Most-Favoured-Nation clause

6. **On the topic *"Expulsion of aliens",*** the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the debate on the report of the International Law Commission that had taken place in the Sixth Committee at the sixty-sixth session of the General Assembly. The eighth report also contained a number of final observations by the Special Rapporteur, including on the form of the outcome of the Commission's work on the topic.

7. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 32 draft articles (A/CN.4/L.797), together with commentaries thereto, on the expulsion of aliens. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

8. In relation to the topic ***"Protection of persons in the event of disasters",*** **t**he Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652), providing an elaboration on the duty to cooperate, as well as a consideration of the conditions for the provision of assistance, and of the termination of assistance. Following a debate in plenary, the Commission decided to refer draft articles A, 13 and 14, as proposed by the Special Rapporteur, to the Drafting Committee.

9. The Commission subsequently took note of five draft articles provisionally adopted by the Drafting Committee, relating to forms of cooperation, offers of assistance, conditions on the provision of external assistance, facilitation of external assistance and the termination of external assistance, respectively (A/CN.4/L.812).

10. With regard to the topic ***"Immunity of State Officials from foreign criminal jurisdiction",*** **t**he Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur. The Commission considered the preliminary report (A/CN.4/654) of the Special Rapporteur, which provided an overview of the work of the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly; addressed the issues to be considered during the present quinquennium, focusing in particular on the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*, the distinction and the relationship between the international responsibility of the State and the international responsibility of individuals and their implications for immunity, the scope of immunity *ratione personae* and immunity *ratione materiae*, and the procedural issues related to immunity; and gave an outline of the work plan. The debate revolved around, inter alia, the methodological and substantive issues highlighted by the Special Rapporteur in the preliminary report.

11. The Commission decided to include two new topics; namely, (i) "*Provisional application of treaties*" and (ii) *"Formation and evidence of customary international law"*. In that regard, the Commission appointed Mr. Juan Manuel Gómez-Robledo and Mr. Michael Wood as Special Rapporteur to these two topics respectively. On ***"Provisional application of treaties"*** **t**he Special Rapporteur presented to the Commission an oral report on the informal consultations that he had chaired with a view to initiating an informal dialogue with members of the Commission on a number of issues that could be relevant for the consideration of this topic. Aspects addressed in the informal consultations included, inter alia, the scope of the topic, the methodology, the possible outcome of the Commission's work as well as a number of substantive issues relating to the topic.

12. In relation to the topic, ***"Formation and evidence of customary international law*"**, during the second part of the session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653), which aimed at stimulating an initial debate and which addressed the possible scope of the topic, terminological issues, questions of methodology as well as a number of specific points that could be dealt with in considering the topic. The debate revolved around, inter alia, the scope of the topic as well as the methodological and substantive issues highlighted by the Special Rapporteur in his Note.

13. On the topic, ***"Obligation to extradite or prosecute (aut dedere aut judicare)", t***he Commission established a Working Group to make a general assessment of the topic as a whole, focusing on questions concerning its viability and steps to be taken in moving forward, against the background of the debate on the topic in the Sixth Committee of the General Assembly. The Working Group requested its Chairman to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various perspectives in relation to the topic in light of the judgment of the International Court of Justice of 20 July 2012, any further developments, as well as comments made in the Working Group and the debate in the Sixth Committee.

14. With regard to the topic, ***"Treaties over time",*** **t**he Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and subsequent practice. The Study Group completed its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, by examining some remaining preliminary conclusions contained in that report. In the light of the discussions in the Study Group, the Chairman reformulated the text of six additional preliminary conclusions by the Chairman of the Study Group on the following issues: subsequent practice as reflecting a position regarding the interpretation of a treaty; specificity of subsequent practice; the degree of active participation in a practice and silence; effects of contradictory subsequent practice; subsequent agreement or practice and formal amendment or interpretation procedures; and subsequent practice and possible modification of a treaty. The Study Group also considered the third report by its Chairman on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings. Furthermore, the Study Group discussed the modalities of the Commission's work on the topic, and recommended that the Commission change the format of that work and appoint a Special Rapporteur. The Commission decided:

(a) to change, with effect from its sixty-fifth session (2013), the format of the work on the topic as suggested by the Study Group; and

(b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

15. On the topic ***"The Most-Favoured-Nation clause",*** **t**he Commission reconstituted the Study Group on the Most-Favoured-Nation clause, which continued to have a discussion concerning factors which appeared to influence investment tribunals in interpreting MFN clauses, on the basis, inter alia, of working papers concerning Interpretation and Application of MFN Clauses in Investment Agreements and the Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions. The Study Group also considered elements of the outline of its future report.

16. The three topics that would be discussed in detail are: (i) Protection of Persons in the Event of Disasters; (ii) Immunity of State Officials from Foreign Criminal Jurisdiction; and (iii) Expulsion of Aliens. These topics were deliberated at the Special half-Day Meeting on ILC at the Fifty-First Session of AALCO.

B. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

17. At the Sixty-Fourth session of the Commission, it took note of five draft articles as provisionally adopted by the Drafting Committee that related to forms of cooperation (Draft Article 5 *bis*)[2], offers of assistance (Draft Article 12)[3], conditions on the provision of external assistance (Draft Article 13)[4], facilitation of external assistance (Draft Article 14)[5], and Termination of external assistance (Draft Article 15)[6].

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[2] **Article 5 *bis* - Forms of cooperation:** For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.…

[3] **Article 12 - Offers of assistance:** In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State.
Relevant non-governmental organizations may also offer assistance to the affected State.

[4] **Article 13 - Conditions on the provision of external assistance:** The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

[5] **Article 14 - Facilitation of external assistance:** 1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

18. The fifth report of the Special Rapporteur addresses the following draft articles. The overview of the comments made by States and International Organizations on the "right to offer assistance (proposed draft article 12)" is the following. Right to offer assistance:

- should be viewed as complementary to the primary responsibility of the affected State and as an expression of solidarity and cooperation and not as interference in its internal affairs.
- right of assisting actors was merely to "offer", not to "provide", assistance and the affected State remained, in line with the principle of sovereignty and notwithstanding draft articles 10 and 11, free to accept in whole or in part any offers of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal.
- the duty of the affected State to give consideration to offers of assistance, rather than as a legal right.
- it was appropriate to consider whether all of the actors mentioned in the text should be placed on the same juridical footing, since only subjects of international law were entitled to exercise the right to offer assistance.

Draft Article 13: Conditions on the provision of external assistance

19. Draft article 13 speaks of placing conditions on provision of external assistance, which ought to be in compliance with rules of international law and the national law of the affected state. There shall be identification of needs of persons affected by disasters and the quality of assistance. In that regard, the right of the affected State to impose conditions for the delivery of assistance is qualified by an obligation that such conditions comply with international and national laws as well as treaty obligations. Although an affected State may impose conditions, including the retention of control over the provision of assistance and requirements that any assistance comply with specific national laws, such conditions may not abrogate otherwise existing duties under national and international law. Further, such conditions may not contravene the provisions of any treaties, conventions or instruments to which the affected State is a party.

20. The Special Rapporteur has cited various multilateral treaties that include a provision requiring compliance with national law. For example Article 4 (8) of the Tampere Convention, Article 13 (2) of the ASEAN Agreement on Disaster Management and Emergency Response, 2005; Paragraph 5 of annex to the General Assembly resolution 46/182, etc,. This is a clear statement that the affected State should be able to condition the provision of assistance on compliance with its national law. Further, the Commission relied on certain principles stating that they should not be construed in a limiting fashion, as only those explicitly enshrined in international agreements, but rather as "obligations applicable on States by way of customary international law, (including) assertions of best practices". Therefore, obligations of State under international law pertaining, inter alia, to the environment and sustainable development may also

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2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

[6] **Article 15 - Termination of external assistance:** The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

serve to circumscribe the conditions an affected State may impose for the provision of assistance. Where the national laws of an affected State provide protections in excess of international standards and the affected State has not agreed to waive such additional protections in order to facilitate the delivery of assistance, assisting States must comply with the national laws of the affected State.

21. The core humanitarian obligations as charted out in paragraph 2 of the Guiding principles found in the annex to General Assembly resolution 48/182, "…humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality". In a nutshell, these obligations are: (i) principle of humanity, (ii) neutrality, and (iii) impartiality.

22. The principle of humanity was initially developed in humanitarian law, but has since been recognized as applying in both war and peace. For example, the *Corfu Channel* case, the International Court of Justice found that the obligations incumbent on State authorities were based "on certain general and well recognized principles, namely: elementary considerations of humanity, more exacting in peace than in war".[7] This principle of humanity is extended to the context of disaster relief by virtue of (i) the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines)[8] and (ii) the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance"[9], (Mohonk Criteria), which affirm that "human suffering must be addressed wherever it is found". Humanity as a fundamental principle States that assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster affected persons at all times". The principle of humanity, therefore, requires that affected States, in imposing conditions for the provision of aid, do so only in ways that respect the human dignity of those affected.

23. The principle of neutrality as described by the Red Cross and Red Crescent Movement as the notion that "humanitarian assistance should be provided without engaging in hostilities or taking sides in controversies of a political, religious, or ideological nature". The Special Rapporteur, in his third report noted that "the affected State must respect the humanitarian nature of the response activities and 'refrain from subjecting it to conditions that divest it of its material and ideological neutrality'".[10] Therefore, conditions set by affected States on the acceptance of aid must be neither "either partisan or political acts nor substitutes for them".[11]

24. The principle of impartiality includes non-discrimination. The doctrine says that aid must be provided without discriminating in terms of ethnic origin, gender, nationality, political opinions, race or religion. Further, relief of the suffering of individuals must be guided solely by their needs and priority which must be given to the most urgent cases of distress. This principle finds place in all human rights instruments take into account the principle of non-discrimination

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[7] Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22.
[8] Oslo Guidelines, as revised on 27 November 2006, para. 54; available from www.ifrc.org/idrl.
[9] Reprinted in *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192-198
[10] A/CN.4/629.
[11] Ibid para 28.

and reference must be made to Article 1 (3) of the Charter of the United Nations that seeks international cooperation for solving international problems to the needy without any distinction as to race, sex, language, or religion.

25. The present report of the Special Rapporteur focused also on the issue of human rights of the affected victims, the need for reconstruction and sustainable development, and the fulfillment of obligations under national laws. At the instance of disaster, existing human rights obligations under human rights law do not cease and it implicates numerous human rights, such as the rights to food and water and the right to adequate housing. The affected State may not impose restrictions on assistance that will violate or infringe upon those rights. Moreover, a State's obligations to vulnerable or disadvantaged groups, such as women, children, people with disabilities and indigenous or minority cultural groups, continue to apply in a disaster situation. In fact, during disaster situations, states are imposed with additional duties to ensure the safety of vulnerable populations. Also, the Hyogo Framework for Action 2005-2015[12], underscores the importance of human rights considerations in the disaster-planning process, urging States to adopt "a gender perspective" in disaster risk management and to take into account "cultural diversity, age, and vulnerable groups" in disaster risk reduction. To the extent that humanitarian assistance contributes to disaster planning and risk management, affected States must condition acceptance on the assurance that the aid will provide adequately for vulnerable groups.

Draft Article 14: Facilitation of external assistance

26. Draft article 14, suggests that when an affected State does accept an offer of assistance, it retains a measure of control over the duration for which that assistance will be provided, and assisting actors are correspondingly obliged to leave the territory of the affected State upon request. Both the countries are duty-bound to cooperate as per draft article 5, and the context of termination of the assistance is no exception. Citing the provisions from the article 6 (1) of the Tampere Convention, the report explained that termination of assistance has been addressed in many ways. That article reads thus; "The requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided … by providing notification in writing. Upon such notification, the States Parties involved shall consult with each other to provide for the proper and expeditious conclusion of the assistance." Few instruments allow the affected State to request the termination of assistance, after which both parties shall consult with each other to that effect.

C. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

27. The debate of the International Law Commission on the topic of immunity of state officials from foreign criminal jurisdiction focuses on three issues: i) The general orientation of the topic, ii) The scope of immunity and iii) the question whether or not there were exceptions to immunity with regard to grave crimes committed under international law. It was decided at the sixty-third session (2011) that in the forthcoming Session a Working Group would be constituted to examine and decide on the general orientation of the topic before getting into draft articles.

[12] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

28. While introducing second report, on the general orientation of the topic, the Special Rapporteur emphasized on the importance of looking at the actual state of affairs as the starting point for the Commission's work on the topic immunity of state officials. He explained that the report was from the perspective of *Lex Lata* or the law as it exists presently. From this perspective, the Special Rapporteur was of the view that immunity of state official from foreign criminal jurisdiction was the established norm and any exceptions to immunity would have to be proven or established. This position of the Special Rapporteur on the general orientation of the topic led to an intense discussion as to the perspective from which the Commission should approach the topic i.e., whether it formulates draft Articles from the *Lex Lata* perspective. It was pointed out that the Commission should proceed with caution in order to achieve an acceptable balance between the need to establish stability in international relations and the need to avoid impunity for grave crimes under international law. In this regard, it was pointed out that even if one chose to adopt the approach of the Special Rapporteur who had analyzed the issue from a strict *lex lata* perspective, the interpretation given to the relevant state practice and judicial decisions relating to this topic could plausibly lead one to different conclusions as to the existing law. It was also felt that the end product of this exercise should have practical utility for the international community of States. The discussions on this topic led to the conclusion that the Commission should establish a Working Group to discuss this issue of orientation and then to proceed with this topic.

29. During the Sixth Committee debates on this issue of general orientation of the topic, several delegates underlined the need to adopt a cautious approach and in that regard it was essential that the Commission clearly makes the distinction between its task of codifying the *lex lata* and making proposals for the progressive development of *lex ferenda*. The Commission was urged to ensure that the distinction was made clear throughout their work and that any proposals made for the *lex ferenda* by way of draft articles for a future Convention are thought through with rigour and vigour. Thus the Sixth Committee debates reflect an approach which in principle endorses Special Rapporteur's position of treating the *lex lata* perspective as a starting point.

30. According to another view the assertion that immunity constituted the norm to which no exception existed was thus unsustainable. In this context it was pointed out that the question of how to situate the rule on immunity in the overall legal context was central to the debate. This argument has strongly emphasized the superior interest of the international community as a whole in relation to certain grave crimes under international law. Therefore, instead of addressing the issue, in terms of rules and exceptions with immunity being the rule, it seemed according to them more accurate to examine the issue from the perspective of responsibility of the states and its representatives in those situations that "shocked the conscience of mankind" and to consider whether any exceptions thereto in the form of immunity may exist. The Special Rapporteur therefore emphasised that to juxtapose immunity and combating impunity was incorrect. Combating impunity had wider context involving variety of interventions in international law including the establishment of international criminal jurisdiction by way of international courts and so on.

31. The Special Rapporteur emphasized that immunity from criminal jurisdiction and immunity from criminal responsibility were separate concepts by way of decisions of

International Courts and so on. Immunity and foreign criminal jurisdiction was the issue to be tackled. The question of State Responsibility for wrongful conductwere provided with remedies in International Law by way of international tribunals, diplomatic procedures. In response to the contention of the hierarchy of norms whereby *jus cogens* prevailed over immunities, the Special Rapporteur contended that *jus cogens* rules which prohibit or criminalize certain acts were substantive in nature and could not overturn the procedural rule such as one concerning immunity. The Special Rapporteur's point that *jus cogens* rule belongs to the sphere of substantive rules and immunity the procedural rules. This view has been upheld by the International Court of Justice (ICJ) in its case concerning *Germany* Vs *Italy*. The ICJ held that there could not be a conflict between rules which were substantive in nature and rules on immunity which were procedural in nature. Further, the question of International Criminal Jurisdiction was entirely separate from the concept of foreign criminal jurisdiction. In his view, the Rome Statute of the ICC was unlikely to be relevant in respect of foreign criminal jurisdiction. The Rome Statute expressly precludes immunity being invoked even in respect of Heads of States. So once states voluntarily accept that obligation, and waive immunity before an international court or tribunal it has no application where it concerns the jurisdiction of domestic courts over foreign Heads of States. The Special Rapporteur stated that with the question of state responsibility for wrongful conduct, it had other remedies like the diplomatic procedures, the international procedures, the international tribunals. It was emphasized that one state enjoys immunity from the jurisdiction of another state and the domestic court of other states.

D. EXPULSION OF ALIENS

32. At the sixty-fourth Session held in 2012, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the debate on the report of the International Law Commission that had taken place in the Sixth Committee at the sixty-sixth session of the General Assembly. The eighth report also contained a number of final observations by the Special Rapporteur, including on the form of the outcome of the Commission's work on the topic.

33. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 32 draft articles (A/CN.4/L.797), together with commentaries thereto, on the expulsion of aliens. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

34. It may be recalled that the work of the Drafting Committee on the draft articles on the expulsion of aliens, had began in 2007 and was completed at the present session. During the previous sessions, the Drafting Committee had decided that the draft articles which had been provisionally worked out thus far would remain in the Drafting Committee until the completion of its work on the topic. The various draft articles on the expulsion of aliens were referred by the Commission to the Drafting Committee at successive sessions. At the current session, the Drafting Committee held twelve meetings on the draft articles on the expulsion of aliens. It first

considered a number of proposals formulated by the Special Rapporteur in the light of comments and suggestions made by States on certain draft articles as they had been referred to the Drafting Committee. Thereafter, the Committee addressed a number of issues that remained pending, and finally proceeded to a review of the whole set of draft articles.

35. In the ensuing pages, the salient features of the Eighth Report of the Special Rapporteur is presented. This is flowed by a brief commentary on the draft articles adopted by the Commission on the subject matter. Finally the implications flowing from these articles are presented in the form of Comments and Observations of the Secretariat of AALCO.

Salient Features of the Eighth Report:

36. It may be recalled that many States had identified a discrepancy between the Commission's progress on the topic of the expulsion of aliens and the related information submitted to the Sixth Committee during its consideration of the Commission's annual report to the General Assembly on its work. Accordingly the Eighth report of the Rapporteur sought to dispel the misunderstandings created by the aforementioned discrepancy, respond to the comments that were doubtless prompted by insufficient clarification of the methodology followed in the treatment of the topic, and consider to what extent some of the suggestions that have not already been incorporated following the discussion in the Committee could be taken into account. To that end, the report considered first the comments made by States (sect. II) and then those of the European Union (sect. III), followed by a few final observations (sect. IV).

37. Most of the States that expressed their views on protecting the human rights of aliens subject to expulsion in the transit State (draft article F1) referred either to the bilateral agreements that they conclude with the transit State or, in a few cases, to their domestic law in addition to bilateral cooperation agreements with the transit State. The Special Rapporteur considered that neither these bilateral agreements nor domestic law can contradict the relevant rules of international human rights law, from which aliens subject to expulsion must also benefit.
14. But, as some members of the Commission rightly noted during the discussion of draft article F1, and as the representative of Malaysia also noted in the Sixth Committee, the transit State "should be obliged only to observe and implement its own domestic laws and other international rules governing the human rights of aliens arising from instruments to which it was a party".

38. On the right of return to the expelling State (draft article H1), the Special Rapporteur showed, in the second addendum to his sixth report, that several States, including Belarus, Germany, Malaysia, Malta and the Netherlands, recognized the right of an unlawfully expelled alien to return to the expelling State. However, these countries' laws on this matter vary: some of them place restrictions on the right of return; others make it contingent on the prior possession of a re-entry permit that would be revoked by the expulsion order; while still others require that the expulsion order be annulled owing to a particularly grave or clear error.

39. As the Special Rapporteur wrote in his seventh report, the two draft articles on, respectively, the responsibility of States for internationally wrongful acts and diplomatic protection are therefore quite appropriate for inclusion in the draft articles on the expulsion of

aliens. The Special Rapporteur welcomed the comments and suggestions made by States in relation to specific draft articles. He believed that the Commission might adopt some proposals when it finalizes the draft articles on first reading. Where applicable, he will endeavour to formulate such proposals.

40. Some States have felt that the topic of the expulsion of aliens was not suitable for codification or that the final outcome of the Commission's work on the topic should, at most, take the form of "fundamental guiding principles, standards and guidelines" or "guidelines or guiding principles" rather than "draft articles". Some States expressed similar views during the discussion in the Sixth Committee of the General Assembly; such opinions were also expressed within the Commission itself. This indeed represents a thorny question.

41. However, since this topic appears to be a source of concern for some States, the Special Rapporteur was convinced that, once the drafting of the draft articles and the commentaries thereto is completed, the consistency and soundness of the work will become more evident than at present and some of the concerns regarding the topic will be allayed. He therefore hoped that at the appropriate time, the Commission would transmit the outcome of its work to the General Assembly as draft articles so that the Assembly can take an informed decision on their final form.

An Overview of the Draft Articles on Expulsion of Aliens

42. It may be recalled that at the sixty-fourth session of ILC the entire set of draft articles on the Expulsion of Aliens was provisionally adopted by the Drafting Committee. At the current session, the Drafting Committee held twelve meetings on the draft articles on the expulsion of aliens. It first considered a number of proposals formulated by the Special Rapporteur in the light of comments and suggestions made by States on certain draft articles as they had been referred to the Drafting Committee. Thereafter, the Committee addressed a number of issues that remained pending, and finally proceeded to adopt the whole set of draft articles.

43. In this part of the Report, the most important features of the draft articles are analyzed to ascertain their salient features. The entire set of draft articles adopted has been divided into five parts. We would he highlighting the most important provisions of each Part in order. However, the entire set of draft articles are found in the Annex to this Report.

44. **Part One**, which is entitled ***"General provisions",*** comprises draft articles 1 to 5. Draft article 1 which is entitled '*Scope*[13]' states that the present draft articles apply to the expulsion, by a State, of aliens who are lawfully or unlawfully present in its territory. The phrase "lawfully or unlawfully present" was introduced in order to signal that the draft articles deal with a broad range of aliens who may be in the territory of the expelling State, irrespective of the legality of their presence. In retaining this formulation, the Drafting Committee was mindful of the fact that, since the inception of the work on this topic, the general view in the Commission had been that the topic should include both aliens lawfully present and aliens unlawfully present in the territory

[13] **Draft article 1: Scope**
1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

of the expelling State. That being said, it should be noted from the outset that not all the provisions of the draft articles equally apply to aliens lawfully and unlawfully present, or treat these two categories of aliens in the same manner.

45. Draft article 2 which is entitled *'Use of the terms*[14]*'*, provides a definition of two terms that are used throughout the draft articles. The term 'expulsion" is defined as a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State.

46. The Drafting Committee found it appropriate to state clearly that the formal act or conduct possibly amounting to expulsion must be attributable to a State, and that the conduct may consist of "an action or omission". These qualifications are in line with the wording retained in the Commission's articles on the responsibility of States for internationally wrongful acts and on the responsibility of international organizations. Furthermore, the Drafting Committee considered it necessary to specify that the notion of expulsion does not cover the extradition of an alien to another State, the surrender of an alien to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State; hence, the addition of a clause to that effect in subparagraph (*a*) of draft article 2. It should be recalled that the exclusion of these issues from the scope of the draft articles appears to have found broad support both in the Commission and among States.

47. Subparagraph (*b*) of draft article 2 provides a definition of the term "alien" as "an individual who does not have the nationality of the State in whose territory the individual is present". This formulation corresponds to that proposed by the Special Rapporteur, except for the replacement of the term "person" by "individual" in order to make it clear that only natural persons are covered by the draft articles.

48. Draft article 3 is entitled *"Right of expulsion"*[15]. This provision begins with the enunciation of the right of a State to expel an alien from its territory, followed by an indication according to which the expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights. A point of critical importance here is the fact that the current formulation avoids the reference to "fundamental principles of international law", which had been viewed by several members of the Commission as too restrictive, and refers instead to "the present draft articles and other applicable rules of international law". A specific mention of human rights was included in this draft article because of their particular relevance in the context of expulsion.

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[14] **Draft article 2: Use of terms**

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

[15] **Draft article 3: Right of Expulsion**

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

49. Draft article 4, entitled "*Requirement for conformity with law*"[16], corresponds, except for some minor changes, to the text originally proposed by the Special Rapporteur in addendum 1 to his sixth report (A/CN.4/625/Add.1), which had received broad support in the Commission during the debate in 2011. The requirement that expulsion shall occur only in pursuance of a decision reached in accordance with law is stated in Article 13 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the expulsion of an alien who is lawfully present in the territory of the expelling State. That said, the Drafting Committee decided to delete the term "lawfully", which appeared in the Special Rapporteur's text. The majority of the members of the Committee were of the view that the requirement for conformity with law corresponds to a well established rule of international law which applies to any expulsion measure, irrespective of the lawfulness of the presence of the alien in the territory of the expelling State.

50. Draft article 5, which is entitled "*Grounds for expulsion*", enunciates the essential requirement – which was emphasized by various members of the Commission – that an expulsion decision shall state the ground on which it is based (Paragraph 1). Apart from recognizing that national security and public order were common grounds for the expulsion of aliens, it goes on to add that only those grounds that are provided for by law may be relied upon by a State in expelling aliens (Paragraph 4). A specific mention of national security and public order was nevertheless retained in the text, given the particular relevance of these grounds in relation to the expulsion of aliens. Paragraph 3 sets out general criteria for the assessment by the expelling State of the ground for expulsion, whatever that ground may be. Paragraph 4 simply indicates that a State shall not expel an alien on a ground that is contrary to international law.

51. **Part Two,** entitled ***"Cases of prohibited expulsion"*** consists of draft articles 6 to 13. Draft article 6, which is entitled *"Prohibition of the expulsion of refugees*"[17], lists out a number of prohibitions on the expulsion of refugees. Paragraph 1 reproduces faithfully the text of Article 32, paragraph 1, of the 1951 Convention, while replacing the words "the contracting States" by the words "a State". This paragraph, which applies only to those refugees who are lawfully present in the territory of the expelling State, limits the grounds for the expulsion of such refugees to national security or public order.

52. Furthermore, pursuant to a preference that had been expressed by several members of the Commission, the reference to "terrorism" as a separate ground for the expulsion of a refugee, which appeared in brackets in the text originally proposed by the Special Rapporteur, was deleted from the draft article. The same is true concerning a previous reference to an additional

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[16] **Draft article 4 : Requirement for conformity with law**
An alien may be expelled only in pursuance of a decision reached in accordance with law.

[17] **Draft article 6: Prohibition of the expulsion of refugees**
1. A State shall not expel a refugee lawfully in its territory saves on grounds of national security or public order.
2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State, who has applied for recognition of refugee status, while such application is pending.
3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

ground for the expulsion of a refugee, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State"; this phrase was deleted because it does not appear in Article 32, paragraph 1, of the 1951 Convention, but in its Article 33, the content of which is reproduced in paragraph 3 of draft article 6. It was proposed that the commentary indicate that the terms "refugees lawfully present" in the territory of the State mean refugees who have been granted refugee status in that State.

53. The Drafting Committee had a long discussion on paragraph 2 of draft article 6. This paragraph, which finds no equivalent in the 1951 Convention, was proposed by the Special Rapporteur on the basis of judicial pronouncements and doctrinal opinions. It purports to extend the applicability of paragraph 1 to any refugee who, albeit unlawfully present in the territory of the receiving State, has applied for recognition of refugee status, while such application is pending. Paragraph 3 of draft article 6, dealing with *non-refoulement*, combines paragraphs 1 and 2 of Article 33 of the 1951 Convention. The text follows that of the 1951 Refugee Convention, except for the addition of the words "to a State" in the second line, in order to cover all cases of expulsion and not only the situation of "*refoulement*" *stricto sensu*.

54. The draft article 7, which is entitled "*Prohibition of the expulsion of stateless persons*[18]" and consists of a single paragraph simply states that a state shall not expel a stateless person lawfully in its territory save on the grounds of national security. As in draft article 6 concerning refugees, the reference to "terrorism" as a possible ground for the expulsion of a stateless person, which appeared in brackets in the text proposed by the Special Rapporteur, was deleted in order to take into account a preference expressed by several members of the Commission. Moreover, as for the case of refugees, the Drafting Committee decided to delete the reference to an additional ground for the expulsion of a stateless person, which appeared in the text originally proposed by the Special Rapporteur and which was not mentioned in Article 31, paragraph 1, of the 1954 Convention, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State".

55. Draft article 10 which is entitled *"Prohibition of collective expulsion"*[19], addresses only the collective element of the expulsion and does not replicate the general elements of the definition of expulsion contained in draft article 2(*a*). Hence, collective expulsion is defined in paragraph 1 of draft article 10 as the "expulsion of aliens as a group".

56. Paragraph 2, which states the prohibition of collective expulsion, corresponds to the first sentence of paragraph 1 of the text originally proposed by the Special Rapporteur. This

[18] **Draft article 7: Prohibition of the expulsion of stateless persons**
A State shall not expel a stateless person lawfully in its territory saves on grounds of national security or public order.

[19] **Draft article 10: Prohibition of collective expulsion**
1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.
2. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited.
3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.
4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

prohibition is to be read in conjunction with paragraph 3 of the draft article. Paragraph 3 is based on the formulation contained in the second sentence that appeared in paragraph 1 of the text initially proposed by the Special Rapporteur. It indicates that a State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group. Paragraph 4 contains a "without prejudice" clause referring to the case of armed conflict.

57. Draft article 11 is entitled *"Prohibition of disguised expulsion"*[20], Paragraph 1 of draft article 11, which states the prohibition of any form of disguised expulsion, corresponds to the text originally proposed by the Special Rapporteur in his sixth report. Paragraph 2, which is also based on the text proposed by the Special Rapporteur, makes it clear that this provision refers only to situations in which the forcible departure is the intended result of actions or omissions of the State concerned and towards that end, the Drafting Committee decided to replace, at the end of paragraph 2, the words "with a view to provoking the departure" by the more explicit formulation "with the intention of provoking the departure". However, contrary to the text originally proposed by the Special Rapporteur, in which only acts of the *citizens* of the expelling State were mentioned, the draft article provisionally adopted by the Drafting Committee refers, in more general terms, to "acts committed by its nationals or other persons".

58. **Part Three,** entitled ***"Protection of the rights of aliens subject to expulsion"*** consists of twelve provisions starting from draft articles 14 to 25. Draft article 14, which is entitled *"Obligation to respect the human dignity and human rights of aliens subject to expulsion"*[21], states that all aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process (Paragraph 1). However, the general reference to the "dignity of the person", which was contained in the text proposed by the Special Rapporteur, was replaced by a more specific reference to "the inherent dignity of the human person", a phrase which was taken from Article 10 of the ICCPR, addressing the situation of persons deprived of their liberty. The wording retained by the Drafting Committee is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent to every human person, as opposed to a subjective notion of dignity, the determination of which might depend on the preferences or sensitivity of a particular person.

59. The text of paragraph 2 of draft article 14, which recalls that aliens subject to expulsion are entitled to respect for their human rights, largely corresponds to the text of the revised draft article 8 proposed by the Special Rapporteur.

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[20] **Draft article 11: Prohibition of disguised expulsion**
1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

[21] **Draft article 14: Obligation to respect the human dignity and human rights of aliens subject to expulsion**
1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
2. They are entitled to respect for their human rights, including those set out in the present draft articles.

60. Draft article 18 is entitled *"Prohibition of torture or cruel, inhuman or degrading treatment or punishment"*[22]. The reference to "torture or to inhuman or degrading treatment" was replaced by a more complete reference to "torture or to cruel, inhuman or degrading treatment or punishment" in this article.

61. Moreover, since no agreement could be reached on the appropriateness of the notions such as "territory", "jurisdiction" or "control" in the draft article, the Drafting Committee opted for omitting any such reference in the text of the draft article, while noting that the element of territory was already covered under the definition of "expulsion" contained in draft article 2(*a*). It was felt, in particular, that the question of acts that would be committed outside the territory of the expelling State in relation to the expulsion of an alien could be better addressed, as necessary, in the commentary.

62. The wordings of draft article 23 entitled *"Obligation not to expel an alien to a State where his or her life or freedom would be threatened"*[23], were chosen by the Drafting Committee in order to make it clear that this provision enunciates an obligation not to expel to certain States. The phrase "where his life or freedom would be threatened" has been taken from Article 33 of the 1951 Refugee Convention which embodies the prohibition of *refoulement*, and has replaced the original proposal of the Special Rapporteur which referred to a State "where his or her right to life or personal liberty is in danger of being violated".

63. In its paragraph 1, draft article 23 states the prohibition to expel a person to a State where his or her life or freedom would be threatened on any of the grounds that are mentioned in draft article 15, which deals with the obligation not to discriminate. Such grounds include those listed in Article 2, paragraph 1, of the ICCPR with the addition of the ground of "ethnic origin" and "any other ground impermissible under international law".

64. Paragraph 2 of draft article 23 addresses the situation in which the life of an alien subject to expulsion would be threatened with the death penalty in the State of destination. The Drafting Committee modified the wording of paragraph 2 in order to render the obligation set forth therein applicable to "a State that does not apply" the death penalty.

65. Draft article 24 is entitled: *"Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment*[24]*"*. In

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[22] **Draft article 18: Prohibition of torture or cruel, inhuman or degrading treatment or Punishment**
The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

[23] **Draft article 23: Obligation not to expel an alien to a State where his or her life or freedom would be threatened**
1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out

[24] **Draft article 24: Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment**

adopting this provision, the Drafting Committee made a number of modifications in the text proposed by Rapporteur and adopted a version that would hang together well with the essence of Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

66. Thus, the Committee replaced the reference to torture and inhuman or degrading treatment, which appeared in the text proposed by the Special Rapporteur, by a more complete reference to "torture or […] cruel, inhuman or degrading treatment or punishment". Also, the words "where there is a real risk that he or she would be subjected to" were replaced by the phrase "where there are substantial grounds to believe that he or she would be in danger of being subjected to". Furthermore, the words "to another country" were replaced by the words "to a State" and, in order to ensure consistency with other draft articles stating a prohibition, the words "may not" were replaced, in the English text, by "shall not" at the beginning of the article.

67. **Part Four,** which is entitled "***Specific procedural rules"*** comprises of three draft articles from 26 to 28. Draft article 26 is entitled *"Procedural rights of aliens subject to expulsion"*[25]. The Drafting Committee considered thoroughly the question of the procedural rights of aliens subject to expulsion. Following an extensive discussion on the general approach to be followed with regard to the enunciation of procedural rights, the majority of the members of the Drafting Committee favored the inclusion, in paragraph 1 of the draft article, of a single list of procedural rights that apply – with the possible exception envisaged in paragraph 4 with regard to aliens who have been unlawfully present for less than six months – both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State.

68. The procedural rights stated in paragraph 1 are the following: (*a*) the right to receive notice of the expulsion decision; (*b*) the right to challenge the expulsion decision; (*c*) the right to be heard by a competent authority; (*d*) the right of access to effective remedies to challenge the expulsion decision; (*e*) the right to be represented before the competent authority; and (*f*) the right to have the free assistance of an interpreter if the alien cannot understand or speak the language used by the competent authority.

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[25] **Draft article 26: Procedural rights of aliens subject to expulsion**

1. An alien subject to expulsion enjoys the following procedural rights:
(a) the right to receive notice of the expulsion decision;
(b) the right to challenge the expulsion decision;
(c) the right to be heard by a competent authority;
(d) the right of access to effective remedies to challenge the expulsion decision;
(e) the right to be represented before the competent authority; and
(f) the right to have the free assistance of an interpreter if he or she cannot
understand or speak the language used by the competent authority.
2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.
3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.
4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

69. Draft article 27 is entitled *"Suspensive effect of an appeal against an expulsion decision"*[26]. It will be recalled that the Special Rapporteur had originally refrained from proposing a draft article dealing with this matter, as he considered that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision.

70. During the plenary debate in 2011, some members of the Commission shared the view of the Special Rapporteur that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. According to other members, the Commission should formulate a draft article, if only as part of progressive development, contemplating the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security.

71. In an attempt to respond to some of these concerns, the Special Rapporteur presented to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that draft article, a distinction was made between the situation of aliens lawfully present in the territory of the expelling State and the situation of aliens unlawfully present. According to that proposal, the suspensive effect would have been recognized to an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met some additional requirements such as a minimum duration of his or her presence in the territory of the expelling State or a minimum degree of social integration in that State. After a prolonged discussion, the Committee opted for a draft article recognizing the suspensive effect only to an appeal lodged by an alien lawfully present in the territory of the expelling State.

72. Let us now turn to **Part Five** of the draft articles, which are entitled ***"Legal consequences of expulsion"*** and comprises draft articles 29 to 32. Draft article 29 is entitled *"Readmission to the expelling State"*[27]. It should be recalled that the draft article initially proposed by the Special Rapporteur, which was entitled "Right of return to the expelling State", gave rise to some concerns during the debate in the Commission in 2011. In particular, several members were of the view that the draft article was too broad as it recognized a right of return in the event of unlawful expulsion, irrespective of the lawfulness or unlawfulness of the alien's presence in the territory of the expelling State, and of the reason for which the expulsion was to be regarded as unlawful.

73. The Drafting Committee worked on the basis of a revised text presented by the Special Rapporteur in response to concerns raised during the plenary debate on the original draft article.

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[26] **Draft article 27: Suspensive effect of an appeal against an expulsion decision**
An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

[27] **Draft article 29: Readmission to the expelling State**
1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.
2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

In this regard, the Special Rapporteur proposed that the scope of the draft article be narrowed down so as to limit the right of return in case of unlawful expulsion to those aliens who were lawfully present in the territory of the expelling State. Also, in view of the fact that some States had questioned the existence of any automatic right of return to the expelling State, the Special Rapporteur proposed to the Drafting Committee that the term *"readmission"* be used instead of *"return"*.

74. Following a lengthy discussion, the Drafting Committee retained a formulation which it considered to be sufficiently cautious in that it covers only aliens lawfully present in the territory of the expelling State and recognizes a right to readmission to the expelling State only if it is established by a competent authority that the expulsion was unlawful, and save where the return of the alien constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State. That being said, the Committee formulated this draft article as an exercise of *progressive development* rather than an attempt to *codify* existing rules.

75. The term "unlawful expulsion", contained in the draft article, covers any expulsion in violation of a rule of international law. However, that term should also be understood in the light of the principle stated in Article 13 of the ICCPR and reiterated in draft article 4, according to which an alien may be expelled only in pursuance of a decision reached in accordance with law, *i.e.*, primarily, the internal law of the expelling State.

76. The recognition of a right to readmission according to draft article 29 is limited to those situations in which the unlawful character of the expulsion has been the subject of a binding determination, either by the authorities of the expelling State or by an international body, such as a court or a tribunal, which is competent to do so. Furthermore, the formulation retained by the Drafting Committee covers also those situations where the unlawful expulsion did not occur through the adoption of a formal decision – a scenario which is addressed in draft article 11 on the prohibition of disguised expulsion.

77. Draft article 29 should not be read as conferring on determinations made by international bodies effects other than those that are provided for in the instruments by which such bodies were established. It only recognizes, as a matter of progressive development, an independent right of the alien to be readmitted as a result of the determination of the unlawful character of his or her expulsion by a competent authority, be it internal or international.

78. As indicated clearly in the draft article, the expelling State would retain the *right to deny readmission* where the return of the alien would constitute a threat to national security or public order, and also in those situations where the alien would no longer fulfill the conditions for admission under the law of the expelling State.

79. Draft article 31 is entitled *"Responsibility of States in cases of unlawful expulsion"*[28]. The text of the draft article as provisionally adopted by the Drafting Committee indicates that the

[28] **Draft article 31: Responsibility of States in cases of unlawful expulsion**
The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law engages the international responsibility of the expelling State.

international responsibility of the expelling State is engaged in the event of an expulsion in violation of international obligations. As stated in the draft article, such obligations may exist under the present draft articles or any other rules of international law.

E. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

80. Five Draft articles on "Protection of Persons in the Event of Disasters" have been provisionally adopted by the Drafting Committee of the Commission. Taking into account the concerns of member States in terms of respecting absolute sovereignty of states within its territory along with adherence to the principle of non-intervention in the internal affairs of affected state, few elements have been given due consideration under Draft Article 13. The said draft article states that such conditions shall be in accordance with the existing draft articles, applicable rules of international law, and the national law of the affected State. Further, conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. However, when formulating conditions, the affected State shall indicate the scope and type of assistance sought.

81. Besides these conditions favouring the affected State, the affected State has been vested with certain duties while seeking external assistance. In order to facilitate the prompt and effective provision of external assistance, the affected State shall grant the civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement, etc,. It shall also grant in compliance with legal provisions, goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof. It has also been considered that the affected State shall ensure that its relevant legislation and regulations could be readily accessible, to facilitate compliance with national law.

82. These are few developments on which Member States of AALCO could reflect upon and raise their concerns. The provision with respect to termination of assistance is a welcome measure because the provision clearly seeks to formulate the modalities of termination of assistance in consultation with both parties and provide the assisting state with adequate notification period.

83. The draft articles on expulsion of aliens, the first reading of which is complete, proceed on the basis of persons in lawful and unlawful presence. They seek to strike an appropriate balance between States' discretion to control the entry of aliens into their territory (Sovereignty) and their international law obligations, particularly in the field of human rights that they have to comply with before expelling aliens. It is very important that these articles receive the critical attention of Member States of AALCO for they do contain some grey areas that the Commission needs to address in the further stages of its work. This becomes all the more important in view of the fact that some provisions of the draft articles go beyond codification and engage in progressive development of the law on the subject.

84. One can identify a number of issues/ concerns emanating from the draft articles that deserve to be highlighted. States are generally recognized as possessing the power to expel aliens from its territory and make this right contingent on the state concerned taking into consideration the draft articles and other applicable rules of international law, particularly the human rights law. This right of every State to expel aliens living on its territory is subject to being a threat to its

national security or public order. The prohibition of extradition disguised as expulsion, it needs to be reiterated here that extradition of an alien to a requesting state should be conceded when all conditions for expulsion are met and the expulsion itself does not contravene international or domestic law. Given the ever-increasing complexity and sophistication of transnational crimes, States should be encouraged to identify flexible, practical and effective means of cooperation. Further, on the 'readmission to the expelling State' which holds immense significance and interest for the Member States of AALCO, could be recognized only if was established by a competent authority that the expulsion was unlawful, except where for reasons of threat to national security or public order. This is an area characterized by lack of adequate state practice. For instance, not many States have national laws that do confer on aliens subject to expulsion, a right of appeal against that decision. Given this fact, it is almost impossible to draw a legal basis for this under customary international law. Furthermore, how far the right of return to the expelling State could be recognized in the case of aliens who had been on its territory unlawfully prior to the expulsion decision requires clarification.

II. SUMMARY OF THE WORK OF THE INTERNATIONAL LAW COMMISSION (ILC) AT ITS SIXTY-FIFTH SESSION

A. BACKGROUND

1. The Commission held its Sixty-fifth session from 6 May to 7 June 2013 and 8 July to 9 August 2013 at UN European Headquarters, Geneva. The session was opened by Mr. Lucius Caflisch, Chairman of the Sixty-fourth session of the Commission.

2. The Commission consists of the following members:

3. Mohammad Bello Adoke (Nigeria); Ali Mohsen Fetais Al-Marri (Qatar); Lucius Caflisch (Switzerland); Enrique J.A. Candioti (Argentina); Pedro Comissário Afonso (Mozambique); **Abdelrazeg El-Murtadi Suleiman Gouider (Libya);** Concepción Escobar Hernández (Spain); Mathias Forteau (France); Kirill Gevorgian (Russian Federation); Juan Manuel Gómez-Robledo (Mexico); **Hussein A. Hassouna (Egypt); Mahmoud D. Hmoud (Jordan); Huang Huikang (China);** Marie G. Jacobsson (Sweden); **Maurice Kamto (Cameroon); Kriangsak Kittichaisaree (Thailand);** Ahmed Laraba (Algeria); Donald M. McRae (Canada); **Shinya Murase (Japan);** Sean D. Murphy (United States of America); Bernd H. Niehaus (Costa Rica); Georg Nolte (Germany); **Ki Gab Park (Republic of Korea); Chris M. Peter (United Republic of Tanzania);** Ernest Petric (Slovenia); Gilberto Vergne Saboia (Brazil); **Narinder Singh (India);** Pavel Šturma (Czech Republic); **Dire D. Tladi (South Africa);** Eduardo Valencia-Ospina (Colombia); Marcelo Vázquez-Bermudez, (Ecuador); **Amos S. Wako (Kenya); Nugroho Wisnumurti (Indonesia);** and Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland).

4. The Commission elected the following officers: Chairperson: Mr. Bernd H. Niehaus (Costa Rica); First Vice-Chairman: Mr. Pavel Šturma (Czech Republic); Second Vice-Chairman: **Mr. Narinder Singh (India);** Rapporteur: Mr. Mathias Forteau (France); and Chairman of the Drafting Committee: **Mr. Dire D. Tladi (South Africa).**

5. On 6 May 2013, the Commission elected **Marcelo Vázquez-Bermudez, (Ecuador)** to fill the casual vacancy occasioned by the resignation of Stephen C. Vasciannie (Jamaica).

6. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission on 9 July 2013[29]. As the Fifty-Second session of AALCO would be held after the Sixty-fifth session of the ILC, the statement delivered by the Secretary-General comprised of the comments on agenda items deliberated at the First segment of the ILC session. He briefed the Commission on the following agenda items of the sixty-fifth session of the ILC: (i) immunity of state officials from foreign criminal jurisdiction; (ii) protection of persons in the event of disasters; and (iii) formation and evidence of customary international law. An exchange of views followed. The statement delivered by Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO to the Sixty-Fifth Session of the Commission on 9 July 2013 is also annexed.

[29] The text of this statement is annexed as Annex II to this Report.

7. There were as many as five topics on the agenda of the aforementioned Session of the ILC. With a view to providing Member States with adequate time for focused deliberations on the work of the International Law Commission, the AALCO Secretariat presents its report with certain modifications. The present section provides a brief summary of some of the topics on the agenda of the ILC. These are:

(i) Subsequent agreements and subsequent practice in relation to the interpretation of treaties, and
(ii) Provisional application of treaties.

8. The following section contains a relatively elaborate review of the work of the Commission on three topics which would be deliberated during the **Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission" during the Fifty-Second Annual Session of AALCO on 11th September 2013.** These are:

- **Protection of persons in the event of disasters**
- **Immunity of State officials from foreign criminal jurisdiction**
- **Formation and evidence of customary international law**

9. Therefore the Member States are requested to focus on these three topics during their deliberations at the Fifty-Second Session of AALCO. Nevertheless the Secretariat will welcome any comment on the other topics, which could enrich the work of the ILC in its coming session.

10. At the sixty-fourth session (2012) of the ILC, the topic "Treaties over Time" was decided to be changed to ***"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"*** and Mr. Georg Nolte was appointed as the Special Rapporteur for this topic. At its sixty-fifth session (2013), the Commission considered the first report presented by the Special Rapporteur and the report synthesized elements of the three reports of the Study Group and covered four proposed draft conclusions that covered basic aspects of the topic: namely, (i) general rule and means of treaty interpretation, (ii) Subsequent agreements and subsequent practice as means of interpretation, (iii) Definition of subsequent agreement and subsequent practice as means of treaty interpretation, and (iv) Attribution of treaty-related practice to a State.

11. The topic ***"provisional application of treaties"*** was included in the work programme of the Commission at its sixty-fourth session (2012), which requested the ILC Secretariat to prepare a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties. At its sixty-fifth session in 2013, the Commission considered the Memorandum of the Secretariat and the First Report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo. The Memorandum of the Commission's Secretariat, dealt extensively with the procedural history of the "provisional application of treaties". The Memorandum also dealt with the substantive topics including: Raison d'etre of provisional application of treaties; Shift from provisional "entry into force" to provisional "application"; legal basis for provisional application; Provisional application of part of a treaty;

Conditionality, Juridical nature of provisional application Termination of provisional application. The first report of the Special Rapporteur has dealt in general terms, the principal legal issues that arise in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice.

12. The Commission considered the sixth report of the Special Rapporteur Mr. Eduardo Valencia-Ospina on *"Protection of persons in the event of disasters"*. The report discussed about the historical development of concept of disaster risk reduction, prevention as a principle of international law tracing from human rights law and environmental law; international cooperation on prevention as dealt under bilateral and multilateral instruments; national policy and legislative framework on prevention, mitigation and preparedness; and proposal to include draft Article 16 on 'duty to prevent' and draft Article 5 *ter* on 'Cooperation for disaster risk reduction'.

13. As regards the topic *"Immunity of State officials from foreign criminal jurisdiction"*, the Commission considered the Second Report of the Special Rapporteur Ms. Concepción Escobar Hernández, who was appointed at the sixty-fourth session (2012) of the Commission. AT the sixty-fifth session (2013), the second report dealt with the Scope of the topic and the draft articles; the concepts of immunity and jurisdiction; the distinction between immunity *rationae personae* and immunity *rationae materiae*; and, the normative elements of immunity *rationae personae*. Three draft Articles 1, 3 and 4 on 'scope of the present draft articles', 'persons enjoying immunity *rationae personae'*, and 'scope of immunity *rationae personae'*, was adopted by the Commission.

14. On the topic *"Formation and evidence of Customary Evidence of International Law"*, there were two main documents which was considered by the Commission. First, the memorandum of the Secretariat on "elements in the previous work of the International Law Commission that could be particularly relevant to the topic Formation and evidence of Customary Evidence of International Law; and second, First Report of the Special Rapporteur Mr. Michael Wood on this subject of Formation and evidence of Customary Evidence of International Law. The memorandum consists of introduction, a few preliminary issues regarding the Commission's mandate and its previous work on the topic of "Ways and means for making the evidence of customary international law more readily available", the Commission's approach to the identification of customary international law and the process of its formation by focusing on (a) the Commission's general approach; (b) State practice; (c) the so-called subjective element (*opinio juris sive necessitatis*); (d) the relevance of the practice of international organizations; and (e) the relevance of judicial pronouncements and writings of publicists. It provides an overview of the Commission's understanding of certain aspects of the operation of customary law within the international legal system, which relate to the binding nature and characteristics of the rules of customary international law, including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens,* as well as to the relationship of customary international law with treaties and "general international law".

15. The First report on the topic is divided into three major parts. Part one deals with scope and outcome of the topic which addresses whether to cover *jus cogens;* customary international law as source of international law under Article 38 of the Statute of the International Court of

Justice; and materials that would be considered during the study which focuses on (i) Approach of States and other intergovernmental actors, (ii) Case law of the International Court of Justice, (iii) Case law of other courts and tribunals, (iv) work of other bodies, and (v) Writings.

16. The Commission paid tribute to the late Ambassador Chusei Yamada and Sir Ian Sinclair. The AALCO Secretariat also pays tribute to late Ambassador Chusei Yamada and commemorates his contribution in the field of International Law as distinguished Member of the ILC from Japan and as Special Rapporteur on the topic "Shared Natural Resources".

B. SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO TREATY INTERPRETATION

Background

17. During its sixty-fourth session (2012), the Commission decided to change the format of work on the topic "Treaties over time" and to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[30]

18. The topic "Treaties over time" was included in the Commission's programme of work at its sixtieth session (2008).[31] At its sixty-first session (2009), the Commission established a Study Group on Treaties over time, chaired by Mr. Nolte.[32] At the sixty-second session (2010), the study group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chair on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction.[33] At the sixty-third session (2011), the Study Group began its consideration of the second report by the Chair on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, focusing on 12 of the general conclusions proposed therein.[34] In the light of the discussions in the Study Group, the Chair reformulated the text of his proposed conclusions to what became nine preliminary conclusions.[35]

19. At the sixty-fourth session (2012), the Study Group completed its consideration of the second report by its Chair.[36] In so doing, the Study Group examined six additional general conclusions proposed in the second report. In the light of the discussions in the Study Group, the Chair reformulated the text of what became six additional preliminary conclusions.[37] The Study Group agreed that the preliminary conclusions by its Chair would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur.[38] In addition to considering the remainder of the second report, the Study Group also considered parts of the third report prepared by its Chair on subsequent agreements and subsequent practice of States outside of judicial and quasi-judicial proceedings.[39]

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[30] A/67/10, para. 269.
[31] A/63/10, para. 353: for the syllabus of the topic, see ibid., annex A. The General Assembly, in paragraph 6 of its resolution 63/123, took note of the decision.
[32] A/64/10, paras. 220-226.
[33] A/65/10, paras. 344-354. The introductory, second and third reports, originally informal working papers, will be included in the forthcoming publication, Georg Nolte (ed.) Treaties and Subsequent Practice (Oxford University Press, 2013).
[34] A/66/10, paras. 336-341.
[35] For the text of the nine preliminary conclusions by the Chair of the Study Group, see ibid., para. 344.
[36] A/67/10, paras. 225-239.
[37] For the text of the six additional preliminary conclusions by the Chair of the Study Group, see ibid., para. 240.
[38] Ibid., para. 231.
[39] Ibid., paras. 232-234.

Consideration of the Topic at the Sixty-Fifth Session of the Commission

20. At its sixty-fifth session the Commission had before it the first report[40] by the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation. The report, in accordance with the discussions in the Study Group on Treaties over time at the Commission's sixty-fourth session (2012), synthesized elements of the three reports of the Study Group and took into account the discussions within that Group. It contained four proposed draft conclusions that covered basic aspects of the topic.

21. The first topic covered was that of **general rule and means of treaty interpretation**, wherein the Special Rapporteur covered the roles of the International Court of Justice (ICJ); adjudicative bodies under international economic regimes such as the World Trade Organization (WTO), Iran-United States Claims Tribunal, and tribunals and panels under the International Centre for Settlement of Investment Disputes (ICSID) and North American Free Trade Agreement (NAFTA); Human rights courts and the Human Rights Committee such as the European and Inter-American Courts of Human Rights; and other international adjudicative bodies such as the International Criminal Court, Seabed Disputes Chamber and European Court of Justice.

22. Through these discussions, the Special Rapporteur highlighted the importance and the instances of interpretation of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties and within Draft conclusion 1 restated the importance of Article 31 and 32 of the Vienna Convention as setting forth the general rules on the interpretation of treaties.[41]

23. The Special Rapporteur then discussed **Subsequent agreements and subsequent practice as means of interpretation** while focusing on the slight variations and different emphasis within the interpretations of Article 31 (3) (a) and (b) of the Vienna Convention by the various afore-mentioned adjudicatory bodies. In this manner the Special Rapporteur highlighted the ways in which these bodies have recognized subsequent agreements and practices of the parties as a means of interpretation. The Special Rapporteur also highlighted the concept of 'evolutive interpretation' and explored its relationship with interpretation in the light of subsequent practice. The Rapporteur's second Draft conclusion was that "Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation"[42]and "Subsequent agreements and subsequent practice by the parties may guide an evolutive interpretation of a treaty."[43]

24. The Special Rapporteur next went on to discuss the **Definition of subsequent agreement and subsequent practice as means of treaty interpretation** through the exploration of the genesis of the term and its exact definition as gleaned from the decisions and judgments of various adjudicatory bodies. This was done in order to ascertain the exact definition of the terms 'subsequent agreement' and 'subsequent practice' in order to determine exactly which agreements and practices could be used to assist in the interpretation of treaties.

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[40] A/CN.4/660
[41] Ibid. para 28.
[42] Ibid. para 64.
[43] Ibid.

25. In Draft conclusion 3, the Special Rapporteur arrived at the definition as:

"[…]*a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions.*

For the purpose of treaty interpretation "subsequent practice" consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.

Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is a means of interpretation according to article 31 (3) (b) of the Vienna Convention. Other subsequent practice may under certain circumstances be used as a supplementary means of interpretation according to article 32 of the Vienna Convention."[44]

26. Finally, under **Attribution of treaty-related practice to a State**, the Special Rapporteur explored the questions of (1) under which circumstances practice "in the application of the treaty" can be attributed to a State and thus be relevant interpretative State practice, and whether (2) social developments or (3) practice by actors other than States, particularly noting the role of the International Committee for the Red Cross (ICRC),can also be relevant for the interpretation of a treaty.

27. In his conclusion, under Draft conclusion 3, the Rapporteur affirmed that conduct of all State organs which can be attributed to a State, social practice and practice of non-State actors may all be used for the purpose of treaty interpretation.[45]

[44] Ibid. para. 118.
[45] Ibid. para. 144.

C. PROVISIONAL APPLICATION OF TREATIES

Background

28. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work. At that session, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties.[46]

29. At that time, the recently appointed Special Rapporteur held informal consultations with the members of the Commission in order to open a dialogue on issues relevant to the handling of the topic and delivered an oral report on those consultations. The Commission then decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties. (A/67/10, para. 143).

30. Article 25 of the Vienna Convention is the outcome of a discussion in the Commission that began in the 1950s. The legislative history of the article in question is highly relevant to the handling of this topic. As mentioned in the previous paragraph, the Secretariat prepared a memorandum that summarizes both the procedural history and the substantive issues discussed by the Commission during the process leading to the drafting of article 25.

31. Before the Commission at its sixty-fifth session were the Memorandum of the Secretariat and the 1st Report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo.

32. The Memorandum of the Commission's Secretariat, dealt extensively with the procedural history of the "provisional application of treaties" including its discussion in various fora and the efforts and events that played a key role in developing the topic. Such efforts included the work of the ILC from 1950 to 1966, UN General Assembly in 1966 and 1967 and the Vienna Conference on the Law of Treaties in 1968 and 1969.

33. The Memorandum also dealt with the substantive topics including: Raison d'etre of provisional application of treaties; Shift from provisional "entry into force" to provisional "application"; legal basis for provisional application; Provisional application of part of a treaty; Conditionality, Juridical nature of provisional application Termination of provisional application.

34. The **raison d'être** for application for the need for provisional applications was stated to be the need to expedite the application of a treaty, typically as a matter of urgency and as an elegant solution to the difficulties raised by constitutional requirements for ratification by avoiding the terms "treaty" and "ratification".

[46] A/67/10, para. 143.

35. **The expression “provisional entry into force” was also changed in favour of “provisional application”** because while the former corresponded to practice, but it was quite incorrect, for the practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.

36. With regards to the **legal basis for provisional application** the Secretariat noted that the text eventually adopted by the Commission referred to the provisional entry into force of a treaty in two scenarios: where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed.

37. With regards to **conditionality** the Secretariat pointed out that during the early consideration in the Commission, references to the provisional entry into force of a treaty typically also alluded to the conditions under which the treaty would enter into force on a provisional basis. However, the text adopted by the Commission in 1965 excluded any reference to a date or event upon which a treaty would enter into force on a provisional basis.

Consideration of the topic at the Sixty-fifth session of the Commission

38. In the words of the Special Rapporteur himself, the report was an attempt to establish in general terms the principal legal issues that arise in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice.

39. Mr. Gómez-Robledo first explored the **purposes and usefulness of provisional application**. Firstly the Special Rapporteur noted that States had pointed out at the Vienna Conference that in matters of great urgency such as the ending of hostilities or natural disasters, provisional application may be useful. Mr. Gómez-Robledo also noted that some States had stressed that it would provide a tool that would give greater flexibility to the treaty regime such as modifying the provisions of a treaty without the need for an amendment process.

40. It was also noted that Provisional application of a treaty may arise where States have concluded highly sensitive political agreements and wish to build trust in order to prevent the contracting parties from reconsidering their position regarding the entry into force of the treaty during the ratification process. It was further noted that one of the primary motives for seeking provisional application is the prevention of legal gaps between successive treaty regimes, or to expedite the implementation process prior to the completion of lengthy constitutional processes.

41. Mr. Gómez-Robledo then discussed the **legal regime of provisional application**. In exploring the modalities that occur in state practice, the Special Rapporteur touch upon the sources of obligations arising from treaty provisions and separate agreements concerning the treaty. The Special Rapporteur also delved into the expressed and tacit forms of expression of intent, and unilateral and agreed termination of the treaty.

42. The Special Rapporteur finally summarized his views as follows:

(a) Recourse to the mechanism of provisional application of treaties is neither uniform nor consistent, which suggests that States are unaware of its potential;

(b) The practice described above demonstrates the usefulness that the provisional application of treaties may have under certain circumstances in order to give effect to all or part of the treaty in question;

(c) The variety of situations that occur in contractual relations between States warrants in-depth consideration of State practice, if only in order to determine the most common systems of domestic law;

(d) As with any institution that is regulated by international law, it is necessary to determine whether there are procedural requirements for the provisional application of treaties;

(e) It might be asked what the relationship between the article 25 regime and other provisions of the Vienna Convention, as well as other rules of international law, is;

(f) Lastly, if the provisional application of a treaty is deemed to produce legal effects, the legal consequences of violation of the obligations assumed through such application must be determined.

D. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Background

43. At the fifty-ninth session of the International Law Commission (2007), it was decided to include the topic "Protection of Persons in the Event of Disasters" in its programme of work and Mr. Eduardo Valencia-Ospina (Colombia) was appointed as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, initially limited to natural disasters. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur32 that traced the evolution of the protection of persons in the event of disasters, identified the sources of the law on the topic, previous efforts towards codification and development of the law in the area, and a broad outline on various aspects of the general scope with a view to identifying the main legal questions to be covered.

44. At its sixty-first session (2009), the Commission considered the second report of the Special Rapporteur analysing the scope of the topic ratione materiae, ratione personae and ratione temporis, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also referred the draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a Working Group to discuss the draft article. Later, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee.

45. At its sixty-second session (2010), the Commission had before it the third report of the Special Rapporteur, providing an overview of the views of States on the work undertaken by the Commission thus far, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State. There were proposals for the following three further draft articles: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State). The Commission provisionally adopted draft articles 1 to 5, and took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee.

46. At the sixty-third session (2011), the Commission had before it the fourth report of the Special Rapporteur, dealing with the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. The Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report, to the Drafting Committee. The Commission provisionally adopted six draft articles, together with commentaries.

47. At the sixty-fourth session of the International Law Commission, in 2012, the Special Rapporteur submitted his fifth report on the protection of persons in the event of disasters[47]. He

[47] See A/CN.4/652.

provided therein an overview of the views of States and organizations on the work undertaken by the Commission to date, in addition to an explanation of his position on the Commission's question in chapter III.C of its 2011 annual report[48]. The report contained a further elaboration of the duty to cooperate and a discussion of the conditions for the provision of assistance and of the question of the termination of assistance. Proposals for the following three further draft articles were made in the report: A (Elaboration of the duty to cooperate), 13 (Conditions on the provision of assistance) and 14 (Termination of assistance).

Consideration of the topic at the Sixty-fifth session of the Commission

48. The Commission considered the sixth report of the Special Rapporteur Mr. Eduardo Valencia-Ospina on *"Protection of persons in the event of disasters"*. The report discussed about the historical development of concept of disaster risk reduction, prevention as a principle of international law tracing from human rights law and environmental law; international cooperation on prevention as dealt under bilateral and multilateral instruments; national policy and legislative framework on prevention, mitigation and preparedness; and proposal to include draft Article 16 on 'duty to prevent' and draft Article 5 *ter* on 'Cooperation for disaster risk reduction'.

49. The focus of the topic was to "undertake activities aimed at the prevention, and mitigation of the effects, of … disasters as well as … the provision of humanitarian relief in the immediate wake of … disasters". The scope of the topic *ratione temporis* would comprise "not only the 'response' phases of the disaster, but also the pre- and the post-disaster phases". Moreover, the syllabus listed the principles of prevention and mitigation among the core principles underpinning contemporary activities in the realm of protection of persons in the event of disasters. With regard to principle of prevention, "States are to review existing legislation and policies to integrate disaster risk strategies into all relevant legal, policy and planning instruments, both at the national and international levels, in order to address vulnerability to disasters". With regard to mitigation, "States are to undertake operational measures to reduce disaster risks at the local and national levels with a view to minimizing the effects of a disaster both within and beyond their borders"

Draft Article 16: Duty to Prevent

Draft article 16
Duty to prevent

1. **States shall undertake to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters.**
2. **Appropriate measures shall include, in particular, the conduct of multihazard risk assessments, the collection and dissemination of loss and**

[48] See A/66/10.

risk information and the installation and operation of early warning systems.

50. As the disaster-proper phase, the pre-disaster phase also implies rights and obligations both horizontally[49] and vertically[50]. The obligation of States in relation to one another and the international community in the pre-disaster phase have been addressed by the Special Rapporteur in his fifth report on duty to cooperate in disaster preparedness, prevention and mitigation. Obligation to prevent transboundary harm is another obligation during pre-disaster. Nevertheless, prevention is more closely associated with a primary obligation to prevent harm to one's own population, property and the environment generally. Historical development of this subject shows that prevention, mitigation and preparedness have long been part of the discussion relating to natural disaster reduction and more recently to that on disaster risk reduction. Generally, they cover measures that can be taken in the pre-disaster phase.

51. On "preparedness", the Report mentioned that it is an integral part of disaster or emergency management, and has been characterized as "the organization and management of resources and responsibilities for addressing all aspects of emergencies, in particular preparedness, response and initial recovery steps".[51]It was proposed as an appropriate measure to confront earthquakes as early as 1983 and UNDP had organized a disaster management training programme on disaster preparedness in the International Decade for Natural Disaster Reduction, in 1994. Preparedness came to be understood as crucial to international relief assistance. Accordingly, the objective of preparedness measures is closely related to the occurrence of a disaster. The ILC Secretariat concluded, "preparedness refers to those measures put into place in advance to ensure an effective response, including the issuance of timely and effective early warning and the temporary evacuation of people and property".[52]

52. Preparedness deals with two areas of disaster risk reduction and disaster management: the pre-disaster phase and the post disaster phase. The goal of disaster preparedness is to respond effectively and recover more swiftly when disasters strike. Preparedness efforts also aim at ensuring that those having to respond know how to use the necessary resources. The activities that are commonly associated with disaster preparedness include developing planning processes to ensure readiness; formulating disaster plans; stockpiling resources necessary for effective response; and developing skills and competencies to ensure effective performance of disaster-related tasks.[53]

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[49] Horizontal rights and obligations means the rights and obligations of States in relation to one another and the international community.

[50] Vertical rights and obligations mean the rights and obligations of States in relation to persons within a State's territory and control.

[51] ISDR, UNISDR *Terminology on Disaster Risk Reduction*, available from www.unisdr.org/eng/library/UNISDR-terminology-2009-eng.pdf.

[52] A/CN.4/590, para. 27.

[53] Jeannette Sutton and Kathleen Tierney, "Disaster preparedness: concepts, guidance and research", report prepared for the Fritz Institute "Assessing Disaster Preparedness" Conference, Sebastopol, California, 3 and 4 November 2006.

53. The topic "mitigation" is frequently referred to in most instruments relating to disaster risk reduction together with preparedness.[54] In its resolution 44/236, the Assembly set as a goal of the International Decade for Natural Disaster Reduction, "to improve the capacity of each country to mitigate the effects of natural disasters expeditiously and effectively".[55] In terms of specific measures, mitigation came to be understood as aiming at structural or non-structural measures to limit the adverse effects of disaster. According to the definition, mitigation and preparedness imply the taking of measures prior to the onset of a disaster; they can be properly regarded as specific manifestations of the overarching principle of prevention, which lies at the heart of international law. The Charter of the United Nations states that its main purpose is to "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace". Further, the Commission while undertaking study on "prevention of transboundary harm from hazardous activities" which lead to draft articles on this subject in 2001, considered the "well-established principle of prevention" in relation to that international aspect of man-made disasters. The Commission explicitly referred to the Declaration of the United Nations Conference on the Human Environment, the Rio Declaration on Environment and Development and General Assembly resolution 2995 (XXVII) and concluded that the "prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution". To substantiate the existence of an international legal obligation to prevent harm, in both horizontal and vertical dimensions, human rights law and environmental law principles were analysed.

54. Referring to the obligations mentioned under international human rights regime, as deal under the preliminary report of the Special Rapporteur on this subject, it was stated that "States are under a permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law".[56] It was further recalled "that each human right is deemed to entail three levels of obligation on the State":[57] the duty to respect (i.e. refraining itself from violating), protect (i.e. protecting rights holders from violations by third parties) and fulfil (i.e. taking affirmative actions to strengthen access to the right). Protection, however, does not only relate to actual violations of human rights but also entails an obligation for States to prevent their occurrence. This positive obligation to prevent human rights violations is explicitly enshrined many of the international human rights instruments. The International Covenant on Civil and Political Rights[58] establishes a positive obligation for States to respect and ensure human rights for all individuals subject to its jurisdiction, without distinction of any kind. Reference was made to Articles 2 (2) and 3 (a) and 3 (b) on an obligation to prepare for and mitigate the consequences of human rights violations. The prevention of human rights violations has been described as basically the identification and the eradication of the underlying causes leading to violations of human rights. In that regard, reference was made to few cases decided by the European Court of Human Rights too. It was reinstated that a State incurs liability when it neglects its duty to take

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[54] General Assembly resolution 46/182, annex, sect. III.
[55] General Assembly resolution 44/236, annex, para. 2 (a).
[56] A/CN.4/598, para. 25.
[57] Ibid., para. 26.
[58] See General Assembly resolution 2200 A (XXI), annex.

preventive measures when a natural hazard is clearly identifiable and effective means to mitigate the risk are available to it. In its 2008 judgement in *Budayeva*, the Court concluded:

> "In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use … The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation."[59]

55. On "environmental law principles" on 'prevention' obligation, the report reiterated that States have an *erga omnes* obligation not to cause environmental harm and to ensure that activities within their jurisdiction do not harm the environment or areas under the jurisdiction of another State. The duty to prevent in international environmental law encompasses both obligations.[60] Prevention in the environmental context is based on the common law principle of *sic utere tuo ut alienum non laedas,* as declared by the ICJ in the *Corfu Channel case*[61]. This principle was earlier addressed in the *Trail Smelter arbitration* case[62] as well. The first clear pronouncement of the principle of prevention in international environmental law can be found in principle 21 of the Declaration of the United Nations Conference on the Human Environment; Principle 2 of the Rio Declaration on Environment and Development adopted principle 21, recognising that States have a sovereign right to exploit their own resources according to their developmental policies; Principle 11 of the Rio Declaration builds on this obligation by adding that States must adopt legislative and administrative policies intended to prevent or mitigate transboundary harm. The principle was affirmed in the 1996 advisory opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons case*[63] in the following terms:

> "The existence of the general obligation of States to ensure that activities within their activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment."

56. This principle of prevention has been used recently to hold States responsible for failing to take steps necessary to stop transboundary harm. For example, in the *Gabčíkovo-Nagymaros Project case*[64], the ICJ found that, at least in the field of environmental protection, "vigilance and prevention are required" on account of the often irreversible character of damage to the

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[59] *Budayeva and Others v. Russia*, application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 5343/02, judgement of 20 March 2008, para. 137.

[60] Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), judgment of 20 April 2010, I.C.J. Reports 2010, Separate Opinion by Judge Cançado Trindade, para. 59.

[61] Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), judgment of 9 April 1949, I.C.J. Reports 1949, p. 22.

[62] Trail Smelter case (United States of America v. Canada), Reports of International Arbitral Awards, vol. III, pp. 1905-1982.

[63] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 241, para. 29.

[64] *Case concerning the Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), *I.C.J. Reports 1997*, p. 7, para. 140.

environment and of the limitations inherent in the very mechanism of reparation to this type of damage. Similarly, in the *Pulp Mills on the River Uruguay case*[65], the Court found that the principle of prevention was part of customary international law and that a State was thus obliged to use all the means at its disposal in order to avoid activities that took place in its territory or in any area under its jurisdiction causing significant damage to the environment of another State. It was observed that both the ICJ and the ILC agreed that the principle of prevention stems from two distinct but interrelated State obligations: principle of due diligence and the precautionary principle.

Draft Article 5 ter: Cooperation for disaster risk reduction

Draft article 5 *ter*
Cooperation for disaster risk reduction

> **Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.**

57. The duty to cooperate is a well-established principle of international law, as enshrined in numerous international instruments, including the Charter of the United Nations and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. It states that the purpose of cooperation is, in part, "to promote international economic stability and progress" and "the general welfare of nations". The duty to cooperate is also well established in connection with prevention. It has been reiterated by the General Assembly in numerous resolutions that address disaster prevention and disaster risk reduction. In establishing the International Decade for Natural Disaster Reduction, the Assembly recognized the responsibility of the United Nations to cooperate to mitigate risk, including through prevention and early warning, while calling upon States to cooperate to reduce natural hazards. General Assembly in its recent resolutions have urged the international community to reduce the adverse effects of natural disasters through cooperation; and support national efforts for prevention, particularly in developing countries.

58. Cooperation is also embedded in the regional organs and platforms concerned with prevention, including the Regional Platform for Disaster Risk Reduction in the Americas, the Arab Strategy for Disaster Risk Reduction 2020, the Asian Ministerial Conference on Disaster Risk Reduction, the European Forum for Disaster Risk Reduction, the Pacific Platform for Disaster Risk Management and the Africa Regional Strategy for Disaster Risk Reduction. In Asia and the Pacific, the *ASEAN Agreement on Disaster Management and Emergency Response* is the most specific and comprehensive international instrument binding States to prevent and mitigate disasters through the adoption of disaster risk reduction mechanisms. It aims to "provide effective mechanisms to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the Parties, and to jointly respond to disaster emergencies". It states that States parties shall give priority to prevention and mitigation, and

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[65] *Pulp Mills on the River Uruguay*, para. 101 (citing para. 22 of the judgment in the *Corfu Channel* case and the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*).

thus shall take precautionary measures to prevent, monitor and mitigate disasters. The Agreement contains three primary categories of disaster risk reduction obligations: risk identification and monitoring; prevention and mitigation; and disaster preparedness. These provisions create a comprehensive duty on all member States of ASEAN to take measures necessary to prevent, prepare for and mitigate disasters.

59. Certain African organizations also have established regional and subregional agencies that facilitate information-sharing and capacity-building tools relating to disaster risk reduction. Article 13 (1) (e) of the Constitutive Act of the African Union provides that its Executive Council may "take decisions on policies in areas of common interest to the Member States, including … environmental protection, humanitarian action and disaster response and relief". Pursuant to this mandate, the African Union and the New Partnership for Africa's Development adopted the Africa Regional Strategy for Disaster Risk Reduction in 2004. The Strategy is intended to facilitate initiatives at the subregional and national levels. In addition, the Economic Community of West African States approved its policy for disaster risk reduction in 2006.

60. The League of Arab States have also developed the Arab Strategy for Disaster Risk Reduction 2020, which was adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, on 19 December 2010. The strategy has two purposes: "to outline a vision, strategic priorities and core areas of implementation for disaster risk reduction in the Arab region" and "to enhance institutional and coordination mechanisms, and monitoring arrangements to support the implementation of the Strategy at the regional, national and local level through preparation of a Programme of Action".

E. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Background

61. At its fifty-eighth Session, in 2006, the ILC, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Immunity of State officials from foreign criminal jurisdiction" for inclusion in its long-term programme of work.[66] At its fifty-ninth Session in 2007, the Commission decided to include the topic in its programme of work.[67]

62. At the sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur[68] as well as a memorandum of the Secretariat on the topic. The preliminary report briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions.[69]

63. The Commission did not consider the topic at the sixty-first session. At its sixty-second session in 2010, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.

64. At the sixty-third session in 2011, the Commission considered the second and third reports of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, inter alia, issues relating to methodology, possible exceptions to immunity and questions of procedure.

65. At the sixty-fourth session in 2012, the Commission considered the preliminary report of the newly appointed Special Rapporteur, Ms. Concepción Escobar Hernández. The preliminary report provided inter alia an overview of the work by the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly while also addressing issues such as the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*, the distinction and the relationship between the international responsibility of the State and the international responsibility of the individual and their implications for immunity, the scope of immunity *ratione personae* and

[66] See *Official Records of the General Assembly, Sixty-First Session, Supplement No. 10* (A/61/10), para. 257.
[67] See *Official Records of the General Assembly, Sixty-Third Session, Supplement No. 10* (A/62/10), para. 375.
[68] A/CN.4/601.
[69] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 267-311

immunity *ratione materiae*, including possible exceptions, and the procedural issues related to immunity

Consideration of the topic at the sixty-fifth session of the Commission

66. At its ongoing sixty-fifth session in 2013, the Commission has before it and is considering the Second report on the immunity of State officials from foreign criminal jurisdiction[70]by the Special Rapporteur.

67. Within the report, Ms. Hernández outlined the methodological approach to the report in the form of the workplan and the structure of the report, as well as areas and methods of future workplans, in addition to the substantive matters. The substantive aspect of the report dealt with the:

a. Scope of the topic and the draft articles;
b. The concepts of immunity and jurisdiction;
c. The distinction between immunity *rationae personae* and immunity *rationae materiae*; and,
d. The normative elements of immunity *rationae personae*

a. *Scope of the Topic and the Draft Articles*

68. Building on the work of former Rapporteur, Mr. Roman Anatolevich Kolodkin, Ms. Hernández extensively dealt with the scope of the topic and the draft articles, and recommended the following approach:

i. The draft articles deal only with criminal jurisdiction, not civil or administrative jurisdiction;
ii. The draft articles deal only with immunity from foreign criminal jurisdiction, i.e., jurisdiction exercised by a State other than the State of nationality of the concerned official;
iii. The draft articles deal only with immunity from domestic criminal jurisdiction, and not international criminal courts;
iv. The draft articles do not deal with persons who are subject to a more specific immunity regime, such as diplomatic agents, consular officials, etc.;
v. The draft articles deal only with the immunity of State officials.

69. The limitation of scope of the draft articles to solely immunity from criminal jurisdiction, are noted by the Special Rapporteur, as necessary because of the specificities of criminal trials that do not arise in other procedures, such as the impact on the freedom of movement of the persons concerned, in instances of both a conviction or preliminary stages of a trial and the impact of a criminal trial on a person's credibility, integrity and dignity.

70. The Special Rapporteur also noted the focus on *foreign* jurisdiction as the immunity granted under domestic law and immunity granted under international law do not necessarily have the same nature, function and purpose. Ms. Hernández also noted that immunity before

[70] A/CN.4/661

international criminal courts is sufficiently delimited and clarified by the international instruments that established and regulate the functioning of those courts.

71. The Special Rapporteur further noted that both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative development in treaty and customary law, and that it would be unnecessary for the Commission to reconsider these well-established regimes. Finally, Ms. Hernández noted that a definition for the term "official" for the purposes of the topic is essential, important in the context of immunity *rationae materiae* and should therefore be addressed.

72. On the basis of the reasoning provided, the following draft articles were proposed by the Special Rapporteur:

Draft Article 1
Scope of the Draft Articles

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

Draft Article 2
Immunities not included in the scope of the draft articles

The following are not included in the scope of the present draft articles:

(a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(c) Immunities established under other ad hoc international treaties;

(d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

b. *The Concepts of Immunity and Jurisdiction*

i. The Concept of Criminal Jurisdiction

73. The Special Rapporteur noted the intrinsic relationship between the concepts of Immunity and Jurisdiction and the fact that the concept of immunity is necessary based on the

prior existence of the criminal jurisdiction of the State, without which the institution of immunity itself would be meaningless

74. Ms. Hernandez stressed on the necessity to first establish that conceptual distinction owing to the fact that the identification of the types of acts that fall into the general category of "jurisdiction", is an important matter that should be taken up by the Commission in due course, particularly when it addresses the issue of immunity from foreign criminal jurisdiction from a procedural standpoint.

75. The Special Rapporteur noted that the intention at the current stage is not to compile a detailed list of all the types of acts covered by the term "jurisdiction", but rather to provide a definition of the term that is broad enough for it to be effectively compared with the various factors that establish immunity and with the various acts in respect of which immunity can be invoked.

76. Ms. Hernández also noted that the very concept of jurisdiction is closely related to the determination of criminal jurisdiction and should be included therein, but that it should also be it should also be borne in mind that the concept of jurisdiction and the legislation on which it is based are not identical in every State; they have their source not only in the norms and principles of international law but in the State's own legislation, which is adopted on the basis of those international norms and principles and grants jurisdiction to its own courts.

77. Thus, the Special Rapporteur concluded that the term "criminal jurisdiction" refers primarily to a State's competence to exercise its power to prosecute crimes and misdemeanours that are established as such in the applicable provisions of its legislation. The Special Rapporteur also noted that care should be taken to ensure that the legal nature of immunity, which is purely procedural, is not affected in any way. Thus, the inclusion in the definition of "criminal jurisdiction" of a reference to the establishment of individual criminal responsibility does not and cannot result in a foreign official who enjoys such immunity being relieved of such responsibility.

78. In light of these observations the following draft article was proposed:

Draft Article 3
Definitions

For the purposes of the present draft articles:

(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

ii. The Concept of Immunity from Foreign Criminal Jurisdiction

79. While noting the fact that the term 'immunity' is yet to be defined in international legal instruments, similar to the term 'jurisdiction', the Special Rapporteur also suggested that the term 'immunity' be defined while taking into account its characteristics, which were summarized as:

a. Immunity prevents a State from exercising its criminal jurisdiction even though its courts would, in principle, be competent to prosecute a given misdemeanour or crime;
b. Immunity arises only as a result of the existence of a foreign component, referred to generically as an "official" of another State;
c. Immunity from foreign criminal jurisdiction is, by nature, eminently procedural and has no affect on the substantive criminal law of the State that has jurisdiction or on the individual criminal responsibility of the person who enjoys immunity.

80. In light of these observations, the Special Rapporteur suggested the following wording for draft article 3:

Draft Article 3
Definitions

For the purposes of the present draft articles:

(b) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

c. The Distinction Between Immunity *Ratione Personae* and Immunity *Ratione Materiae*

81. Regarding *the distinction between immunity rationae personae and immunity rationae materiae*, Ms. Hernández, has suggested that it would be necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. The reason for this, as noted by Ms. Hernández, is that despite the fact that the distinction between immunity *rationae personae* and immunity *rationae materiae*, or "personal immunity" and "functional immunity", has been discussed and generally accepted in doctrine, the normative elements of each of these types of immunity must be determined in order to establish the legal regime, including procedural approaches, applicable to it.

82. The Special Rapporteur noted that the two types of immunity have significant elements in common and elements that clearly differentiate them from one another. The former include their basis and purpose, which is simply to ensure respect for the principle of the sovereign equality of States, prevent interference in their internal affairs and facilitate the maintenance of stable

international relations by ensuring that the officials and representatives of States can carry out their functions without external difficulties or impediments. Ms. Hernández also noted that in addition, both immunity *ratione personae* and immunity *ratione materiae* protect and are granted to individuals even though the ultimate purpose of granting them is to protect the rights and interests of the State.

83. However, in addition to the common elements the Special Rapporteur also outlined significant differences between immunity *ratione personae* and immunity *ratione materiae* that should be noted. The Special Rapporteur concluded that immunity ratione personae has the following characteristics:

a. It is granted only to certain State officials who play a prominent role in that State and who, by virtue of their functions, represent it in international relations automatically under the rules of international law;
b. It applies to all acts, whether private or official, that are performed by the representatives of a State;
c. It is clearly temporary in nature and is limited to the term of office of the person who enjoys immunity.

84. The Special Rapporteur concluded that immunity *ratione materiae* has the following characteristics:

a. It is granted to all State officials;
b. It is granted only in respect of acts that can be characterized as "official acts" or "acts performed in the exercise of official functions";
c. It is not time-limited since immunity ratione materiae continues even after the person who enjoys such immunity has left office.

85. The Special Rapporteur then went on to suggest the following draft article:

Draft Article 3
Definitions

For the purposes of the present draft articles:

(c) "Immunity ratione personae" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(d) "Immunity ratione materiae" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

d. Immunity *ratione personae*: normative elements

86. The Special Rapporteur has also discussed the *normative elements of immunity rationae personae*, in some detail, focusing on the subjective, relating to the persons who can invoke personal immunity, the material aspect, relating to the types of actions for which immunity can be claimed, and the temporal aspect, concerning the time period for which immunity may be applicable.

87. In discussing the subjective of immunity *rationae personae*, Ms. Hernández discussed both the stricter interpretation as well as the broader interpretation. The former, as was noted by Ms. Hernandez, conferred this immunity on the so-called *Troika* –Heads of State, Heads of Government and ministers for foreign affairs –through established practice, as held in the judgment of the *Arrest Warrant* case. The rationale for this interpretation is that the special status accorded to the *troika* recognized their functions as representatives of the State, and except in exceptional cases, this same recognition was not afforded to other State Officials, even senior ones, if they did not function as representatives of the State. Conversely, the broader interpretation extends the scope of immunity to senior State officials, in addition to the troika, who play a roles in international affairs as a result of their functions under their domestic law, and who represent their State abroad even in highly specific areas.

88. Ms. Hernández noted that the broader interpretation is not a widely accepted one, despite the non-restrictive wording in the *Arrest Warrant* case. Ms. Hernández has drawn attention to the fact that the ICJ itself has not expanded the scope of immunity *rationae personae*as seen in the decision in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case. The Special Rapporteur also notes that there is inconsistent State practice with regard to this interpretation and that it is impossible to find cogent arguments in favour of extending immunity *ratione personae* to non-*Troika* officials.

89. Ms. Hernandez also critiqued the broader interpretation that there is general agreement on the impossibility of creating an exhaustive of officials who can invoke immunity *rationae personae.* Finally, the Special Rapporteur noted that conferring this immunity on all senior State officials, including Government officials, could prevent the competent courts of other States from exercising their jurisdiction, thereby depriving those States of a power that is an aspect of their sovereignty, and that this cannot be done without a proper basis in customary international law. Customary international law has only demonstrated the immunity of the *Troika*, but not of other State officials.

90. Thus, the Special Rapporteur concluded that immunity *rationae personae* cannot be extended to State Officials other than the *Troika*.

91. With regards to the material aspect of immunity *rationae personae*, the Special Rapporteur asserted that international jurisprudence, which refers to this type of immunity as “full”, “total”, “complete”, “integral” or “absolute” immunity precisely in order to show that it applies to any act performed by a person who enjoys immunity.

92. Ms. Hernández also concluded that the temporal aspect of immunity *rationae personae* is also not controversial, as there is broad consensus that the immunity begins when the official in question takes office and ends when the official leaves office.

93. With regards to the above conclusions, the Special Rapporteur made the following recommendations:

Draft Article 4
The subjective scope of immunity *ratione personae*

Heads of State, Heads of Government and ministers for foreign affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

Draft Article 5
The material scope of immunity *ratione personae*

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and ministers for foreign affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

2. Heads of State, Heads of Government and ministers for foreign affairs do not enjoy immunity ratione personae in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

Draft Article 6
The temporal scope of immunity *ratione personae*

1. Immunity ratione personae is limited to the term of office of a Head of State, Head of Government or minister for foreign affairs and expires automatically when it ends.

2. The expiration of immunity ratione personae is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity ratione materiae in respect of official acts performed while in office.

F. FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

Background

94. At the sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its work programme, on the basis of the recommendation of the Working Group on the long-term programme of work. The Commission decided to appoint Mr. Michael Wood as Special Rapporteur for the topic.

95. On the topic *"Formation and evidence of Customary Evidence of International Law"*, there were two main documents which was considered by the Commission. First, the memorandum of the Secretariat on "elements in the previous work of the International Law Commission that could be particularly relevant to the topic Formation and evidence of Customary Evidence of International Law; and second, First Report of the Special Rapporteur Mr. Michael Wood on this subject of Formation and evidence of Customary Evidence of International Law. The memorandum consists of introduction, a few preliminary issues regarding the Commission's mandate and its previous work on the topic of "Ways and means for making the evidence of customary international law more readily available", the Commission's approach to the identification of customary international law and the process of its formation by focusing on (a) the Commission's general approach; (b) State practice; (c) the so-called subjective element (*opinio juris sive necessitatis*); (d) the relevance of the practice of international organizations; and (e) the relevance of judicial pronouncements and writings of publicists. It provides an overview of the Commission's understanding of certain aspects of the operation of customary law within the international legal system, which relate to the binding nature and characteristics of the rules of customary international law, including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens,* as well as to the relationship of customary international law with treaties and "general international law".

96. The First report on the topic is divided into three major parts. Part one deals with scope and outcome of the topic which addresses whether to cover *jus cogens;* customary international law as source of international law under Article 38 of the Statute of the International Court of Justice; and materials that would be considered during the study which focuses on (i) Approach of States and other intergovernmental actors, (ii) Case law of the International Court of Justice, (iii) Case law of other courts and tribunals, (iv) work of other bodies, and (v) Writings.

Consideration of the topic at the Sixty-fifth session of the Commission

97. In the first report of the Special Rapporteur, it was stated that Commission's work on this topic should be in the form of set of "conclusions" with commentaries.[71] One issue that the Commission had to address was on various approaches to the formation and evidence of customary international law in different fields of international law, such as international human rights law, international criminal law and international humanitarian law. The question was

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[71] On scope of the conclusion, the report proposed:

> **"1. *Scope*. The present draft conclusions concern the formation and evidence of rules of customary international law."**

raised during the debates in the Commission and the Sixth Committee of the UNGA in 2012, on whether to cover the formation and evidence of peremptory norms of general international law (*jus cogens*). It was emphasized by the members of the Commission as well as at the Sixth Committee that it should not be covered.

98. Rules of *jus cogens* are legal norms "accepted and recognized by the international community of States as a whole" as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character" (Article 53 of the Vienna Convention on Law of Treatise, 1969). Since there was no contestation on the "superior" category in international law, doctrinal controversy still abounds with regard to its substantive content, as well as the evidentiary elements associated with it. On the source of *jus cogens* rules there are varied opinions, like to consider them as a special category of customary international law; they do not come from custom; customary international law is merely one possible source of *jus cogens*.

99. Stating that public international law is a law, and customary international law as one of the main sources of that law, it was stressed that formal source would be the one which gives the the content of rules of international law their character as law. Article 38.1 of the Statute of the International Court of Justice, which is widely regarded as an authoritative statement of sources of international law, reads as follows:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

100. Article 38.1 (b) being identical to Article 38 (b) of the Statute of the Permanent Court of International Justice, which was originally proposed as the following, "international custom, being practice between nations accepted by them as law." There was reference to making a distinction between customary international law and treaties as per the hierarchy of sources of international law, general principles of law, and conduct by international actors. An international court may also decide that it may apply customary international law where a particular treaty cannot be applied because of limits on its jurisdiction. The inclusion of "state practice", "usage", and "*opinio juris sive necessitates*" in the use of terms of customary international law was suggested. In that regard, the following conclusion was proposed on the use of terms;

> **"2. *Use of terms*. For the purposes of the present draft conclusions:**
>
> **(a) "customary international law" or "rules of customary international law" means the rules of international law referred to in Article 38, paragraph 1 (b) of the Statute of the International Court of Justice;**

(b) [“State practice” or “practice” …;]
(c) [“*opinio juris*” or “*opinio juris sive necessitatis*” …;]
(d) …”

101. The jurisprudence emanating from international courts and approach of States and International organizations are very significant as far as States are concerned in deriving at the conclusions on what constitutes customary international law. While addressing the range of materials to be consulted, the following materials were also briefly discussed: those demonstrating the attitudes of States and other intergovernmental actors; the case law of the International Court of Justice and other courts and tribunals; the work of other bodies, such as the International Law Association; and the views of publicists, in particular as to the general approach to the formation and evidence of customary international law.

Decisions of the International Courts and Tribunals

102. The report discussed certain important cases and their major excerpts that are very relevant in the understanding of customary international law. For example, in the *Lotus* case, the Permanent Court of International Justice stated that international law emanates from the free will of States as expressed in conventions or “by usages generally accepted as expressing principles of law”. It emphasized the distinction between the two constitutive elements of customary international law, stressing the need for both to be present in order to ground a finding of such law:

> “Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain, would it be possible to speak of an international custom.”

103. On the processes of formation and evidence of rules of customary international law, the statement of ICJ in the *North Sea Continental Shelf* case holds very crucial, and thus could be considered elementary in defining ‘state practice’;

> “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.
>
> … The essential point in this connection, and it seems necessary to stress it, is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to

constitute the *opinio juris*; for in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice [*une pratique constante*, in the French text], but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any legal sense of duty."

104. The Court reaffirmed this in *Military and Paramilitary Activities in and against Nicaragua*, where it said that in order to consider what rules of customary international law were applicable it "has to direct its attention to the practice and *opinio juris* of States", and that:

"… as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*'."

105. There are two main approaches to the identification of particular rules of customary international law in the case law of the Court. In some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis. In other cases the Court engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law. There are considerable number of cases in which the Court has addressed specific aspects of the process of formation and identification of rules of customary international law, covering many of the issues that arise under the present topic, chief among them the nature of the State practice and *opinio juris* elements, and the relationship between treaties and customary international law.

Approach of the States and International Organizations

106. On the Approach of States and International Organizations, there seems to be relatively little publicly available material on formation and evidence of customary international law. Still the approach of States may be derived from their statements on particular issues, as well as from pleadings before courts and tribunals. In such pleadings, States regularly adopt the two-element approach, arguing both on State practice and *opinio juris*, though occasionally they adopt a different approach. They frequently produce much evidence of State practice. States also exchange views among themselves about rules of customary international law, often in a confidential manner, and in doing so they no doubt also reflect on the way such rules emerge and are identified. This may happen at regular meetings of legal advisers within international

organizations, such as the United Nations and regional organizations, in smaller groups, or bilaterally.

107. Regarding the approach of other intergovernmental actors, reference was made to international organizations such as the United Nations, wherein it was stated that it might also prove valuable when surveying practice with regard to this topic. This point was reiterated vide two recent examples: found in the report of the Working Group on Arbitrary Detention to the Human Rights Council[72], which referred to "a near universal State practice" accompanied by *opinio juris* as evidence of the "customary nature of the arbitrary deprivation of liberty prohibition"[73]; and the report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident. The Flotilla Incident report stated in one of its sections that that "Custom has the force of law and is binding on States where it reflects the general practice of States, and the recognition by States that this general practice has become law (known as the *opinio juris* requirement)".[74]

[72] A/HRC/22/44.
[73] Ibid, p: 17-18, para. 43.
[74] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, appendix I, September 2011, p. 76, para. 3

G. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SEVENTH SESSION (2012)

108. On 16 November 2012, the Sixth (Legal) Committee of the UN General Assembly adopted draft resolution A/C.6/67/L.13, entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions". The draft resolution was adopted by the Assembly on 14 December 2012. In accordance with paragraph 32 of the resolution, upon request by the General Assembly, the Secretariat prepared and distributed topical summary of the debate held on the report of the Commission at the sixty-seventh session of the Assembly. It consists following sections: (1) Expulsion of aliens; (2) Protection of persons in the event of disasters; (3) Immunity of State officials from foreign criminal jurisdiction; (4) Provisional application of treaties; (5) Formation and evidence of customary international law; (6) Obligation to extradite or prosecute (*aut dedere aut judicare*); (7) Treaties over time; and (8) Most-Favoured-Nation clause.

1. Expulsion of aliens

109. Some delegations expressed their doubts regarding the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, because there already exist detailed regional rules on the subject. It was opined that the topic was not suitable for codification or progressive development at the present time. It was also observed that the Commission should clearly distinguish between the provisions of the draft articles reflecting existing law and those attempting to develop new rules. It was further suggested that the Commission should be cautious in generalizing rules set forth at the regional level and should not give excessive weight to the practice of treaty bodies.

110. Several delegations stressed the need to ensure a balance between the sovereign right of States to expel aliens and the protection of the rights of the aliens concerned. It was underlined, in particular, that States must comply with international law, including human rights law, the law governing the treatment of aliens, international humanitarian law and refugee law. Emphasis was placed on promoting voluntary departure.

111. Commenting on draft article 8, particular relevance of public order and national security as grounds for the expulsion of an alien was emphasized. It was noted that the unlawfulness of an alien's presence in the expelling State should also be explicitly recognized as a valid ground for his or her expulsion. Further, the need to avoid any arbitrary detention of aliens pending expulsion was emphasized, in view of the non-punitive nature of such detention. In addition, it was recommended that a maximum duration for detention pending expulsion be set in the draft articles. Appreciation was expressed for the recognition of the principles of legality and due process in the draft articles.

112. Some delegations questioned the appropriateness of the draft article recognizing the suspensive effect of an appeal against an expulsion decision. The view was taken that the provision was not acceptable, as it did not find sufficient support in State practice. Some other delegations considered that exceptions to the suspensive effect should be recognized in certain

situations, taking into account public order and safety considerations, unless the granting of suspensive effect was necessary in order to respect the principle of non-refoulement. It was also stated that international law would require the granting of suspensive effect only in those cases in which the alien could reasonably demonstrate the existence of a risk to his or her life or liberty in the State of destination. Concerning the State of destination of an alien subject to expulsion, a view was expressed that the State from which the alien had entered the territory of the expelling State was under no obligation to readmit that alien at the request of the expelling State, if the alien had entered the expelling State lawfully. It was observed that the issue of readmission to the expelling State in the event of unlawful expulsion deserved further consideration in view of limited State practice in that regard.

113. On the form of the final outcome of the Commission's work on this topic, delegations expressed support either for a set of draft articles, or a convention, or other possible outcomes, such as guidelines, guiding principles or best practices.

2. Protection of persons in the event of disasters

114. As regards draft article 12 on "offers of assistance", it was expressed that it should not *a priori* be regarded as unfriendly acts or interference in the affected State's internal affairs. Nor should offers of assistance be linked to unacceptable or discriminatory conditions. States and other role players offering assistance should acknowledge the affected State's sovereignty and its primary duty to direct, control, coordinate and supervise relief and assistance in the event of disasters. It was stated that the introduction of the concept of "right" before "offer assistance", implied a corresponding duty, which was confusing, especially in the light of the Commission's finding that there existed no legal duty for States and international organizations to render assistance. Concern was also expressed with the approach of treating States, the United Nations, other competent intergovernmental organizations and non-governmental organizations on the same juridical footing.

115. On "Conditions on the provision of external assistance" under draft article 13, it was observed that those conditions imposed by an affected State should first and foremost comply with international human rights law and core humanitarian obligations. The view was expressed that an affected State was not free to impose conditions unilaterally or arbitrarily. Rather, such conditions had to be based on consultations between the affected State and the assisting actors, taking into account the general principles governing such assistance and the capacities of the assisting actors. Special emphasis was given on addressing the special needs of women and especially vulnerable or disadvantaged groups, including children, the elderly and persons with disabilities.

116. Draft article 14 required further elaboration, because there existed more issues to be addressed including questions of confidentiality, liability, the reimbursement of costs, privileges and immunities, the identification of control and competent authorities, overflight and landing rights, telecommunications facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, and the prompt granting of visas or other authorizations free of charge.

3. Immunity of State officials from foreign criminal jurisdiction

117. Appreciating the importance of this topic, delegations considered it important to determine the acts of a State exercising jurisdiction that were precluded by immunity. It was suggested that the acts so precluded were those subjecting the official to a constraining act of authority. On "Relationship between immunity ratione personae and immunity ratione materiae" delegations observed that situations giving rise to questions of the conduct-based immunity ratione materiae and those raising questions of the status-based immunity ratione personae were treated differently in the practice of their States. On the criteria for identifying persons covered by immunity ratione personae, it was noted that in practice the matter depended on seniority of the individual and the functional need to travel for the purpose of promoting international relations and cooperation. Some delegations considered that immunity ratione personae applied to the troika. While other delegations did not exclude the possibility of other high-ranking State officials enjoying such immunity, some delegations were not amenable to such extension, noting that present customary international law did not extend such immunity to high-ranking officials other than the troika.

118. Concerning immunity ratione materiae, delegations considered the definition of the notions of official act, State official, person acting on behalf of a State in an official capacity or representative of the State, as used in the United Nations Convention on Jurisdictional Immunities of States and Their Property. It was suggested that a State official was a person who exercised governmental authority, occupied a particular government office or served in the highest echelons of public service. Some delegations considered the criteria for attribution of the responsibility of the State for a wrongful act a relevant factor in determining whether a person was a State official. On exceptions to immunity, it was noted that rules and principles in this area need not be construed as exceptions to the rule of immunity of State officials; rather, they constituted specific norms strictly linked to the establishment of the individual criminal responsibility of the officials who commit certain classes of crimes.

119. It was recalled that there might be exceptions to the rule on immunity ratione materiae, where an international agreement constituted a lex specialis for certain crimes or in respect of criminal proceedings for acts committed on the territory of the forum State. Concern was raised in relation to countering impunity for the most serious crimes which are of concern to the international community, wherein no State official should be able to hide behind the veil of immunity. It was nevertheless recognized that different views existed as to the evidence available for the identification of customary law in that regard. Some delegations stressed that an analysis of State practice was crucial in determining whether exceptions to immunity existed. It was suggested that it would be vital to clarify such terms as "international crimes", "grave crimes" and "crimes under international law" for the purpose of this topic. Some delegations argued that the possible exception on the basis of crimes under universal jurisdiction was not convincing, as universal jurisdiction was also applicable to crimes not of an equally serious nature.

4. Provisional application of treaties

120. The delegates referred to increasingly prevalent practice of States resorting to the provisional application of treaties, which had given rise to a number of legal issues. It was

observed that States made use of the option of provisional application due to the lengthy national ratification procedures which became an obstacle towards entry into force of a treaty. Strict adherence to Article 25 and Article 40 on provisional application of treaties under Vienna Convention on the Law of Treaties, 1969 was stressed by delegates. It was stated that recourse to the provisional application of treaties should depend on the specific circumstances and the national legislation of each State, besides the funding for the ratification of the treaty required parliamentary approval. Given the diversity of legal positions at the domestic level, doubts were expressed as to the advisability of drawing conclusions as to general rules.

121. It was suggested that the Commission must clarify the legal situation arising out of the provisional application of a treaty, as well as the nature of obligations created by provisional application and the legal effect of its termination. It was also suggested that the Commission identify the differing forms of provisional application, as well as the procedural steps that were preconditions for provisional application. Provisional application of treaties did not amount to giving consent or entailing obligations. It meant that States agreed to apply a treaty, or certain provisions thereof, as legally binding prior to its entry into force, subject to the conditions provided in the particular provisional application clause, the key distinction being that the obligation to apply the treaty, or its provisions, could be more easily terminated during the period of provisional application than after entry into force. On the question of the termination of the provisional application of a treaty, reference was made to Article 25 (2) of the Vienna Convention and it was reiterated that in relation with Article 18 of the Vienna Convention, general obligation not to defeat the object and purpose of the treaty prior to its entry into force should be upheld.

5. Formation and evidence of customary international law

122. Significant role of customary international law at the international and national levels was emphasized. It was suggested to the Commission to take a practical approach, with a view to providing useful guidance to those called upon to apply rules of customary international law, including at the domestic level. At the same time, some delegations underlined the need to preserve the flexibility of the customary process and its identification. Suggestion was given to provide a broad approach to the topic which includes sources that ought to be analysed by considering the practice of States from various regions of the world. There were divergent views stating that the Commission's work should be either on the ways and methods relating to the identification of customary rules, or on the formation of customary rules. For attaining this, the substantive questions had to be examined like the constituent elements of custom, including their characterization, relevant weight and possible manifestations. In that respect, it was suggested that the judicial findings of both international and domestic courts be scrutinized.

123. On the proposal that the Commission should examine the role of international organizations in the formation and identification of customary law, the opinion was not to give too much weight to resolutions of international organizations. It was suggested that the Commission's approach should focus on the actual practice of States rather than on written materials.

6. Obligation to extradite or prosecute (aut dedere aut judicare)

124. The delegations stressed that the Commission should clarify the customary law status of this obligation for which a systematic survey of State practice was required. Certain delegations also expressed doubt as to the existence of a customary obligation. According to several delegations, however, the absence of a customary obligation should not preclude further consideration of the topic or the development of general principles or rules. It was indicated that Commission should not try to harmonize relevant treaty provisions or focus on their application or interpretation, although such an analysis may be appropriate if general principles could be gleaned from the work. The need to undertake more systematic identification of the relevant core crimes to which the obligation applied was highlighted, for example, terrorism should be included as such a crime. The view was also expressed that the identification of crimes would be redundant in the light of the Draft Code of Crimes against the Peace and Security of Mankind.

125. The analysis by the Commission of the recent ICJ judgment on the subject (*Belgium* v. *Senegal*) and its implications for the topic was appreciated noting that the analysis was necessary to assess whether or how to proceed with the topic, while others noted that the judgment could give greater impetus to the Commission's work. It was also suggested that the judgment revealed both the validity and continued debatability of the obligation. The potential usefulness of an analysis of the topic's relationship with universal jurisdiction and the need to be delinked from it was noted.

7. Treaties over time

126. Delegations welcomed the change in the format of the Commission's work on the topic, with effect from the sixty-fifth session, as well as the appointment of Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Some of the delegations looked forward to the first report by the newly appointed Special Rapporteur, which was expected to synthesize the three reports that he had produced in his capacity as Chair of the Study Group. The importance of preserving the flexibility which characterizes the use of subsequent agreements and subsequent practice as a means of treaty interpretation was emphasised. In that regard, a balance should be maintained between the principle *pacta sunt servanda* and the necessary adjustment of treaty provisions in the light of a changing environment. It was also observed that the existence of formal interpretation procedures did not exclude the consideration of subsequent practice for interpretation purposes.

127. Clarification was sought in terms of contours of the notion of "subsequent agreements" and "subsequent practice" for purposes of treaty interpretation. It was suggested that the Commission examine, inter alia, the relevance of the practice of lower-ranking State officials. The point was made that the subsequent practice of all parties to a multilateral treaty carried special weight and should not be placed on the same footing as practice reflecting the position of only some of the parties. Hence, subsequent practice must, according to article 31 of the 1969 Vienna Convention on the Law of Treaties, embrace all States parties, unless an effect for certain States only was envisaged.

128. States and international organizations were encouraged to provide the Commission with information on their practice, the comment was also made that views expressed orally in the Sixth Committee during the discussion of the Commission's report were as important as written submissions and should receive equal consideration.

8. Most-Favoured-Nation clause

129. Delegations affirmed the importance of Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969 which served as the point of departure in the work of the Study Group. It was stressed that treaty interpretation should remain the core focus of the work and that the specific wording of the Most-Favoured-Nation clause was crucial to its interpretation. It was hoped that the real economic relevance of the Most-Favoured-Nation clause in contemporary times would be studied that would increase the utility of this topic. The delegations welcomed approach of the Study Group to locate its work within a broader normative framework of general international law. The need for the Study Group to take into account the work of other relevant institutions, such as the World Trade Organization, the United Nations Conference on Trade and Development and the Organization for Economic Cooperation and Development, was echoed by some delegations. It was hoped that the Study Group would explore the relationship between bilateral investment treaties and investment in trade in services, the relevance of national treatment standards, fair and equitable treatment, etc., that guarantees against expropriation and access to investor-State arbitration.

H. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

130. The AALCO Secretariat appreciates the work of the Commission and the Special Rapporteurs on specific topics. It is no doubt that these reports would be very useful and informative for Member States. On "**Subsequent agreement and subsequent practice",** concept social practice is given a liberal interpretation on its possible use and subsequent practice by non-State actors as a means to interpret treaty provisions. It could be noted that using these indicators for treaty interpretations must be thoroughly studied before they may be used. The fundamental aspect of the Vienna Convention on Treaties, 1969; is that all discussion of interpretation flows from the subsequent practice of the *parties* to the treaty, which can only mean the States are the sole actors of international treaty-law making and any deviation from this accepted principle could only be an exception, and a thoroughly evaluated exception, and not the rule.

131. On "**provisional application of treaties"**, except when there is an emergency, the application of treaties provisionally and the fulfillment of international obligations should be only towards expediting constitutional procedures. Particularly in states with dualist legal systems, where any implementation of treaties requires ratification to be followed by legislation, provisional application is in some ways being touted as a way to bypass the system and avoiding lengthy constitutional legislative procedures. However, while this possibility may seem attractive to some states, the possibility of by-passing constitutional safeguards is an extremely grey legal area which States much thoroughly consider before entering.

132. As regards, "**Protection of persons in the event of disasters**", it should be noted that though prevention was a definitive principle in international law. Recognising that the States are vested with the duty to prevent disaster and reduce disaster risk, yet even at the presence of national legislations and authorities, pre-disaster preparedness would be very limited. Further, funding for the disaster management also remains a challenge, especially for the developing countries. However, it would be more relevant and apporpirate to deal with technology transfer in terms of addressing post-disaster relief and rescue operations within the country. This comes with a caveat that AALCO member States may consider the view that duty to offer assistance, previously discussed in the fifth report on this subject, shall be not compulsory but voluntary and should respect the principle of non-intervention in the internal affairs of the state by assistance offering state.

133. Several key observations and recommendations have been made in the topic concerning "The Immunity of State Officials from foreign criminal jurisdiction". The first was the recommendation to limit the discussion of the scope of the draft articles on immunity to only matters strictly falling within the definitions of 'State official', 'foreign', particularly limitation to only the domestic laws of states, and 'criminal jurisdiction'. The demarcation of the term 'State official' also played into her discussions of the differences between immunity *rationae personae* and immunity *rationae materiae* and the discussion of the likelihood and legality of an extension of immunity *rationae personae* to persons who do not fall under the commonly accepted "troika" definition; Heads of State, Heads of Government and ministers for foreign affairs. Ms. Hernández quite unequivocally stated that the protection afforded by immunity *rationae personae* could not be extended to state officials who were not part of the "troika" as inconsistent State practice made

it is impossible to find cogent arguments in favour of extending immunity. The AALCO Secretariat favours the view that with regard to applicability of immunity *ratione personae* beyond Troika, there was a need to identify a clear criterion in establishing such practice and also to consider the suggestion of enhancing cooperation between States in matters relating to invocation of immunity between the State exercising jurisdiction and the State of the official, in respect of the Troika as well as others. The view of AALCO Secretariat conforms to the view of the Special Rapporteur to the extent that in the absence of compelling arguments to the contrary, the status quo with regards to the extension of protection offered by immunity *rationae personae* being limited to the "troika" be maintained.

134. The topic "**Formation and evidence of customary international law**" is very significant as far as AALCO Member States are concerned. AALCO Member States must very diligently follow the work on this subject and contribute towards the 'range of materials to be consulted'. It should be noted that the Special Rapporteur to this topic, has reiterated that in order to derive the 'attitude of states and international organization', materials on state practice which has been asked by the Rapporteur must be transmitted. Those approaches and materials would be very essential to evolve evidentiary practices on customary international law from the developing country's perspective. Such comments and country positions would contribute towards established state practices under international law.

ANNEX I

STATEMENT DELIVERED BY PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) DELIVERED AT THE SIXTY-FOURTH SESSION OF THE INTERNATIONAL LAW COMMISSION ON 25TH JULY 2012, GENEVA

Mr. Lucius Caflisch, the Chairman of the International Law Commission, Distinguished Members of the Commission,

It is my privilege and honour as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO), to address the second part of the Sixty-Fourth Session of the International Law Commission (ILC or Commission) being held in Geneva from 2 July to 3 August 2012. Since this is the first time that I address this newly constituted ILC, I extend my warm congratulations to all of you on your election/reelection and wish you the very best in the important task of progressive development and codification of international law.

The ILC and AALCO share a longstanding and mutually beneficial relationship. AALCO attaches the greatest importance to its traditional and longstanding relationship with the Commission. One of the Functions assigned to AALCO under its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.

In view of the importance that the agenda items of ILC hold for the Asian-African States, the Fiftieth Annual Session of AALCO held at Colombo, Sri Lanka in 2011 had mandated that the future Annual Session of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC. In view of this, a Half-Day Special Meeting on *"Selected Items on the Agenda of the International Law Commission"* was convened at the recently held Fifty-First Annual Session of AALCO at Abuja, Federal Republic of Nigeria from 18 to 22 June, 2012. The topics for deliberation at this Half-Day Special Meeting were (i) "**Protection of Persons in the Event of Disasters"**, and (ii) "**Immunity of State Officials from Foreign Criminal Jurisdiction"**. The distinguished Panelist for both the topics was Dr. A. Rohan Perera, former Member of the International Law Commission from Sri Lanka. This was followed by the comments of Prof. Djamchid Momtaz , former member of ILC from the Islamic Republic of Iran who shared some of his thoughts on the above-mentioned topics in his capacity as the Discussant.

In the following pages, I would like to give a brief overview of the Half-Day Special Meeting highlighting the essence of it.

Dr. A. Rohan Perera, former Member of the ILC from Sri Lanka presented a paper on "Protection of Persons in the Event of Disasters". He observed that the question of protection of affected persons within the State, victims of natural disasters on the one hand and the fundamental principle of respect for sovereignty and territorial integrity on the other hand, both falls under the customary international law and under the Charter of United Nations under Article 2 (7).

The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views especially in relation to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Firstly, the Commission considered that withholding consent to external assistance was not arbitrary where a State was capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Secondly, withholding consent to assistance from one external source was not arbitrary if an affected State had accepted appropriate and sufficient assistance from elsewhere. Thirdly, withholding of consent was not arbitrary if the relevant offer was not extended in accordance with the present draft articles. It was also observed that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance was made in accordance with the draft articles and no alternate sources of assistance were available there would be a strong inference that a decision to withhold consent would be arbitrary.

Concurring with the views of Special Rapporteur with respect to Draft Article 12 on the right to offer assistance, he said that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. It was also stated that offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. The middle ground which seemed to surface from these range of views was that the 'right' of an affected State to seek international assistance was complimented by the duty on third States and Organization to 'consider' such requests, and not necessarily a duty to accede to them. It was further emphasized that, the right to the international community to offer assistance could be combined with an encouragement to the international community to make such offers of assistance on the basis of the Principle of International Cooperation and Solidarity.

Dr. A. Rohan Perera had also presented a paper on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction". While pointing out that the debate in the ILC on this topic centered around three principal issues, namely (i) the general orientation of the topic; (ii) the scope of immunity; and (iii) the question whether or not there were exceptions to immunity with regard to grave crimes under international law, he also informed that the consideration of this topic by ILC for the past few years has been of a preliminary nature and that no draft articles had so far been drafted.

Regarding the *General Orientation* of the topic, he brought attention to creation of a Working Group at the current Session as decided by the outcome of the discussions held in the

Commission last year, to examine and discuss the general orientation of the topic, before the adoption of draft articles.

While highlighting the views of the States as revealed in the Sixth Committee debates on the topic, he stated that it reflected an approach which in principle endorsed the Special Rapporteur‘s position of treating the *lex lata* perspective as the starting point. However, it nevertheless underlined the need that having codified and identified the gaps, the Commission should proceed to the next stage, the d*e lege ferenda* perspective. He was of the view that this is the challenging task before the Working Group and that the viewpoints of the Asian-African States on this approach would be of immense value to the Commission in determining the future direction of this topic, he added.

With regard to the *Scope of Immunity* that dealt with the question as to which officials are to be covered under the topic, he noted that there was a broad degree of consensus within the Commission in the light of State practice and recent judicial decisions that Heads of State, Heads of Government and Ministers of Foreign Affairs who constituted the so called ―Troika of State officials enjoyed personal immunity *rationae personae*. In the light of the foregoing discussion, Dr. Rohan Perera observed that it was with regard to the other categories of State Officials outside the 'Troika' that the Commission was required to move into unsettled territory. The challenge before the Commission was to strike a delicate balance between the need to expand, albeit cautiously, the different categories of state officials to be granted jurisdictional immunities―*rationae personae*, in the light of contemporary developments in international relations on the one hand, and the need to avoid the risk of a liberal expansion of such categories, which could be conducive to an environment of impunity under the cover of immunity, on the other, he clarified.

Regarding the *Question of Exceptions to Immunity* of a State Official from Foreign Criminal Jurisdiction, Dr. Rohan Perera drew attention to the observations of the Special Rapporteur that in the case of immunity *rationae personae*, the predominant view seemed to be that such immunity was absolute and covered acts performed both in an official capacity or personal capacity and committed both while in office and prior thereto and that no exceptions thereto could be considered. The Special Rapporteur was of the opinion that the question of exceptions could only be pertinent with regard to immunity *ratione materiae* concerning acts performed in an official capacity, in the context of crimes under international law. He also drew attention to the opinion of the Special Rapporteur that the issue of exceptions to immunity fell within the sphere of progressive development of international law. Dr. Rohan Perera, however, was of the view that these issues raised serious concerns including the potentiality of the politically motivated prosecutions, trials in absentia and evidentiary problems as a result of lack of cooperation of the State concerned. Hence, he cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law.

Dr. Rohan Perera highlighted the recent judgment of the International Court of Justice (ICJ) delivered in the *"Jurisdictional Immunities of States case"* (Germany Vs Italy - 3rd February 2012) and stated that it had clear implications for the ongoing work on the question of immunity of State officials from foreign criminal jurisdiction. In this case the ICJ upheld that there could

not be a conflict between rules which are substantive in nature and rules on immunity which are procedural in nature, he clarified.

Prof. Djamchid Momtaz, Former Member of the ILC from Islamic Republic of Iran was the Lead Discussant for the topics discussed at the Special Half-Day Meeting. He reiterated the need for effective participation by Member States to the questions posed by the Commission, he cited the topic "obligation to extradite or prosecute (*aut dedere aut judicare*)". Wherein the Special Rapporteur raised a question as to whether the practice of State regarding the question of obligation to extradite or prosecute was based on a treaty obligation or an obligation based on customary international law.

Commenting on the topic Protection of Persons in the Event of Disasters, he posed a question whether States have the duty to offer assistance. Another important issue was that the scope of the obligation on the State in whose territory the disaster has taken place was, however, limited only to the subjects of international law, excluding non-governmental organizations that were not subject of international law.

On the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", Prof. Momtaz said that distinction needs to be made between this subject and subject of accountability of state officials. The question of accountability of state officials has been dealt with in some very important texts and the most important one was the Statute of International Criminal Court and Article 27 of the Statute does not give immunity to any Head of State, Ministry of Foreign Affairs, and any other high-ranking officials of the State.

Agreeing with the question of distinction between *lex lata* and lex *ferenda,* he stressed with a note of caution that it should focus on codifying the existing customary practice of States in international law as it exists. Regarding the decision of the International Court of Justice (ICJ) on the dispute between Germany and Italy, he said that the decision of the ICJ insisted once more on the jurisdictional immunity of States before national tribunals.

In the ensuing deliberations the delegations from **People's Republic of China, Indonesia, Japan, Islamic Republic of Iran, Malaysia, Republic of Korea, Kingdom of Saudi Arabia, State of Kuwait, and India** made their statements. I would like to highlight some of the important points that the delegations had made during the deliberations:

Firstly, in view of the fact that half of the Members of the Commission are from the Asian-African States, a number of Delegations expressed hope that their active participation in the Commission will help reflect the views/aspirations of the Asian-African States in the progressive development and codification of international law in a substantial manner. It was also stated that the new Members of the ILC would make valuable inputs into the work of the ILC and collaborate constructively with other Members of the ILC from the Asian–African region and other regions. In this regard, it was also proposed that AALCO Secretariat should arrange for an Interaction Session, via, tele-conference between the Members of ILC and its Member States.

Secondly, with regard to the follow-up of the work of ILC, one delegation observed that the codification works of ILC must be followed up by the UN General Assembly to give effect to the ILC's works. In this regard, he pointed out that his delegation would be taking up two subjects at

the forthcoming session of the UN General Assembly. One is the Draft Articles on the Law of Transboundary Aquifers and another is the UN Convention on Jurisdictional Immunities of States and Their Property. As regards the introduction of new topics on the agenda of the ILC, the Delegation agreed with the three-fold criteria propounded by an academic that included; ***practical*** consideration; ***technical*** feasibility, and ***political*** feasibility of the topic proposed to be included. In his view, new topics could be introduced into the agenda of ILC provided they satisfy these three parameters. The Delegation also expressed the view that, in view of the co-existence of various rules in the field of environmental law and with a view to avoid the phenomenon of the fragmentation of international law, the Commission should take up the topic of *"Protection of the Atmosphere"* in its agenda during the current Session itself.

Thirdly, with regard to the topic of 'Protection of Persons in the Event of Disasters', it was observed by many Delegations that humanitarian assistance should be undertaken solely with the consent of the affected country, and with utmost respect for the core principles of international law such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. One Delegation also proposed that AALCO Secretariat could initiate contact with ASEAN Secretariat on the mechanisms of disaster management and emergency response under the auspices of ASEAN Agreement on Disaster Management and Emergency Response (AADMER) and that the outcome of that contact should be disseminated to the AALCO Member States to provide a practical example of regional initiative in disaster management and emergency response.

Fourthly, with regard to the topic of 'Immunity of State Officials from Foreign Criminal Jurisdiction', a number of States felt that the work of ILC should focus only on *lex lata*, i.e, codifying the existing rules of international law as opposed to embarking on an exercise of progressive development.

Mr. Chairman,
Due to time constraints, I have only touched upon a few important points made by the Panelists and the Delegations at the Fifty-First Annual Session of AALCO. However, I would like to bring to your kind notice that at the recently held Fifty-First Annual Session, I, as the Secretary-General of AALCO, was unanimously re-appointed as the Secretary-General for a further four year tenure starting from 2012 to 2016. Let me assure you that AALCO would continue to actively cooperate with the ILC with a view to bringing the voice of Asia and Africa to bear on the work of ILC and to contribute substantially towards the work of the Commission. I thank you all for giving me a patient hearing.

ANNEX II

STATEMENT DELIVERED BY PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION" DELIVERED AT THE SIXTY-FIFTH SESSION OF THE INTERNATIONAL LAW COMMISSION (ILC) ON 9TH JULY 2013, GENEVA

Mr. Chairman,
Distinguished Members of the ILC,
Ladies and Gentlemen,

It is a privilege for me as the Secretary-General of AALCO to meet with the Commission and to deliver my address at this august body. That the role of ILC is indeed indispensable in the efforts of the United Nations towards progressive development and codification of international law is too well-known and I feel much honoured to be invited to address such a distinguished gathering.

The founders of the Asian-African Legal Consultative Organization (AALCO), alive as they were to the contributions that ILC could make to the progressive development and codification of international law, gave a statutory role to AALCO in relation to the Commission. Accordingly, one of the Functions assigned to AALCO under its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.

In view of the importance that the agenda items of ILC hold for the Asian-African States, the Annual Sessions of AALCO spend considerable time in discussing them. It is exactly for this reason that the Fifty-Second Annual Session of AALCO which is scheduled to take place in New Delhi in September 2013 later this year, we have arranged for a Half-Day Special Meeting on "Some Selected Items on the Agenda of the International Law Commission".

Even as I mention this, I need to underline here the fact that generally speaking, the Sessions of ILC precede the Annual Sessions of AALCO. However, the forthcoming Fifty-Second Annual Session of AALCO would be convened after ILC Session is over. Hence, the inputs/opinion of AALCO Member States on all the agenda items of ILC's 65th Session are not available as of now. Hence, what I am going to do in this address is to try to reflect the views of our Member States on the basis of their views that they have aired in other international fora, on three important topics of concern to them, namely

(i) Immunity of State Officials from Foreign Criminal Jurisdiction
(ii) Protection of persons in the Event of Disaster; and

(iii)Formation and Evidence of Customary International Law

Immunity of State Officials from Foreign Criminal Jurisdiction

From an international law perspective, the immunity of a state official from criminal jurisdiction is based on the principle of sovereign equality of states. The effective conduct of a state's foreign relations is inherent in the preserving of its sovereignty. They constitute an integral whole in providing the rationale for the according of jurisdictional immunities to state officials. The legal basis of the immunity of State Officials is found in both treaty law as well as customary international law. While the immunity provided to State Officials has been a long-standing aspect of international law, the question whether immunity of State Officials should prevail over the duty to prosecute and punish individuals responsible for international crimes has presented considerable difficulties of late. Hence, the ILC's embarkation on the study of the immunity of State Officials from foreign criminal jurisdiction is particularly timely.

The Special Rapporteur *Ms. Concepción Escobar Hernández* has clearly identified (in her second Report submitted in 2013) that the topic of the immunity of State officials from foreign criminal jurisdiction must be approached from the perspective of both *lex lata* and *lex ferenda*, in other words, of both codification and progressive development. While agreeing with this view, AALCO however wants to add that in the course of its work on this topic, the Commission should clearly indicate to States those elements which the Commission considers statements of *lex lata*, and those which the Commission considers statements of *lex ferenda*. It is important to do this in the reports of the Commission while work on this topic is in progress, as well as in its final form. This is due to the reason that doing so would allow States to respond more precisely to the Commission's work.

On the *scope of the topic and draft articles*, building on the work of former rapporteur, Mr. Roman Kolodkin, Ms. Hernández has extensively dealt with the scope of the topic and the draft articles, with an understanding that the draft articles deal only with criminal jurisdiction, not civil or administrative jurisdiction; the draft articles deal only with immunity from foreign criminal jurisdiction, i.e., jurisdiction exercised by a State other than the State of nationality of the concerned official.

Immunity *rationae materiae*, or functional immunity (immunity for official acts committed as part of one‘s duties while in office), has traditionally been granted to all state officials. High-ranking officials of the so-called "troika" –the incumbent Heads of State and Government and Ministers for Foreign Affairs –have also traditionally been granted immunity *rationae personae*, immunity for personal acts committed during the official's term in office. The dual concepts of *rationae material* as well as *rationae personae* are of particular importance given the focus on these concepts in the preliminary and second reports of the Special Rapporteur. The discussions concerning the distinction and scope of immunities proffered by these concepts and their modification through expansion and narrowing of these immunities through codification are sure to be a continually pressing issue as the session of the ILC progresses.

The Special Rapporteur also rightly points out that the focus on *foreign* jurisdiction as the immunity granted under domestic law and immunity granted under international law do not

necessarily have the same nature, function and purpose. She is of the view that immunity before international criminal courts is sufficiently delimited and clarified by the international instruments that established and regulate the functioning of those courts. AALCO is of the view that the Special Rapporteur has also clearly identified that both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative development in treaty and customary law, and that it would be unnecessary for the Commission to reconsider these well-established regimes.

Regarding *the distinction between immunity rationae personae* and *immunity rationae materiae*, Ms. Hernández, has suggested that it would be necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. The reason for this, as noted by her, is that despite the fact that the distinction between immunity *rationae personae* and immunity *rationae materiae*, or "personal immunity" and "functional immunity", has been discussed and generally accepted in doctrine, the normative elements of each of these types of immunity must be determined in order to establish the legal regime, including procedural approaches, applicable to it. While agreeing with this position, AALCO wants to point out that in any determination regarding the scope of persons to be covered for immunity, this distinction (which is widely accepted in doctrine and reflected in judicial practice) retains a vital relevance.

In discussing the subjective scope of immunity *rationae personae*, the Special Rapporteur elaborates on both the stricter interpretation and the broader interpretation. As is well known, while the former conferred this immunity on the so-called *Troika* –Heads of State, Heads of Government and Ministers for Foreign Affairs, the latter seeks to extend the scope of immunity to "other senior State officials", in addition to the troika, who play a role in international affairs as a result of their functions under their domestic law, and who represent their State abroad even in highly specific areas. The absence of well-established and the presence of inconsistent state practice clearly points to the need on the part of her to adopt a restrictive approach. Furthermore while drawing attention to the fact that the ICJ itself has not expanded the scope of immunity *rationae personae* as seen in the decision in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case, she rightly comes to the conclusion that it is impossible to find cogent arguments in favour of extending immunity *ratione personae* to non-*Troika* officials. Accordingly, she concludes that immunity *rationae personae* cannot be extended to State Officials other than the *Troika*[75].

AALCO is of the view that without a strong basis of necessity and state practice, coupled with compelling reasons, immunity *rationae personae* should not be abruptly extended beyond the troika. The Commission needs to be cautious in adopting a liberal approach that would extend the boundaries of exception.

Protection of Persons in the Event of Disasters

On behalf of the AALCO Member States, I would like to appreciate the Special Rapporteur Eduardo Valencia-Ospina, for presenting the Sixth Report on Protection of Persons in the Event of Disaster. The report highlights the "prevention" as a principle of international law, which

[75] Second Report of the Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction A/CN.4/661, page 22.

should be the basis of disaster aversion programmes. While tracing the historical development of concept of disaster risk reduction, special emphasis was laid on five specific goals, including "disseminating existing and new information related to measures for the assessment, prediction, prevention and mitigation of natural disasters".

The obligation of States in relation to one another and the international community in the pre-disaster phase is enshrined in the *duty to cooperate* in disaster preparedness, prevention and mitigation. The obligation to prevent transboundary harm alongside the primary obligation to prevent harm to one's own population, property and the environment generally, is significant approach while applying prevention obligation. Prevention, mitigation and preparedness have long been part of the discussion relating to natural disaster reduction and more recently to that on disaster risk reduction. Preparedness, which is an integral part of disaster or emergency management, has been characterized as the organization and management of resources and responsibilities for addressing all aspects of emergencies, in particular preparedness, response and initial recovery steps.

Effectively the report states that mitigation and preparedness are manifestations of overarching principle of prevention because it implies taking of measures prior to the onset of a disaster, which lies at the heart of international law. In that regard, the Charter of the United Nations has so enshrined it in declaring that the first purpose of the United Nations is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace".

Mr. Chairman,
The argument of concept of prevention has been derived from human rights law and environmental law, wherein reference is made to due diligence principle and precautionary principle in international environmental law, which has been well supported by excerpts from major decisions of International Court of Justice including *Legality of the Threat or Use of Nuclear Weapons case* and the *Gabčíkovo-Nagymaros Project* and certain other decisions by other courts.

There is a comprehensive report on the bilateral instruments, multilateral instruments and regional instruments on disaster risk reduction and its management which form part of the broad spectrum of international cooperation during disaster and prevention of disaster. On the regional instruments, for the Asia-Pacific region, ASEAN Agreement on Disaster Management and Emergency Response is important as it focuses on three primary categories of disaster risk reduction obligations: risk identification and monitoring; prevention and mitigation; and disaster preparedness. Further, Africa Regional Strategy for Disaster Risk Reduction which was adopted in 2004 has also been mentioned.

Under the present report, two draft articles have been proposed. Draft Article 16 on duty to prevent and Draft Article 5 *ter* on Cooperation for Disaster Risk Reduction. Draft Article on duty to prevent requires States to undertake measures to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms are defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters. The measures include the conduct of multi-hazard risk assessments, the collection and

dissemination of loss and risk information and the installation and operation of early warning systems.

On legislative measures to be adopted to prevent disaster and risk reduction, many of the AALCO Member States have either national legislations or guidelines. Further, on institutional mechanisms too, certain regulatory bodies have been established at national level to address prevention, preparedness and mitigation of disaster and disaster risk reduction.

Though prevention is the definitive concept in international law and possible measure to reduce the disaster risk, yet pre-disaster preparedness even at the presence of national legislations and authorities would be very limited. Moreover, funding for the disaster management also remains a challenge for the developing countries. It would be more relevant to deal with technology transfer in terms of addressing post-disaster relief and rescue operations within the country. This comes with a caveat that AALCO member States are of the view that duty to offer assistance, previously discussed in the fifth report on this subject, shall be not compulsory but voluntary and should respect the principle of non-intervention in the internal affairs of the state by assistance offering state. AALCO Member States have been very diligently following the work on this subject and I look forward for more comments and country positions on the Sixth Report of the Special Rapporteur on this subject.

Formation and Evidence of Customary International Law

The question of sources of international law lies at the heart of international law. Customary International Law, (CIL) notwithstanding the great increase in the number and scope of treaties, remains an important source of international law[76]. Customary international law is normally said to have two elements.

First, there is an objective element consisting of sufficient state practice ("general practice" under the ICJ definition).

Second, there is a subjective element, known as *opinion juris*, which requires that the practice be accepted as law or followed from a sense of legal obligation.

The nature and the relative importance of custom's constituent elements are contentious. This is because there is no clear-cut rule proposed in the international jurisprudence or in the international legal doctrine of how much consent or how much consistent state practice are necessary for the formation of customary law. Furthermore, there has been a long-standing debate over whether Consistent State Practice a*nd Opinio Juris* are the only building blocks of customary international law continue even today.

Hence, custom as a source of international law poses a number of challenges and articulating a coherent theory of custom has been a difficult exercise because the traditional and modern

[76] An understanding of custom is critical to an understanding of international law at least for two reasons; Firstly, there remain important areas of international relations governed primarily by customary rules. Secondly, even in areas where one or more treaties exist, CIL often plays an important role.

approaches to custom appear to be opposed, with traditional custom emphasizing state practice and modern custom emphasizing *opinion juris.* One reason for the difficulty of identifying the formation and change of custom is the radical decentralization of the international system. States are both legislators and subjects of international law, which explains why D'Amato argues that every breach of a customary law contains the seed for a new legality. Whether one accepts his opinion or not, the fact remains that the formation and evidence of customary law has got plenty of things that need clear articulation and clarity.

Hence AALCO commends the ILC for taking up this important topic and appointing Sir. Michael Wood as the Special Rapporteur for this topic[77]. In the view of AALCO, there are a number of issues that need to be dealt with by the Commission. These include;

Firstly, the identification of State practice. What counts as "State practice"? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law?

Secondly, the nature, function and identification of *opinio jurissivenecessitatis*.

Thirdly, relationship between the two elements: State practice and *opiniojurissivenecessitatis*, and their respective roles in the identification of customary international law.

Fourthly, how new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

Fifthly, the role of "specially affected States".
Sixthly, the time element, and the density of practice; "instant" customary international law.

Seventhly, whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

Eighthly, The "persistent objector" theory.

Ninthly, treaties and the formation of customary international law; treaties as possible evidence of customary international law; the "mutual influence"/interdependence between treaties and customary international law.

Tenthly, resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

[77]At its sixty-fourth session in 2012, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work.

AALCO, an Organization consisting as it is of developing countries, welcomes the inclusion of this topic on the agenda of ILC. It is of the considered view that the determination of the existence of customary international rules and the knowledge of the process leading to such existence require knowledge of the manifestations of international practice. Closely connected with the question of the basis of customary international law is the question of which facts are to be ascertained empirically in order to determine that a customary international rule has come into existence. A key aspect of this question is whether these practices are produced by the will of the international community in general or of particular states. AALCO is of the considered view that the diverse practices obtaining in different states from different forms of civilizations should be taken into account in judging a principle / rule to be of customary nature. Furthermore it also needs to be realized here that as subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Hence, it is of utmost importance for the Commission to be alive to the possibility of international organizations facilitating the creation of state practice that can, in future crystallize into customary law.

Ladies and Gentlemen,
AALCO, as always, has been an important advocate of the work of the Commission and would be continuing to follow the important work of ILC as regards the progressive development and codification of international law. Let me assure you that AALCO would continue to cooperate with it with a view to influence its work with the help of our Member States in future.

I thank you.

AALCO/RES/52/SP 2
12 SEPTEMBER 2013

RESOLUTION ON HALF-DAY SPECIAL MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION"
(*Deliberated*)

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

Having considered the Secretariat Document No. AALCO/52/HEADQUARTERS SESSION (NEW DELHI)/2013/S 1;

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the Chairperson and the Panelists and the statements of the Member States during the Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission" jointly organized by the Government of India, International Law Commission (ILC) and AALCO held on 11th September 2013 at New Delhi, India;

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

Expressing its appreciation for the statement made by the Representative of the ILC on its work;

Recognizing the significant contribution of the ILC to the codification and progressive development of international law;

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

2. **Requests** the Secretary-General to continue convening AALCO-ILC meetings in future.

3. **Also requests** the Secretary-General to bring to the attention of the ILC the views expressed by Member States during the Annual Sessions of AALCO on the items on its agenda during its Fifty-Second Annual Session, and

4. **Decides** to place the item on the provisional agenda of the Fifty-Third Annual Session.