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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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I. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SIXTH-SIXTH 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-Sixth session from 5th May -6th June and 7th July-8 August 2014 at Geneva. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad addressed the Commission at its Sixty-Sixth Session on 8th July 2014. He briefed the Commission on the activities and deliberations of AALCO on the agenda items found in the Commission. An exchange of views followed the address.

2. The Sixty-Sixth session of the Commission consisted of the following members:

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

3. At the Sixty-Sixth Session of the International Law Commission, the following persons were elected: **Mr. Kirill Gevorgian (**Russian Federation); First Vice-Chairman: **Mr. Shinya Murase** (Japan); Second Vice-Chairman: **Ms. Concepcion Escobar-Hernandez** (Spain); Rapporteur: **Mr. D. Tladi** (South Africa); Chairman of the Drafting Committee**: Mr. Gilberto VergneSaboia** (Brazil).

4. There were as many as eight topics on the agenda of the aforementioned Session of the ILC. These were:

- Expulsion of aliens
- The obligation to extradite or prosecute (*aut dedere aut judicare*)
- Protection of persons in the event of disasters

- Immunity of State officials from foreign criminal jurisdiction
- Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties
- Identification of Customary International Law
- Protection of Environment in relation to armed conflicts
- Protection of Atmosphere

5. As regards the topic "**Expulsion of Aliens"**, the Third report of the Drafting Committee (which deals with the topic "Expulsion of aliens", and is contained in document A/CN.4/L.832) was presented to the Commission. The Committee had before it the entire set of draft articles on the expulsion of aliens, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his ninth report, the suggestions made during the plenary debate and the comments received from Governments and from the European Union. The Drafting Committee held eleven meetings from 14 to 27 May on this topic and the Committee was able to complete the second reading of a set of 31 draft articles on the expulsion of aliens, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission on second reading.

6. As regards the topic "**The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)",** the Commission considered the Final Report of the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*) the purpose of which is to summarize the conclusions and recommendations of the Working Group on the topic. The Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic on which the delegations had different opinions. Some delegations emphasized the continued relevance of the topic in the prevention of impunity, while others questioned the usefulness of continuing with work on the topic. After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that is of practical value to the international community and further suggested that it adopt the 2013 report of the Working Group; and that it adopt this report, which addresses additional issues raised by delegations to the Sixth Committee in 2013.

7. As regards the topic, "**Protection of Persons in the Event of Disasters",** the Commission considered the seventh report of the Special Rapporteur Mr. Eduardo Valencia-Ospina on *"Protection of persons in the event of disasters"* which consisted of four sections. The first section provided a brief summary of the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the Sixty-eighth session of the UN General Assembly. The second section dealt with the protection of relief personnel and their equipment and goods, which contained a proposal for an additional *draft article 14 bis*, entitled "Protection of relief personnel, equipment and goods". The third section proposed three draft articles that contained general or saving clauses relating to the interaction of the draft articles with other rules of international law applicable in disaster situations.

8. As regards the topic,"**Immunity of State Officials from Foreign Criminal Jurisdiction"** the Special Rapporteur submitted his Third Report on the topic that marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in

particular the concept of an "official". The concept of an "official" is particularly relevant to the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic.

9. As regards the topic. **"Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation",** the Special Rapporteur on the topic Mr. Georg Nolte presented the Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties that covers the following aspects of the topic:

The identification of subsequent agreements and subsequent practice (II.);

- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);

- The form and value of subsequent practice under article 31 (3) (b) (IV);

- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V);

- Decisions adopted within the framework of Conferences of State Parties (VI);
- And the possible scope for interpretation by subsequent agreements and subsequent practice (VII).

10. As regards the topic, "**Identification of Customary International Law",** the focus of the brief is the Second Report of the Special Rapporteur, Sir Michael Wood, which was presented at the Sixty-Sixth Session of the International Law Commission. In the Second Report, the Special Rapporteur discusses in detail the elements of the "two-element" approach to customary international law, i.e. the objective element, which deals with the general practice of States (State practice), and the subjective element, which the Special Rapporteur refers to as "acceptance as law" as an alternative term to the more commonly used but often misunderstood term *opinion juris*. As an outcome of the Report, the Special Rapporteur suggested Draft Conclusions which incorporate his research into guidelines by which these two elements of customary international law may be identified and assessed.

11. As regards the topic, "**Protection of the Environment in relation to Armed Conflicts",** the focus of the brief is the Preliminary Report of the Special Rapporteur, Ms. Marie G. Jacobsson, which was presented at the Sixty-Sixth Session of the International Law Commission. Within the Report, the Special Rapporteur includes discussion on the purpose of the report, as well as of the scope, methodology and outcome of the topic, the use of terms, and the sources and others materials to be consulted. Additionally, the Special Rapporteur makes consideration of the relationship with other topics addressed by the Commission and of Environmental principles and concepts, human rights and the environment, as well as of the future programme of work.

12. As regards the topic, **"Protection of Atmosphere"**, the Special Rapporteur Mr. Shinya Murase submitted his First Report on this topic. The report lays down three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3). In preparing this report, the Special Rapporteur has provided thorough background of the topic, such as its historical development and the sources of law relevant to it, as well as attempted to explain the

rationale of the topic and the basic approaches, objectives and scope of the project. The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law, sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law.

B. DELIBERATIONS AT THE FIFTY-SECOND ANNUAL SESSION OF AALCO (HEADQUARTERS, NEW DELHI, INDIA, 2013)

13. **Prof. Dr. Rahmat Mohamad,** Secretary-General of AALCO introduced the agenda item and on behalf of the Organization, the SG paid tribute to late Ambassador Chusei Yamada and commemorated in grief his contributions in the field of International Law as distinguished Member of the ILC from Japan and as Special Rapporteur on the topic "Shared Natural Resources".

14. The SG reaffirmed the longstanding relationship between AALCO and the ILC.Considering the importance of the work of ILC, the AALCO had been statutorily mandated by its Member States to follow and exchange the views of its Member States on the agenda items of the ILC. It was reiterated that customarily, both the Organizations has been mutually represented at each other at their respective annual sessions. The SG mentioned that he had addressed the sixty-fifth session of ILC, on behalf of the AALCO, briefed the Commission about AALCO's comments and observations on specific agenda items of ILC.

15. The Panelists for this special session, Sir Michael Wood, Member of the ILC and SpecialRapporteur for the agenda item "Formation and Evidence of Customary International Law"; Mr. Narinder Singh, Member of the ILC from India who has served as former President of AALCO; and Dr. A. Rohan Perera, the member of the Commission from Sri Lanka and the Chairman of the Eminent Persons Group (EPG) of AALCO; were welcomed to the special half-day meeting. Briefly, he stated that the deliberations at the sixty-fifth session of the Commission focused on seven topics listed on the agenda of the ILC; namely, (i) Subsequent agreements and subsequent practice in relation to the interpretation of treaties, (ii) Provisional application of treaties, (iii) Most-Favoured Nation clause, and (iv) Obligation to Extradite or Prosecute *(aut dedere aut judicare).* However, with a view to have a focused deliberation on the work of the ILC, it was decided that the Special Meeting on "Selected Items on the Agenda of the International Law Commission" would be on three important topics of ILC: namely, (1) Protection of persons in the event of disasters; (2) Immunity of State officials from foreign criminal jurisdiction; and (3) Formation and evidence of customary international law.

16. The summary of the work of ILC on its agenda items was pointed out. The topic "Treaties over Time" was changed to "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and the Commission considered the first report and dealt with (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.

17. On "Provisional Application of Treaties", the SG stated that the Commission considered the Memorandum of the Secretariat and the First Report of the Special Rapporteur. The report discussed the procedural history of the "provisional application of treaties",

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 focus of the study would be on Article 25 of the Vienna Convention on the Law of Treaties, 1969. The principal legal issues that arise in the context of the provisional application of treaties by virtue of doctrinal approaches to the topic would review the existing State practice.

18. The SG while referring to the topic "Most Favoured Nation", stated that the Study Group on "Most-Favoured Nation clause" had working paper entitled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements" by Mr. Shinya Murase. The catalogue of the provision was prepared by Mr. Donald McRea and Dr. A. Rohan Perera. The Study Group traced the contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. In that connection, it had before it recent awards and dissenting and separate opinions addressing the issues under consideration by the Study Group.

19. The Report of the Working Group on "Obligation to Extradite or Prosecute (*autdedereautjudicare*)", consisted of detailed discussion of recent ICJ decision on Obligation to Extradite or Prosecute (2012) (Belgium v. Senegal). The decision was helpful in elucidating: Basic elements of the obligation to extradite or prosecute to be included in national legislation, Establishment of the necessary jurisdiction, Obligation to investigate, Obligation to prosecute, Obligation to extradite, and Consequences of non-compliance with the obligation to extradite or prosecute.

20. A Brief outline of the agenda items for the focused deliberation at the Special Half-Day Meeting was provided: (i) protection of persons in the event of disasters; (ii) immunity of State Officials from foreign criminal jurisdiction; and (iii) formation and evidence of customary international law. On "Protection of Persons in the Event of Disasters", the Commission considered the sixth report of the Special Rapporteur Mr. Eduardo Valencia Ospina. 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'.

21. As regards the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission considered the second report which 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*. Moreover, 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.

22. On the topic "Formation and Evidence of Customary International Law", he referred to two main documents which were 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 International Law; and second, First Report of the Special Rapporteur Mr. Michael Wood on the subject of Formation and evidence of Customary International Law. The First report on

the topic explained the 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. Also, reference was made to 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.

23. The SG explained the Comments of AALCO Secretariat on the focused agenda items: The concept of prevention as referred under 'protection of persons in the event of disasters' was a definitive concept in international law and a possible measure to reduce the disaster risk. However, he pointed out, pre-disaster preparedness even at the presence of national legislations and authorities would be very limited due to shortage of funding disaster management which remained a challenge for many of 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. He stated that AALCO Secretariat was of the view that duty to offer assistance, previously discussed in the fifth report on this subject, must not be compulsory but voluntary and must respect the principle of non-intervention in the internal affairs of the state by assistance offering state. With regard to applicability of immunity *rationae personae* beyond *Troika*, he stated that 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. According to him the view of AALCO Secretariat conformed to the view of the Special Rapporteur to the extent that in the absence of compelling arguments to the contrary, the status quo with regard to the extension of protection offered by immunity *rationae personae* being limited to the "troika" be maintained.

24. He stated that the topic "Formation and Evidence of Customary International Law" was very significant to AALCO Member States and that for deriving the 'attitude of states and international Organizations', the Asian-African States must transmit their position on the same to the Commission. He stated that those approaches and materials would be very essential to evolve evidentiary practices on customary international law from the developing country's perspective and such comments and country positions would contribute towards established state practices under international law. He also said that it is the strong view of the AALCO Secretariat that resolutions of International Organizations, especially AALCO, form part of customary international law and that the statements presented at forums such as AALCO, depict the 'state practice' which should also be regarded as contributing to customary international law. The SG thanked the panellists for their participation and forthcoming presentations.

25. **Sir. Michael Wood, Member of the International Law Commission and Special Rapporteur on the topic "Formation and Evidence of Customary International Law"** made a presentation about the work of the International Law Commission with respect to this issue; the progress achieved; and highlighted some of the important issues left for consideration.

26. Sir Michael Wood Thanked the Secretary-General for inviting him for the special half-day meeting on ILC. The panellist recalled the significant role played by the AALCO inthe formative years of negotiations of the UNCLOS, law of state immunities and law of treaties. The panellist referred to the United Nations Convention on the Jurisdictional

Immunities of States and Their Property, 2004, which won such significant contribution from the research and work of Special Rapporteurs from Asian Member States of AALCO, especially the work of Special Rapporteur Late Amb. Chusie Yamada from Japan. He briefly narrated the Draft Articles on Expulsion of aliens and the Guide to Practice on Reservations to Treaties wherein comments of Member States were pertinent and requested by the Commission. The topic **Subsequent agreements and subsequent practice in relation to the interpretation of treaties** dealt with an important aspect of treaty interpretation. It covered subsequent agreements and subsequent practice both under article 31.3(a) and (b)('authentic interpretation') and under article 32 VCLT ('supplementary means of interpretation'). Five draft conclusions were adopted in 2013, with detailed commentaries. They were largely introductory but include some interesting points – For example - one issue addressed was the role of subsequent agreements and practice in relation to 'evolutionary' interpretation. He pointed out that on the topic there has not yet been great progress, though interesting discussions on the first report by the Special Rapporteur were held. The Commission added the topic *Protection of the environment in relation to armed conflict* to its current work programme, and appointed Ms. Jacobsson as Special Rapporteur. The Commission added the topic *Protection of the atmosphere* to its current work programme, and appointed Professor Shinya Murase of Japan as Special Rapporteur.

27. On the topic **Obligation to extradite or prosecute (*aut dedere aut judicare*),** a working group under Ambassador Kriangsak Kittichaiserie continued its consultations on where to go on this topic and that a rather detailed report was annexed to the ILC's report, in the hope of eliciting reactions in the Sixth Committee on the future of the topic. The report described how the topic has developed, and analysed the ICJ judgment of 20 July 2012 (*Belgium v. Senegal*). He said that it does not deal with the question whether the obligation to extradite or prosecute was, already a rule of customary international law, at least in relation to certain crimes.

28. On **"Immunity of State officials from foreign criminal jurisdiction",** stressed on the practical importance of the law on special missions, both under the 1969 New York Convention and under customary international law. He said that there have been a number of recent cases in this field, including one in the English High Court which confirmed the customary law status of the immunity of persons on special missions.

29. This was of practical importance because it meant that senior officials may enjoy personal immunity from foreign criminal jurisdiction even if they do not fall into that narrow circle of high State officials who enjoyed immunity *ratione personae* by virtue of their office. On the Commission's work on this topic, the endorsement in draft article 3 of the so-called 'troika' (Heads of State, Heads of Government and Minsters for Foreign Affairs) stated that Troika enjoyed immunity *ratione personae*. He pointed out that that was a compromise, as there remained one or two members of the Commission who thought foreign ministers should have such immunity and that the ICJ was wrong in the *Arrest Warrant* case. Certain other members expressed concern that it should not be regarded as confined to the three but include, for example, Defence Ministers and Ministers of Commerce and International Trade.

30. On **"Protection of Persons in the Event of Disasters",** the Special Rapporteur, Valencia-Ospina, produced a lengthy sixth report on disaster risk reduction. It dealt with the need to take steps to avert disasters before they occur, and to make preparations so that they

can be dealt with as effectively as possible if and when they do occur. The report contained a great deal of information, and drew on a wealth of texts and documents.

31. On **Formation and evidence of customary international law,** he said that there was an agreement that the outcome of the Commission's work on that topic should be practical. He noted that "The aim [was] to provide guidance for anyone, and particularly those not expert in the field of public international law, faced with the task of determining whether or not a rule of customary international law exists." He stated that it seemed to be widely accepted that it was not the Commission's task to seek to resolve purely theoretical disputes about the basis of customary law and the various approaches to be found in the literature as to its formation and identification. He quoted the ILC Secretariat memorandum: "we are looking at the approach to the identification of the rules of customary international law and the process leading to their formation." The Commission decided that they should not deal with *jus cogens* within the present topic.

32. Among other things the report dealt with the relationship between customary international law and other sources of international law. The relationship between customary international law and treaties was a matter of great practical importance for the topic. It was a reasonably well-understood question, on which there was a wealth of case-law and writings. Less obvious, less studied, perhaps less well understood was the relationship between customary international law and general principles of law within the meaning of Article 38.1(c) of the ICJ Statute. The report sets out at some length, with examples, the range of materials that the Commission may need to take into account in the course of our work. He stated that while illustrating their richness and diversity, it also tries to highlight the general approach to the formation and evidence of customary international law which they reveal and that it was noteworthy that virtually all of the materials stressed the need for both State practice and *opinion juris*. The International Court of Justice, in particular, "has clearly and constantly held […] that customary international law was formed through State practice accompanied by *opinion juris*."He stated that if one studied the case-law of the International Court of Justice, in particular the *North Sea*, *Nicaragua*, and *Germany* v. *Italy* cases, it was clear that the Court viewed the two elements, State practice and *opinion juris*, as essential for the formation of a rule of customary international law.

33. The panellist referred to the importance of AALCO Member States in framing approaches at the ILC to ensure that the voice of Asian and African States would be heard loud and clear in the progressive development and codification of international law and that an important part of this was the contribution of Commission members from AALCO Member States, and the contribution of AALCO Member States themselves to the work of the Commission. The Asian and African members of the Commission had undoubtedly made, he pointed out, and continued to make, a valuable contribution to the work of the Commission. He stated that their presence was essential if the Commission was to be truly representative.

34. **Mr. Narinder Singh, Member of the International Law Commission from India,** began by noting the importance of the 'United Nations Convention on Jurisdictional Immunity of States and their Property'. Mr. Singh also noted that this Convention was adopted after extensive negotiation both in the ILC and the Sixth Committee of the UN and that AALCO contributed extensively in both forums. He mentioned that India had signed but not ratified the Convention, but also that India has already applied many of the provisions in

practice and that Indian Courts have considered provisions of the Convention while arriving at decisions.

35. Mr. Singh stated that under the law in India any person wishing to file suit against Government officials or property needed Government permission to do so. While considering whether to grant or deny such permission, the Indian government looked at practices around the world. Courts have agreed that trends in International Law must be considered when deciding whether to grant permission and thus the Courts have examined in detail the provisions of the Convention. Mr. Singh hoped that all the AALCO States would ratify the Convention.

36. With respect to other relevant ILC topics such as reservation to treaties, draft articles to state responsibility and so on, Mr. Singh recommended that States should submit comments wherever necessary and participates actively in discussions.

37. Coming to the topics under consideration, Mr. Singh noted the politically important subject of "immunity of state officials from foreign criminal jurisdiction". He noted that the divergent opinions within the ILC and some members highlighted the issue of impunity for serious crimes and advocated restricted application of immunity to higher officials, while other members have emphasized that the basic purpose of immunity was to provide adequate independence to high officials for them to perform their functions. They also referred to historical practice to justify immunities. The ILC has agreed that the 'troika' enjoys full immunity (both *rationae materiae* and *personae*). Mr. Singh also noted that some have questioned personal immunity granted to Ministers for Foreign Affairs on the ground that complete immunity can only apply to the Heads of State and Heads of Government. Others have looked at classification based on function rather than post.

38. Mr. Singh then moved on to the topic of "protection of persons in the event of disasters". He noted that in the draft articles that have been adopted, the ILC has recognized the concerns of members and Sixth Committee States. Particularly they have asserted that the State on whose territory the disaster occurred was the State which must decide on the course of action to deal with the after-effects and assistance to victims. The Articles also recognized that it was the affected State that decides whether it needs assistance from foreign States as well as the nature and extent of this assistance.

39. **Dr. Rohan Perera, Former Member, ILC, Sri Lanka,** spoke about an important agenda item of the International Law Commission, relevant to African and Asian States, namely, the 'Immunity of State Officials from Foreign Criminal Jurisdiction'. He pointed out that the former Special Rapporteur had put in a considerable amount of work concerning the general orientation of this complex and sensitive topic. He further pointed out that the States have responded highlighting the need for a cautious approach and the need to approach the topic from a *LexLata* perspective and maintain the distinction between codifying the *Lex Lata* and making proposals for the progressive development of the law – *Lege Ferenda*. Referring to the work of the current Special Rapporteur, he pointed out that at present there were 6 draft Articles and it was important to clarify the scope of the topic and the draft articles. He also pointed out that the most important contribution so far was the distinction made between Immunity *Rationae Personae* and Immunity *Rationae Materiae* as a frame of reference, the efforts made to identify the normative content of the each of these kinds immunity and the established legal regime applicable to them. Referring to Draft Article 3, which defines these two, Dr. Perera pointed out that Immunity *Rationae Personae* applied to functionaries who

represented State in its international relations and Immunity *Rationae Materiae* applied to the Acts that they performed in the discharge of their mandate, described as "Official Acts".

40. He stated that significant efforts were required and was being put in to identify the scope of persons who could invite personal immunity. He pointed out that based on the *Arrest Warrant Case* and *Case Concerning Certain Mutual Assistance In Criminal Matters Case* the Special Rapporteur has concluded that personal immunity applied to the *Troika*, in recognition of their functions as representing the State as this was what promotes and facilitates international relations. Dr. Perera then referred the reasons given by the Special Rapporteur in reaching this conclusion. With respect to the issue of extension of Immunity *Rationae Personae* beyond *Troika*, it was pointed out by him that the Special Rapporteur had observed that creating an exclusive list of such "other officials" was not possible and that this would be determined by the government or legal department of each State. However, he noted that the Commission, in its previous sessions had noted that current international relations have undergone a fundamental change and now involves actions of functionaries other than the Foreign Minister. He pointed out that, the commission was however, also aware of the need to avoid a large scale expansion of the eligible categories, as this would then create a zone of impunity under the cover of immunity. The commission was, according to him, moving towards identifying and defining the applicable criteria, based on which the "other categories" could be determined. The criteria for this are that the representation of State in international relations must be an indispensible part of the duties of the functionary. He also pointed out the need for further clarification of the principles of functional necessity & representative character of the official duty and exercise of powers intrinsic to the State.

41. The Delegation of **Islamic Republic of Iran** stated that the topic of 'Immunity of State Officials from Foreign Criminal Jurisdiction' must be approached from both *lexlata (*law as it is*)/lexferanda (*as it ought to be*)* and that (in his opinion), many states have endorsed the methodological approach adopted in the study which allows extending immunity beyond *Troika.* As regards the question of immunity *rationae personae* granting immunity only to Heads of States, Heads of Government and Minister of Foreign Affairs, the delegate requested the Commission to take a special mission approach and in his view adopting such an approach had some grounding. He also highlighted the fact that in some judicial practices, some countries have granted immunity *rationae personae* to senior officials of government. He also substantiated this by reference to the ICJ decision given in Arrest Warrant case which had favoured this approach.

42. On the issue of Customary International law the Delegation raised the issue why *jus cogens* should not be covered within the scope of the study? While noting that the ICJ in Republic of Congo's case referred to the notion of 'jus cogens'. The delegate stated that flexibility to one of the important source of international law should not be allowed and current state of international law must be reviewed and does not require embarking on new concept of 'custom'.

43. The delegate also raised two pertinent questions as well. First as to whether the Special Rapporteur considered resolutions of international and regional organizations as customary international law and state practice. Secondly, how separate and dissenting opinions could be construed to constitute customary international law. In his view these required in-depth discussions.

44. While agreeing with the position that due to their representational capacity of the State, some high-ranking State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika*, were entitled to immunity from criminal jurisdiction of foreign States, the Delegation of **India** argued that a similar logic could be extended to some other high-level state officials, especially, Ministers of Defence and Ministers of International Trade who also have come to represent states.

45. On the issue of Customary International law the Delegation noted that the task of the ILC was to identify the manner or methods by which the processes of formation of Customary International Law could take place and to identify the rules of it. The delegate welcomed the focus of the work of the Commission on this topic and looked forward to the proposed further study on the relationship of customary international law with other sources of international law. This includes treaties, 'general principles of law recognised by civilised nations', and also the 'soft law'. The delegate agreed that there was a need to examine and study the approaches of States and other intergovernmental actors. In his view, the concept of *jus cogens*should be kept aside from the scope of the study and that the subjects of study would be the decisions of international as well as domestic judicial bodies, writings of publicists and also the work of other bodies like International Law Association and so on.

46. The Delegation of **Malaysia** noted that the topic should focus on the immunities accorded under international law, in particular customary international law and not domestic law. With regard to draft Article 2, the delegate stated that criminal immunities granted in context of diplomatic or consular relations, headquarters agreements or other treaties or similar arrangement should be excluded from the scope of the topic as they are settled areas of law.

47. With regard to draft Article 3(d), the delegate viewed that all State officials should receive immunity and the word "certain" should be removed. While stating that "Official acts" should also be carefully defined, the delegate pointed out that with regard to Article 4, the sovereign rulers who act as Head of State in addition to the head of Government such as Prime Minister or President should be included under the definition of Heads of State or Heads of Government. With regard to the need to define the term "official" within the larger term "certain State officials", the delegate made the point that it was of the view that all State officials should be covered under the definition of the term "official".

48. While making their preliminary observations on the issue, the Delegate of Malaysia stated that it found the general idea behind the formulation of Draft Article 5 *ter*favourable and supported cooperation that could lead to circumvention of disaster and reduction of disaster risk. The delegate also noted that the reference to the term "measures" in draft Article 5 *ter* appeared to correlate to the "appropriate measures" stated in draft Article 6 and that this correlation may prove venturesome when Article 5 *ter*is read with Article 5 on "Duty to Cooperate".

49. The delegate further noted that Article 5 made it mandatory for States to cooperate with the United Nations and other competent intergovernmental organizations, and that such cooperation, read together with Article 16 and Article 5 *ter*may lead to the sovereign right of the States being usurped by any supra-international body. With regard to draft Article 16, the delegate noted that the Article, as introduced by the Special Rapporteur limits the adoption of "appropriate measures" through the establishment of institutional arrangements, whereas draft Article 16 as adopted by the Drafting Committee widens the scope of the

implementation of "appropriate measures" to include the adoption of legislation and regulations by the State. It found the proposed draft by the Special Rapporteur preferable and maintained that any measures taken by a State should be within its full capabilities having regard to the principle of State sovereignty.

50. On the topic 'Protection of Persons in the Event of Disaster' the delegation noted the proposed two draft articles regarding "prevention of disasters and disaster risk reduction", which expanded the scope of this topic from the response phases after the disaster to the pre- and the post-disaster phases could be welcomed. The delegation highly valued the disaster prevention, mitigation and preparedness in the disaster management. However, at the same time, the delegate was of the view that ILC should note the difference between natural disaster and man-made disasters. And those states who suffered from disaster should not be obliged to bear too many responsibilities with regard to unpredictable disasters. While in the process of pre-disaster prevention, it suggested that the Commission shed some lights on the application of space technologies, add new contents on "encouraging application of space technology in field of disaster prevention, mitigation and preparedness".

51. On the topic of Customary International Law the Delegation of Malaysia acknowledged the importance of customary international law and agreed with the Secretariat that in-depth study should be conducted in relation to determining the formation and evidence of customary international law by taking into consideration views from different states. The delegate also stated that analysis of the 10 questions highlighted by AALCO at the ILC's 5th Session are of crucial importance and would further shed light on the core study of CIL. Additional issues which the delegate noted were important for consideration by the ILC related to customary international law for groups of states/regional level, persistent objection, and evidence of customary international law.

52. The delegate stated that, with regard to the 2 draft conclusions in the first report of the Special Rapporteur relating to the scope and use of terms of "customary international law", the delegate was agreeable to the proposition and emphasized that the draft conclusions should be reflective of State practices from all principal legal systems of the world and from all regions and should be able to give guidance to international tribunals and practitioners as well as domestic courts and judges. The delegate also reiterated the importance of the issue regarding the resolutions of organs of international organizations, including the UNGA, and international conferences, in the formation and evidence of CIL.

53. On the scope of immunity *rationae personae* the Delegation of **People's Republic of China** held the view that the customary international law is that heads of states, heads of governments and foreign ministers (the *Troika*) enjoy immunity *rationae personae*. The immunity is an absolute one without exception. The delegate also went on to add that international practice does not rule out the possibility of granting immunity *rationae personae* to other high ranking officials of a State. If we probe into state practices, it may be observed that many cases in national courts have demonstrated that immunity *ratione personae* for officials are not limited to the *Troika*. The delegate also pointed out that statements made by States at the 66th and 67th session of UN Sixth Committee, revealed that many countries agreed to explore, in varying degrees, the scope of immunity *rationae personae*.

54. On the topic of 'Customary International Law' the Delegation of China stated that the criteria on the formation and evidence of customary international law should be unified

system applied to all situations; there should not be different criteria for different branches of international law or for different audiences. As *Jus cogens*and customary international law were just different legal concepts and were not necessarily connected, there was no need to introduce the concept of *Jus cogens*in this topic. The delegate went on to add that ILC could discuss the relationship between customary international law and treaties, as well as customary international law and general principles of law. The delegate also agreed to change the title of this topic to "identification of customary international law", which could reflect more appropriately the substance of this topic.

55. On *the Protection of Persons in the Event of Disasters*, the Delegation of **Thailand** recognized that people's lives need to be protected and appropriate procedures must be in place for the necessary operations to be conducted effectively. At the event of disasters, the delegate added that the important and highly sensitive issue of state sovereignty must be respected and required a right balance between the two principles under the specific circumstances of each case.

56. He further noted with regard to the topic of Customary International Law thatthe AALCO Member States should try to compile evidence of their State practice and *opinion juris*on the ILC agenda, along with the answers to the questions posed by the ILC. This was to ensure that AALCO played a role in shaping the development of international law by taking into account the interests of AALCO Member States.

II. EXPULSION OF ALIENS

A. BACKGROUND

1. At its fifty-second session, in 2000, the International Law Commission (ILC) on the basis of the recommendation of a Working Group on the long-term programme of work identified the topic "Expulsion of aliens" for inclusion in its long-term programme of work.[1] The General Assembly, in resolution 55/152 of 12 December 2000 took note of the Commission's report concerning its long-term programme of work. In resolution 56/82 of 12 December 2001 the Assembly requested the Commission to further consider the topic, having due regard to comments made by Governments.

2. At its fifty-sixth session, in 2004, the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[2] At its fifty-seventh session, in 2005, the Commission had before it the preliminary report of the Special Rapporteur[3] setting out an overall view of the subject, while highlighting the legal problems, which it raised, and the methodological difficulties related to its consideration.

3. At its fifty-eighth session, in 2006, the Commission had before it the second report of the Special Rapporteur on the topic[4], and a memorandum prepared by the Secretariat. The Commission decided to consider the second report at its next session in 2007. At its fifty-ninth session, in 2007, the Commission considered the second and third reports of the Special Rapporteur[5], dealing, respectively, with the scope of the topic and definition (two draft articles), and with certain general provisions limiting the right of a State to expel an alien (five draft articles).

4. The General Assembly, in its resolution 62/66 of 6 December 2007 invited Governments to provide information to the ILC on the topic. At its sixtieth session, in 2008, the Commission considered the fourth report of the Special Rapporteur[6]. The first part of the report dealt with the issues raised by the expulsion of persons having dual or multiple nationalities and the second part addressed the problem of loss of nationality and denationalization in relation to expulsion. Following the debate on the report, the Commission established a Working Group under the chairmanship of Mr. Donald M. McRae to consider these two issues. The Working Group determined that there was no need to have separate draft articles on these matters since the necessary clarifications will be made in the commentaries to the draft articles.

5. At the sixty-first session in 2009, the Commission had before it the fifth report of the Special Rapporteur[7]and comments and information received from Governments up to that point. The Special Rapporteur presented to the Commission a revised and restructured version of draft articles 8 to 14, taking into account the plenary debate. The Special

[1] See Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), paras. 726-728 and 729 (4). For the syllabus on the topic, see ibid., annex (4).
[2] See Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10), para. 364.
[3] A/CN.4/554.
[4] A/CN.4/573 and Corr.1.
[5] A/CN.4/581.
[6] A/CN.4/594
[7] A/CN.4/611 and Corr.1

Rapporteur then submitted to the Commission a document containing a set of draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate. He also submitted a new draft work plan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.

6. At the sixty-second session in 2010, the Commission had before it the draft articles on the protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur[8]; the new draft work plan presented by the Special Rapporteur with a view to structuring the draft articles; and the sixth report presented by the Special Rapporteur[9]. The Commission likewise had before it comments and information received thus far from Governments. It decided to refer to the Drafting Committee draft articles 8 to 15 on the protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report, as subsequently revised and restructured by the Special Rapporteur; draft articles A and 9, as contained in the sixth report of the Special Rapporteur; draft articles B1 and C1, as contained in the addendum to the sixth report, aswell as draft articles B and A1, as revised by the Special Rapporteur during the session[10].

B. CONSIDERATION OF THE TOPIC AT THE 66TH SESSION OF THE COMMISSION

i. A brief summary of the Ninth Report of the Special Rapportuer

7. At the present session, 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.

8. 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 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.

9. It was noted that in regard to the discussions made in the Sixth Committee in 2012, it was noted that some States doubt whether the topic is suitable for codification, while other states said the topic was problematic and raised complexities and doubted whether the draft articles would provide a good basis for a future convention.[11] For another State codification

[8] A/CN.4/618.
[9] A/CN.4/625 and Add.1.
[10] See Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10(A/65/10).
[11]Denmark (on behalf of the Nordic countries) (A/C.6/67/SR.18, para. 45), United Kingdom (A/C.6/67/SR.19, para. 67 and A/CN.4/669, sect. II.A), Hungary (A/C.6/67/SR.20, para. 50). It should be noted, however, that "[the Hungarian] delegation welcomed the Special Rapporteur's attention to the Return Directive of the European Union, which had harmonized the minimum standards on the matter established under the national laws of more than 30 European States" (ibid.).

of the topic raised numerous methodological questions, including the extent of its reliance on diverse and specific national and regional jurisprudence and the methods for determining the relevant general rules of international law.

10. The questions raised were as to the need for *lex lata* codification and whether treatment *de lege ferenda*, as suggested by the Special Rapporteur regarding the current formulation of the provisions on readmission and appeal procedures was suitable or not.[12]It was noted that, in considering the topic Expulsion of aliens, the Special Rapporteur did not adopt any new or different approach from the one employed in the past to consider other topics in the Commission's agenda.

11. On the other hand few of the States showed strong support for the topic and the set of draft articles adopted by the Commission. It was noted that one State felt that the topic of expulsion of aliens could, be considered for codification with modification.[13] Another State welcomed the changes made in the previous session to the draft articles on expulsion of aliens, which reflected the Commission's efforts to achieve a balance between the regulatory power of expelling States and the legitimate rights of aliens subject to expulsion and at the same time leaving States some room for manoeuvre in enforcing their domestic legislation[14] while the representative of another State felt that the draft articles represented a positive contribution to the codification.[15]

ii. An overview of the Draft Articles adopted by the Drafting Committee

12. It was noted that the draft articles should achieve a better balance between the rights of aliens and the sovereign rights of the State as mentioned by one State[16] and in response another delegation said that it was satisfied with the structure of the draft[17]. It also welcomed the incorporation of the principles of legality and due process, which were fundamental to protecting the human rights of aliens subject to expulsion. Also to be commended were the cross-cutting mention of such human rights norms as the right to life, the prohibition of torture and the obligation not to discriminate and the specific recognition of the rights of vulnerable persons, refugees and stateless persons, in keeping with the international conventions regarding them.

13. Importantly it was noted that the draft articles clearly distinguished between expulsion of aliens and extradition, thus resolving the confusion that had existed in earlier versions[18] and it also identified the most important and widely recognized rights of aliens subject to expulsion, along with relevant prohibitions placed upon States by international law.[19]

14. It was noted that the Commission tended to overvalue the practice of treaty bodies, such as the Human Rights Committee, in identifying rules, sometimes at the price of overriding the very rule that the treaty in question had meant to establish[20] and in response the Special Rapporteur noted that, there is no recognized rule or method in international law for

[12] Israel (ibid.,para. 35).
[13] Poland (A/C.6/67/SR.19, para. 72).
[14] China (ibid.,para. 53).
[15] Mexico (ibid,para. 17).
[16] Thailand (ibid.,para. 38).
[17] Poland (ibid.,para. 70).
[18] Mexico (ibid.,para. 17).
[19] Greece (A/C.6/67/SR.22, para. 24).
[20] ibid.

establishing *opinio juris*, it appeared difficult to say that a rule arising from general practice does not constitute a customary rule.

15. It was noted that some States felt that the word "aliens" in the title of the draft articles had a negative connotation[21], since it distracted attention from the fact that human beings were involved while another State recommended a change in terminology by replacing the words "lawful/unlawful" with the expression "regular/irregular immigration status", and the word "alien" with the expression "alien person".[22]

16. While some states criticized the use of regional law[23] others were pleased that European law on the topic had been taken into consideration.[24]It was noted that one State suggested that, the State of destination, readmission agreements should be included in the draft articles. Another State felt that the draft articles, specifically draft articles 11, 12, 30 and 32, should be further elaborated with regard to the protection of the property of expelled aliens.[25]

iii. Comments on Draft Articles

(1) Article 1 – Scope[26]

17. Under Part I of General provisions Draft 1 is entitled "Scope", as originally proposed and Paragraph 1of the same states that the 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. 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.

18. Furthermore, the inclusion within the scope of the draft articles of aliens unlawfully present is to be understood in conjunction with the exclusion, stated in draft article 2(a) and paragraph 2 of draft article 1, excludes from the scope of the draft articles aliens enjoying privileges and immunities under international law.

(2) Article 3 – Right of expulsion

19. Draft article 3[27] is entitled "Right of expulsion". 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.

(3) Article 4- Requirement for conformity with law

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[21] Peru (A/C.6/67/SR.18, para. 89); and South Africa (A/C.6/67/SR.19, para. 79).
[22] El Salvador (A/CN.4/669, sect. II.A).
[23] See inter alia statements by the United States of America in the Sixth Committee.
[24] Hungary (A/C.6/67/SR.20, para. 50).
[25]Republic of Korea (A/C.6/67/SR.18, para. 120).
[26]**Article1-Scope:** 1. The present draft articles apply to the expulsion by a State of aliens present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.
[27]**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, without prejudice to other applicable rules of international law, in particular those relating to human rights.

20. Draft article 4[28] states that an alien can only be expelled in pursuance of a decision which is in accordance with law.

(4) Article 5- Grounds for expulsion

21. Draft article 5[29] is entitled "Grounds for expulsion" and Paragraph 1 enunciates the essential requirement – that an expulsion decision shall state the ground on which it is based. While recognizing that national security and public order were common grounds for the expulsion of aliens, the general view in the Drafting Committee was that these were not the only valid grounds. At the same time, it was generally recognized that a State may only expel aliens on a ground that is provided for in its legislation. Thus, the Drafting Committee decided to redraft paragraph 2 so as to indicate clearly that only those grounds that are provided for by law may be relied upon by a State in order to expel an alien. A specific mention of national security and public order was given the particular relevance of these grounds in relation to the expulsion of aliens. The term "law" in paragraph 2 is to be understood as a reference to the domestic law of the expelling State. Furthermore, it would provide some clarifications with regard to the notions of "national security" and "public order" as grounds for the expulsion of an alien, while also mentioning other grounds – including the violation of immigration law – which are provided for in domestic laws. Paragraph 3 corresponds, with minor modifications, to the text initially proposed by the Special Rapporteur. It sets out general criteria for the assessment by the expelling State of the ground for expulsion, whatever that ground may be. Paragraph 4 indicates that a State shall not expel an alien on a ground that is contrary to international law.

(5) Article 6- Rules relating to the expulsion of refugees

22. Under Part II of cases of Prohibited expulsion, Article 6[30]paragraph 1 reproduces 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. The Drafting Committee had a long discussion on paragraph 2 of draft article 6. 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. A discussion took place among the members of the Drafting Committee on whether it was necessary to provide, as initially proposed by the Special Rapporteur, an exception to such a

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

[29]**Article 5- Grounds for expulsion:** 1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law.

3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

[30]**Article 6- Rules relating to the expulsion of refugees:** The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules: (a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever 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.

protection for the case where the manifest intent of the application for refugee status would be to thwart an expulsion order likely to be handed down against the person concerned. After an intense debate, the Drafting Committee concluded that this was not necessary as draft article 6 applies only to those individuals who meet the requirements of the definition of "refugee" according to the 1951 Convention (or, as the case may be, any other relevant instrument such as the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa). 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 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" *strict sensu*. The commentary would indicate that paragraph 3 applies both to refugees lawfully present and to refugees unlawfully present in the territory of a State.

(6) Article 7- Rules relating to the expulsion of stateless persons

23. Regarding Article 7 [31] the Drafting Committee had a discussion on whether a provision on non- refoulement, similar to that retained in paragraph 3 of draft article 6 on refugees, should be included in article 7. The committee finally decided to omit such a provision with the understanding that stateless persons enjoy the protection recognized by the draft article 23 and 24 which apply to aliens in general. Furthermore, as for draft article 6 dealing with refugees, the Drafting Committee decided that other aspects relating to the expulsion of stateless persons would be covered by the "without prejudice" clause contained in draft article 8.

(7) Article 8[9]–Deprivation of nationality for the purpose of expulsion

24. The Drafting Committee discussed the advisability of including in the draft articles a provision dealing with cases of deprivation of nationality in connection with expulsion in Article 8[9].[32] The Committee was of the Commission's approval of the conclusions of a working group established in 2008 in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion[33]. One of these conclusions was that draft articles should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. However, the Drafting Committee considered that, since no prohibition of the expulsion of nationals was stated in the draft articles, it would not be appropriate to address the question of the circumvention of such a prohibition. A view was also expressed in the Committee against the inclusion of any provision that would touch upon the sensitive area of nationality in which States maintained a wide margin of discretion. It was found that such a deprivation of nationality, insofar as it had no other justification than the State's wish to expel the individual, would be abusive and arbitrary within the meaning of Article 15, paragraph 2, of the Universal Declaration of Human Rights. It was emphasized that draft article 9 is not intended to interfere with the normal operation of nationality laws or to affect a State's right to denationalize an individual on a ground that is provided for in its legislation.

(8) Article 9[10]- Prohibition of collective expulsion

[31] **Article 7- Rules relating to the expulsion of stateless persons:** The present draft articles are without prejudice to the rules of international lawrelating to stateless persons, and in particular to the rule that a State shall not expel stateless people lawfully in its territory save on grounds of national security or public order.

[32] **Article 8 [9] - Deprivation of nationality for the purpose of expulsion:** A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

[33] See A/63/10, paragraph 171

25. Draft article 9[10][34] is entitled "Prohibition of collective expulsion" and a discussion took place in the Drafting Committee on whether a definition of collective expulsion was necessary or appropriate in the context of the draft articles. The Drafting Committee eventually decided to include such a definition in paragraph 1 of draft article 10. However, contrary to the original proposal by the Special Rapporteur, the definition retained by the Drafting Committee addresses only the collective element and does not replicate the general elements of the definition of expulsion, which are provided for in draft article 2(a). Thus, collective expulsion is defined in paragraph 1 as the "expulsion of aliens as a group". 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 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 on the basis of a reasonable and objective examination of the particular case of each individual member of the group. It is indicated that the criterion of the "reasonable and objective examination" is drawn from the case-law of the European Court of Human Rights. Paragraph 4 contains a "without prejudice" clause referring to the case of armed conflict. At a later stage, the Special Rapporteur presented a revised version of that paragraph, which aimed at providing further limitations on the right of a State to expel aliens collectively in the event of an armed conflict. During the discussions in the Drafting Committee, some members expressed the view that a possible exception, in times of armed conflict, to the prohibition of collective expulsion would only apply in respect of aliens who are nationals of a State engaged in an armed conflict with the State in which they are, and not to any alien who would be in the territory of a State engaged in an armed conflict. The view was also expressed that such aliens might be subject to measures of collective expulsion only if they were engaged as a group in activities, which endanger the security of the State. It was noted that according to a different view, current international law would not impose such limitations on the right of a State to expel aliens who are nationals of another State with which it is engaged in an armed conflict. Furthermore, the point was noted that the issue of expulsion in times of armed conflict was a complex one, and that the Commission should not take the risk of elaborating a draft article that would not be entirely compatible with international humanitarian law. In the light of these difficulties, the Committee eventually opted for a "without prejudice" clause, which was formulated broadly so as to cover any rules of international law that may be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

(9) Article 10[11] -Prohibition of disguised expulsion

[34] **Article 9 [10]- Prohibition of collective expulsion:**
1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
2. The collective expulsion of aliens 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 an assessment of the particular case of each individual member of the group in accordance with the present draft articles.
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.

26. Paragraph 1 of Article 10[11][35], states the prohibition of any form of disguised expulsion. Paragraph 2 is based on the text proposed by the Special Rapporteur. However, the Drafting Committee introduced some changes to that text, with a view to clarifying the definition of "disguised expulsion". It was felt, in particular, that there was a need to circumscribe more precisely the notion of "disguised expulsion" in order to avoid possible overlaps with the general definition of "expulsion" in draft article 2(a). Later, the Drafting Committee agreed on the inclusion of the word "indirectly" in the second line of paragraph 2, so as to capture the specificity of "disguised expulsion". 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".

(10) Article 11[12] -Prohibition of expulsion for the purpose of confiscation of assets

27. It is emphasized that the expulsion of an alien for the purpose of confiscating his or her assets is prohibited. Draft article 11[12][36], which is entitled "Prohibition of expulsion for purposes of confiscation of assets", corresponds to paragraph 2 of the originally proposed draft article on the protection of the property of aliens subject to expulsion. The Drafting Committee did not introduce any change to the wording of this provision. However, following a suggestion made by some members of the Commission in 2011, the Drafting Committee preferred to address the issue of confiscatory expulsions in a separate draft article, which it decided to place in Part Two as it deals with a specific case of prohibited expulsion.

(11) Article 13 [14] -Obligation to respect the human dignity and human rights of aliens subject to expulsion and Article 14 [15]-Prohibition of discrimination

28. Part Three of the draft articles talk about Protection of the rights of aliens subject to expulsion and Chapter I of it deals about Obligation to respect the human dignity and human rights of aliens, prohibition of discrimination, vulnerable persons etc. For example Article 13[14] [37]deals about obligation to respect the human dignity and human rights of aliens subject to expulsion, is the result of the merging of the revised draft articles 8 and 9 proposed by the Special Rapporteur in document[38] which dealt with the general obligation to respect the human rights of persons subject to expulsion and with the obligation to respect the dignity of those persons. Paragraph 1 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. Some members of the Drafting Committee were of the view that human dignity should not have been referred to in a draft article, since it was not a human right entailing specific obligations for States, but rather the source of inspiration of human rights in general. Other members believed that it was important to state in a draft article the obligation to respect the human dignity of persons subject to expulsion. It was observed, that in the

[35]**Article 10 [11] - Prohibition of disguised expulsion:** 1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of the present draft article, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.

[36]**Article 11 [12]- Prohibition of expulsion for the purpose of confiscation of assets:** The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

[37]**Article 13 [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.

[38]A/CN.4/617

course of the expulsion process aliens were often subjected to humiliating treatment which, without necessarily amounting to cruel, inhuman or degrading treatment, was offensive to their dignity as human beings. 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 International Covenant on Civil and Political Rights, 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. The text of paragraph 2 recalls that aliens subject to expulsion are entitled to respect for their human rights. The words "in particular", which preceded the reference to the rights mentioned in the draft articles, were replaced by the word "including", which was considered to be more neutral as it avoids conveying the impression that the rights set out in the draft articles should be regarded as more important than the other human rights to which an alien subject to expulsion is also entitled. Article 14 [15][39] on the other hand mentions about the prohibition of discrimination that the expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind 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.

(12) Article17 [18] – Prohibition of torture or cruel, inhuman or degrading treatment or punishment

29. Chapter II of Part three deals with Protection required in the expelling State, which includes obligation to protect the right to life of an alien, prohibition of torture or cruel, inhuman or degrading treatment or punishment, obligation to respect the right to family life, protection of the property of an alien subject to expulsion.

30. It is noted that the reference to "torture or to inhuman or degrading treatment" made in article 17[18][40] was replaced by a more complete reference to "torture or to cruel, inhuman or degrading treatment or punishment". Also, the Drafting Committee discussed the appropriateness of the words "in its territory or in a territory under its jurisdiction", which appeared in the text proposed by the Special Rapporteur. It was suggested by some members that reference be made, more broadly, to persons under the jurisdiction or control or the expelling State. This proposal met with the opposition of other members who were of the view that the notion of jurisdiction was broad enough to cover the situations to be addressed in this draft article. Since no agreement could be reached on that point, the Drafting Committee opted for omitting any reference, to the notions of "territory", "jurisdiction" or "control", while noting that the element of territory was already covered under the definition of "expulsion" contained in draft article 2(a).

[39] **Article 14 [15]- Prohibition of discrimination:** The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind 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.

[40] **Article 17 [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.

(13) Article 21- Departure to the state of destination and Article 22 - State of destination of aliens subject to expulsion

31. Chapter III of part three deals with Protection in relation to the State of destination which includes how the expelling state shall take measures to facilitate the departure of an alien etc as mentioned in Article 21[41]is entitled "Departure to the State of destination". The Drafting Committee was of the view that the term "return", which appeared in the original title, was not appropriate because the State of destination might well be a State in which the alien had never been before. The substance of paragraph 1, as provisionally adopted by the Drafting Committee, corresponds to a large extent to the original proposal by the Special Rapporteur. During the debate in 2010 some members of the Commission suggested that paragraph 1 be recast to prevent its being construed as an encouragement to the exercise of undue pressure on the alien. It was noted, in particular, that the verb "encourage" lacked legal precision and could pave the way to abuse. On the basis of a new formulation subsequently presented by the Special Rapporteur, the Drafting Committee addressed these concerns by stating, in paragraph 1, that the expelling State shall take "appropriate measures" to "facilitate the voluntary departure" of an alien subject to expulsion. With regard to paragraph 2 of draft article 21, the Drafting Committee retained the text originally proposed by the Special Rapporteur, except for the deletion of the Specific reference to the rules of international law relating to air travel, as proposed by certain members of the Commission and by a number of States during the debate in the Sixth Committee, and for the replacement, in the English text, of the term "orderly transportation" by "safe transportation". While recognizing the particular relevance of air transportation in the implementation of an expulsion decision, as well as the existence of an extensive body of international law relating to air travel, the Drafting Committee was of the view that a reference to that law in the commentary would suffice, also considering that other means of transportation were used for expulsion purposes.

(14) Article 22 – State Of Destination of Aliens Subject To Expulsion

32. Article 22[42] deals about state of destination of aliens subject to expulsion and is entitled "State of destination of aliens subject to expulsion". The Drafting Committee introduced a number of changes to the original text of the draft article. Some of these changes are of a substantive nature and are intended to respond to concerns expressed and comments made by several members of the Commission during last year's debate. While some members supported the priority given in the original text to the State of nationality as the "natural" State of destination of an alien subject to expulsion, some other members considered that there was no reason why the possibility of expelling an alien to a State other than his or her

[41]**Article 21-Departure to the State of destination:** 1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.
2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.
3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

[42]**Article 22-State of destination of aliens subject to expulsion:** 1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.
2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

State of nationality should be limited to those situations in which that State could not be identified. Furthermore, some members of the Commission were of the opinion that a greater role should be recognized to the alien's choice in determining his or her State of destination. At the same time, certain members observed that only the State of nationality had an obligation to receive a person expelled from another State. These divergent positions were reiterated in the Drafting Committee, where a prolonged discussion took place.

(15) Article 25- Protection in a transit State of the human rights of an alien subject to expulsion

33. Chapter IV comprises only one draft article, namely draft article 25[43]which is entitled "Protection in the transit State of the human rights of an alien subject to expulsion". The text of draft article 25 as provisionally adopted by the Drafting Committee is a reformulation of the draft article originally proposed by the Special Rapporteur, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. While several members of the Commission supported the inclusion of a draft article on the human rights obligations of the transit State, some members were of the view that the draft article should be reworded so as to avoid conveying the erroneous impression that the transit State would be required to comply with human rights rules that are binding only upon the expelling State. The same point was raised in the Drafting Committee. In order to address this concern, the Drafting Committee reformulated the draft article so as to refer specifically to the obligations of the transit State under international law.

(16) Article 26- Procedural rights of aliens subject to expulsion

34. Part Four deals with specific procedural rules which include procedural rights of aliens subject to expulsion, suspensive effect of an appeal against an expulsion decision, etc and in that regard Article 26[44]is entitled as "Procedural rights of aliens subject to expulsion" and the Special Rapporteur had originally proposed, in the first version of draft article A1 and C1 contained in addendum 1 to his sixth report[45] to draw up a list of procedural rights applicable to the expulsion of aliens who are lawfully present in the territory of the expelling State, while leaving to the discretion of the expelling State whether or not to grant such procedural rights, or at least some of them, also to aliens unlawfully present. During the

[43]**Article 25- Protection in a transit State of the human rights of an alien subject to expulsion:** A transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

[44]**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, except where compelling reasons of national security otherwise require;
(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 a brief duration.

[45]A/CN.4/625/Add.1

plenary debate in 2010, several members of the Commission expressed the view that some procedural rights should also be recognized to aliens unlawfully present in the territory of the expelling State. In an attempt to respond to these concerns, the Special Rapporteur presented to the Commission, at the same session, a revised version of draft article A1 providing for the applicability of certain procedural rights to aliens who, albeit unlawfully present, enjoy a special status in the expelling State or have been residing in that State for a certain period of time, e.g. six months. The Commission then referred draft article C1, together with the revised draft article A1, to the Drafting Committee.

(17) Article 29- Readmission to the expelling State, Article 30 [31] Responsibility of States in cases of unlawful expulsion and Article 31 [32] Diplomatic protection

35. Part Five deals with legal consequences of expulsion and in that regard Article 29[46] is entitled "Readmission to the expelling State". 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. In the Drafting Committee, the appropriateness of stating in the draft articles a right to readmission in cases of unlawful expulsion was debated. Some members were of the view that the recognition of such a right would go too far and would also be questionable from the perspective of *lexferenda*. According to another point of view, the rules on the responsibility of States for internationally wrongful acts, which are referred to in the "without prejudice" clause contained in draft article 31, and in particular the rules governing reparation, including, as the case may be, *restitutio in integrum*, already provided an adequate solution to this issue; therefore, there was no need for addressing the issue from the perspective of an individual right of the expelled alien. However, the Drafting Committee eventually decided to devote a separate draft article to the question of readmission in case of unlawful expulsion.

36. Article 30 [31][47]is entitled "Responsibility of States in cases of unlawful expulsion". The inclusion in the draft articles of a provision referring to the legal regime of responsibility of States for internationally wrongful acts, which was proposed by the Special Rapporteur in addendum 2 to his sixth report[48] found broad support in the Commission. The formulation originally proposed by the Special Rapporteur referred, in this context, to the "legal consequences" of an unlawful expulsion. However, the Special Rapporteur presented to the Drafting Committee a revised version of the draft article, which referred directly to the engagement of the international responsibility of the expelling State as a result of an unlawful expulsion. The Drafting Committee worked on the basis of the revised text presented by the Special Rapporteur. The text of the draft article as provisionally adopted by the Drafting

[46]**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.

[47]**Article 30 [31]-Responsibility of States in cases of unlawful expulsion:** The expulsion of an alien in violation of the expelling State's obligations set forth in the present draft articles or in any other rule of international law entails the international responsibility of that State.

[48]A/CN.4/625/Add.2

Committee indicates that the 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 rule of international law.

37. Finally, draft article 31[32] [49] is entitled "Diplomatic protection", as originally proposed. It refers to the right of the State of nationality of an alien subject to expulsion to exercise diplomatic protection in respect of that alien. Apart from minor linguistic changes, the text retained by the Drafting Committee corresponds to that originally proposed by the special Rapporteur. This draft article acts as a generic reference to the legal institution of diplomatic protection, which is well established in international law. The general conditions and modalities of the exercise of diplomatic protection in accordance with international law are applicable to the protection exercised by the State of nationality in respect of an alien subject to expulsion.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON EXPULSION OF ALIENS AT THE UN GENERAL ASSEMBLY AT ITS SIXTY-EIGHTH SESSION (2013)

38. Commenting on the topic the delegate of **Republic of Korea** noted that with respect to State sovereignty and human rights of aliens, the draft articles highly respect the human rights of aliens and seek the balance between State sovereignty and the human rights of aliens subject to expulsion. However, some articles limit State sovereignty to an unreasonable extent and noted that the decisions or opinions of local courts on human rights and noted that some articles seemed to go beyond the purview of multilateral treaties, general principles of international law, domestic law and international practices in their operation. For instance, draft article 6 (Prohibition of the expulsion of refugees), article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), and 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) were drafted based on the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Notwithstanding, the draft articles expand the range of persons covered, while reducing the grounds for limitation, thus practically exceeding the scope of application of the above-mentioned conventions.

[49] **Article 31 [32]-Diplomatic protection:** The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

III. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

A. BACKGROUND

1. At its fifty-sixth session, in 2004, the Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work[50].At its fifty-seventh session, in 2005, the Commission decided to include the topic in its programme of work and to appoint Mr. Zdzislaw Galicki as Special Rapporteur for the topic[51].

2. At its fifty-eighth session, in 2006, the Commission considered the preliminary report of the Special Rapporteur[52].The General Assembly, in resolution 61/34 of 4 December 2006, invited Governments to provide to the International Law Commission information on legislation and practice regarding the topic.

3. At its fifty-ninth session, in 2007, the Commission considered the second report of the Special Rapporetur containing one draft article on the scope of application as well as a proposed plan for further development[53]. The Commission also had before it comments and information received from Governments.

4. At the sixtieth session, in 2008, the Commission had before it the third report of the Special Rapporteur[54],as well as comments and information received from Governments.The third report of the Special Rapporteur was aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic. The questions were intended to enable the Special Rapporteur to draw final conclusions regarding the main issue of whether the obligation *aut dedere aut judicare* existed as a matter of customary international law. The Commission held a debate on the basis of the Special Rapporteur's third report, which covered, *inter alia*, substantive questions related to the customary nature of the obligation, the relation to universal jurisdiction and international courts, as well as procedural aspects to be dealt with in the future. The Commission further decided to establish a Working Group on the topic under the chairmanship of Mr. Alain Pellet.

5. At the sixty-first session, in 2009, the Commission had before it comments and information received from Governments. The Commission re-established an open-ended Working Group on this topic under the Chairmanship of Mr. Alain Pellet. The Commission subsequently took note of the oral report presented by the Chairman of the Working Group. The Working Group proposed the following general framework for the Commission's consideration of the topic: the legal bases of the obligation to extradite or prosecute, the

[50]See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 362. For the syllabus on the topic, see *ibid*., annex.
[51]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500

[52]Document A/CN.4/571. (seeAnalytical Guide) See *Official Records of the General Assembly, Sixty-fiirst Session, Supplement No. 10* (A/61/10), paras. 215-232.
[53]Document A/CN.4/585 and Corr. 1. (seeAnalytical Guide)
[54]Document A/CN.4/603. (seeAnalytical Guide)

material scope of the obligation to extradite or prosecute, the content of the obligation to extradite or prosecute, relationship between the obligation to extradite or prosecute and other principles, conditions for the triggering of the obligation to extradite or prosecute, the implementation of the obligation to extradite or prosecute and the relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal.

6. At its sixty-second session in 2010, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which, in the absence of its chairman, was chaired by Mr. Enrique Candioti. The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a Survey of multilateral conventions, which may be of relevance for the Commission's work on the topic, prepared by the Secretariat, together with the general framework prepared by the Working Group in 2009. The Working Group also had before it a working paper prepared by the Special Rapporteur, entitled "Bases for discussion in the Working Group on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)", containing observations and suggestions, based on the general framework prepared in 2009 and further drawing upon the Survey by the Secretariat. The Working Group reaffirmed, taking into account the practice of the Commission in the progressive development of international law and its codification, that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed in 2009.

7. At the sixty-third session in 2011, the Commission had before it the fourth report of the Special Rapporteur[55], addressing the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom, and concerning which three draft articles were proposed.

8. At the sixty-fourth session in 2012, the Commission decided to establish an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group was to evaluate progress of work on the topic in the Commission and to explore possible future options for the Commission to take. No Special Rapporteur was appointed in place of Mr. Galicki, who was no longer a member of the Commission.

9. At the sixty-fifth session in 2013, the Commission reconstituted the open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group continued to evaluate work on this topic, particularly in the light of the judgment of the International Court of Justice in the Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) case, of 20 July 2012.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SIXTH SESSION OF THE COMMISSION

10. At this session held in 2014, the Commission considered the Final Report of the Working Group on the topic “The obligation to extradite or prosecute (*aut dedere aut*

[55]Document A/CN.4/648. (seeAnalytical Guide)

judicare) the purpose of which is to summarize the conclusions and recommendations of the Working Group on the topic.

11. At the present session, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group met on 6 May and 4 June 2014. It was mindful of the priority that the General Assembly continued to give to this topic over the years, as evidenced most recently in General Assembly resolution 68/112 entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions", operative paragraph 7, which reads:

> "*Invites* the International Law Commission to continue to give priority to the topics 'Immunity of State officials from foreign criminal jurisdiction' and 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'."

12. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic. In this regard, most members of the Working Group noted that the delegations to the Sixth Committee in 2013 were divided in their views of how the Commission should approach future work on the topic. Some delegations emphasized the continued relevance of the topic in the prevention of impunity, while others questioned the usefulness of continuing with work on the topic. After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that is of practical value to the international community. The Working Group recommended to the Commission that it adopt the 2013 report of the Working Group; and that it adopt this report, which addresses additional issues raised by delegations to the Sixth Committee in 2013.

13. The 2013 report of the Working Group was generally well received in the Sixth Committee. Several delegations found it to be a valuable resource, particularly in relation to its examination and interpretation of the obligation in multilateral conventions and the Judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Delegations also appreciated it for answering several questions raised during the work of the Commission on this topic. One delegation queried whether any broad implications could be derived from the specific circumstances presented in that Judgment. Another delegation contended that the report contained certain problematic conclusions, particularly because paragraph 28 of the report did not adequately reflect the position of States on draft article 13 of the draft articles on the topic "Expulsion of aliens" adopted by the Commission at its first reading in 2012. In light of these largely favorable reactions, the Working Group recommends that the Commission adopt the 2013 report of the Working Group as a report of the Commission on this topic.

14. The Working Group considered remaining issues that were not covered by its 2013 report but were subsequently raised in the Sixth Committee, namely the customary international law status of the obligation to extradite or prosecute; gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and the continued relevance of the 2009 General Framework.

15. The remaining issues are addressed in the following summary.

- *Conclusions of the Working Group on the remaining issues*
- *The customary international law status of the obligation to extradite or prosecute*

16. Some delegations to the Sixth Committee opined that there was no obligation to extradite or prosecute under customary international law, whereas others were of the view that the customary international law status of the obligation merited further consideration by the Commission.

17. It may be recalled that in 2011 the then Special Rapporteur Galicki, in his Fourth Report, proposed the following draft article:

i. Article 4
International custom as a source of the obligation *aut dedere aut judicare*

18. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

19. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

20. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2."

21. However the draft article was not well received either in the Commission or the Sixth Committee. There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes. Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Working Group has decided not to have the outcome of the Commission's work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

22. The Working Group wishes to make clear that the foregoing should not be construed as implying that either the Working Group or the Commission as a whole has found that the obligation to extradite or prosecute has not become or is not yet crystallizing into a rule of customary international law, be it a general or regional one.

ii. Gaps in the existing conventional regime and the "*third alternative*"

23. It may be recalled that the 2013 report of the Working Group observed that there were important gaps in the present conventional regime governing the obligation to extradite or prosecute, notably in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict. The Working Group also noted that the Commission had placed on its long-term work programme in 2013 the topic of crimes against humanity, which would include as one element of a new treaty an obligation to

extradite or prosecute for those crimes. It further suggested that, in relation to genocide, the international cooperation regime could be strengthened beyond the one that exists under the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.

24. Instead of drafting a set of model provisions to close the gaps in the existing conventional regime regarding the obligation to extradite or prosecute, the Working Group recalls that an obligation to extradite or prosecute for, *inter alia*, genocide, crimes against humanity and war crimes is already stipulated in article 9 of the 1996 *Draft Code*. The Working Group also points out that the obligation to extradite or prosecute was developed in article 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*.

25. The above provision, known as the "Hague formula", has served as a model for most contemporary conventions containing the obligation to extradite or prosecute, including the UN Convention against Transnational Organized Crime and the UN Convention against Corruption which have been mentioned by several delegations in the Sixth Committee in 2013 as a possible model to close the gaps in the conventional regime. In addition, the Judgment of the International Court of Justice in *Belgium v. Senegal* is helpful in construing the Hague formula. The Working Group recommends that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime.

26. Under such a provision, the obligation to extradite or prosecute may be satisfied by a "third alternative", which would consist of the State surrendering the alleged offender to a competent international criminal tribunal or a competent court whose jurisdiction the State concerned has recognized.

27. The examples highlight the essential elements of a provision containing the obligation to extradite or prosecute, and may assist States in choosing the formula that they consider to be most appropriate for a particular context.

iii. The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute

28. To recapitulate, beyond the basic common features, provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action. Although the relationship between the obligation to extradite and the obligation to prosecute is not identical, the relevant provisions seem to fall into two main categories; namely, (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition.

29. Instruments containing clauses in the first category impose on States Parties (at least those that do not have a special link with the offence) an obligation to prosecute only when extradition has been requested and not granted, as opposed to an obligation *ipso facto* to prosecute the alleged offender present in their territory.

30. Clauses in the second category impose upon States an obligation to prosecute *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition.

31. It can be recalled here that in *Belgium v. Senegal,* the International Court of Justice considered article 7 (1) of the *Convention against Torture* as requiring:

32. "the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. …."

33. Accordingly, it follows that the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight. Extradition was an option offered to the State by the Convention while prosecution was an obligation under the Convention, the violation of which was a wrongful act resulting in State responsibility.

iv. The relationship of the obligation to extradite or prosecute with *erga omnes* obligations or *jus cogens* norms

34. The issue of the impact of the *aut dedere aut judicare* principle on international responsibility when it relates to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture has been a matter of serious debates.

35. Several members of the Working Group pointed out that this area was likely to concern the interpretation of conventional norms. The statements of the International Court of Justice in this regard in *Belgium v. Senegal* must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the *Convention against Torture* as giving rise to "obligations *ergaomnespartes*", whereby each State Party had a "common interest" in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party. The issue of *jus cogens* was not central to this point. In the understanding of the Working Group, the Court was saying that insofar as States were parties to the *Convention against Torture*, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.

36. Other treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States Parties may have a legal interest in invoking the international responsibility of a State Party for being in breach of its obligation to extradite or prosecute.

37. The State that can request extradition normally will be a State Party to the relevant convention or have a reciprocal extradition undertaking/arrangement with the requested State,

having jurisdiction over the offence, being willing and able to prosecute the alleged offender, and respecting applicable international norms protecting the human rights of the accused.

38. It also needs to be understood here that the present report exhausts all the issues remaining to be analyzed in relation to this topic. Therefore, the Working Group recommended that the Commission adopt the 2013 report of the Working Group and the present final report of the Working Group, which, in the view of the Commission, provide useful guidance for States.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THIS TOPIC AT THE UN GENERAL ASSEMBLY AT ITS 68TH SESSION HELD IN 2013

39. One Delegate was of the view that the Working Group's report made clear that the obligation to extradite and the obligation to prosecute were inextricably linked. His delegation agreed with the Commission that the harmonization of multilateral treaty regimes would be a futile exercise because of the complex nature of multilateral treaties on the subject, and that an assessment of the actual interpretation, application and implementation of clauses on the obligation to extradite or prosecute in particular situations, such as *Belgium v. Senegal*, would not be useful to the development of the topic, since the interpretation of a specific *aut dedere aut judicare* obligation would be subject to the specific context in which the clause occurred.

40. In his view, an effective *aut dedere aut judicare* obligation must, clearly involve universal jurisdiction in some form or another. This was the case in particular with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which placed a primary obligation on the State to exercise jurisdiction. The continuation of the topic, as with any topic in which the intention would be to create a classical *aut dedere aut judicare* obligation, should thus include, as a major element, universal jurisdiction or, at the very least, aspects thereof. His delegation also wondered whether there was any point in continuing with the topic if the Commission decided to include in its agenda the topic of crimes against humanity, whose primary "hard obligation" would be an *aut dedere* obligation for crimes against humanity.

41. Another delegate appreciated the report of the Working Group on the topic of the obligation to prosecute or extradite (*aut dedere aut judicare*). While considering the final results satisfactory he was of the view that the Commission should conclude its work on the topic.

42. One delegate agreed with the Working Group that, owing to the great diversity in the formulation, content and scope of the obligation in treaty practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses. The obligation to extradite or prosecute was currently an obligation under general international law arising from treaties or domestic legislation, as well as on the basis of reciprocity between States. Since there was no strong evidence of its widespread acceptance by the majority of States, it did not have customary international law status. Moreover, the *aut dedere aut judicare* principle was not equivalent to or synonymous with the principle of universal jurisdiction. Her Government had not criminalized offences subject to universal jurisdiction and believed that the obligation to extradite or prosecute was binding on a State only if it had bound itself by means of a treaty or domestic legislation.

43. While explaining the legal position of her Country on this issue she pointed out that the obligation to extradite or prosecute had been included in the Malaysian Extradition Act of 1992, under which the Minister of Home Affairs had discretion to determine whether to grant an extradition request or refer the case to the relevant authority for prosecution, taking into account the alleged offender's nationality and whether the Malaysian courts had jurisdiction in respect of the offence in question. Only extraditable offences would be considered in determining any extradition request. In that regard, her delegation agreed with the Working Group that the obligation to prosecute was actually an obligation to submit the case to the prosecuting authorities and did not involve an obligation to initiate a prosecution.

44. In her view, it would be premature to attempt to draft any articles until the basis of the obligation to extradite or prosecute had been determined. The status of existing law must therefore be ascertained before embarking on progressive development of the topic. With regard to the third alternative suggested by the Working Group, that of a State surrendering a suspect to a competent international criminal tribunal in order to meet its international obligation to extradite or prosecute, as Malaysia had a dualist legal system, its international obligations would only be legally binding with regard to those treaties to which it had become a party, subject to any reservations, and which it had incorporated in its domestic legislation. Her Government would fulfill its obligation to extradite or prosecute as agreed in the bilateral and multilateral treaties that it had concluded, subject to applicable domestic laws and procedures.

45. Another Delegate welcomed the reconstitution of the open-ended Working Group in order to evaluate progress of work on the topic and to explore possible future options to be taken by the Commission.

46. One Delegate stated that this topic represents an indispensable tool for combating impunity, and that there were gaps in the existing conventional regime governing the obligation that might need to be closed, particularly in relation to crimes against humanity and war crimes that did not fall within the scope of the grave breaches set out in the four Geneva Conventions of 1949 and Additional Protocol I. Moreover, in relation to genocide, as stipulated by the International Court of Justice in its judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention obligated contracting parties to exercise criminal jurisdiction or to cooperate with an international penal tribunal only under certain circumstances. In that regard, his delegation agreed with those delegations that had encouraged the Commission to develop a model set of provisions on the obligation to extradite or prosecute in order to close such gaps. It also highly commended the joint initiative of Argentina, Belgium, the Netherlands and Slovenia aimed at the adoption of a new international instrument on mutual legal assistance and extradition for the investigation and prosecution of all the major international crimes, including crimes against humanity. The Commission's work on the topic would support that endeavor.

47. With regard to the need to establish the necessary jurisdiction to implement the obligation to prosecute or extradite, in his view, there was a possible overlap between that obligation and universal jurisdiction in cases when a crime was committed abroad with no nexus to the forum State. The Commission should study State practice in applying the principle of universal jurisdiction, which could be relevant to its work on the topic. Lastly,

the link between the obligation to extradite or prosecute and the mechanisms put in place by international jurisdictions should be given particular attention he added.

48. Another Delegate stated that, the report of the Working Group on the obligation to extradite or prosecute (A/68/10, annex A) provided a useful analysis of the judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* . However, it was not clear how the Commission intended to proceed with the topic, particularly in the light of the suggestions made by some Commission members during its sixty-fourth session concerning the possibility of suspending or terminating consideration of the topic. In that regard, her delegation would study closely the suggestions to be submitted by the Working Group on the way forward.

IV. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. BACKGROUND

1. 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 Rapporteur 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.

2. 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.

3. 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.

4. 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.

5. At the sixty-fourth session of the International Law Commission, in 2012, the Special Rapporteur submitted the fifth report on the protection of persons in the event of disasters[56]. He 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

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

Commission's question in chapter III.C of its 2011 annual report[57]. 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).

6. At the Sixty-fifth session of the International Law Commission in 2013, the Special Rapporteur submitted the sixth report on the protection of persons in the event of disasters.[58] The report dealt with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The report further provided an overview of national policy and legislation. Proposals for the following two draft articles were made in the report: draft articles 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to prevent).

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SIXTH SESSION OF THE COMMISSION

7. The Commission considered the seventh report of the Special Rapporteur Mr. Eduardo Valencia-Ospina on *"Protection of persons in the event of disasters"*. The Seventh report consisted of four sections. First section provided a brief summary of the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the Sixty-eighth session of the UN General Assembly. The second section dealt with the protection of relief personnel and their equipment and goods, which contained a proposal for an additional *draft article 14 bis*, entitled "Protection of relief personnel, equipment and goods". The third section proposed three draft articles that contained general or saving clauses relating to the interaction of the draft articles with other rules of international law applicable in disaster situations.

Draft article 14 bis
Protection of relief personnel, equipment and goods

> The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

8. The Special Rapporteur explains in detail the need to extend protection to the relief personnel, equipment and goods, foreseeing the event of breakdown of the law and order situation in the affected State during the outbreak of a disaster. It is stated:

> "A disaster can lead to a temporary breakdown in law and order in the affected State, thus raising the security threats posed for disaster relief personnel. Besides, the considerable value of equipment and goods belonging to international actors engaged in relief operations represents a tempting target for common criminals".

9. Taking into view this concern, this additional draft article has been incorporated within draft Article 14, which speaks about the duties of the affected State with regard to the

[57] See A/66/10.
[58] See A/CN.4/662.

'facilitation of external assistance'. The categorisation of those relief personnel, equipment and goods that need protection, is in accordance with certain universal, regional, bilateral and non-binding legal instruments dealing with disaster relief.

10. At the event of disasters, the lives of the relief personnels and other international humanitarian missions had to be protected. Certain important risks prevailed while the 'relief personnel'[59], their 'equipment and goods'[60] operated in relief measures. Few international humanitarian missions faced certain challenges most commonly in cases where international actors had to operate in situations of armed conflict or in States affected by a general deterioration of security conditions. The recent UN Security Council resolution 2139 (2014), on the situation in Syria, is very pertinent in this regard. Through this resolution, the Security Council condemned "all acts or threats of violence against United Nations staff and humanitarian actors, which have resulted in the death, injury and detention of many humanitarian personnel". The Security Council also urged "all parties to take all appropriate steps to ensure the safety and security of United Nations personnel, those of its specialized agencies, and all other personnel engaged in humanitarian relief activities, without prejudice to their freedom of movement and access". Though such situations invoked the application of international humanitarian law (IHL), situations of disaster also faces similar challenges, wherein there are possibilities that relief personnel and their equipment and goods might face risks was no less real. Hence, the relevance of this draft article in the Seventh report of the Special Rapportuer.

11. The significance of this provision is evident when this provision is the specific duty to ensure the protection of personnel, equipment and goods attached to relief operations did not overlap with the parallel though distinct obligation embodied in draft article 14, namely, the facilitation of external assistance. The specific nature and scope differs from the measures under the draft Article 14. The need to maintain as distinct the obligations pertaining to the facilitation of external assistance, on the one hand, and those concerning the protection of relief personnel, equipment and goods, on the other, was clearly reflected in international practice, as was evident in universal, regional and bilateral treaties as well as in soft-law instruments.

12. Another important aspect is that the absence of specific exclusions (under categories of relief personnels) could not be interpreted as implying that any individual or entity present in the territory of the affected State, during disasters, with the aim of providing support in the relief efforts could automatically qualify as being entitled to coverage under the provisions affording protection. Treaties constantly reaffirmed a basic tenet of humanitarian assistance in the event of disasters, namely, *the need to secure the consent of the affected State for the provision of external assistance and the primary role of that State in the direction, coordination and supervision of assistance and relief activities undertaken by various actors*.

[59] The term relief personnel is defined in draft Article 3 bis (g). It means "specialized personnel, including military
personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;"

[60] The term equipment and goods have been defined in draft Article 3 bis (e) to include 'supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;"

13. The measures to be adopted by affected States to fulfill their duty to protect relief personnel and their equipment and goods, might differ in content and could imply different forms of State conduct. A preliminary requirement as far as the affected States is concerned, was to respect the negative aspect of such an obligation, in order to prevent their State organs from being directly involved in pursuing detrimental activities with regard to relief personnel and their equipment and goods. Thus, in order to avoid detrimental activities of that kind, carried out by individuals in their private capacity, affected States were required to show due diligence in taking the necessary preventive measures. The report states that the duty to protect disaster relief personnel, goods and equipment could be qualified as an obligation of conduct and not of result.

14. Despite any preventive measures adopted, harmful acts could still be committed against relief personnel, their equipment and goods. Those unlawful activities should be prosecuted by the affected State when committed within its jurisdiction. Reference had been made to the Convention on the Safety of United Nations and Associated Personnel of 1994 and the Optional Protocol of 2005, wherein the treaty required States parties to ensure the security and safety of certain categories of personnel and to repress specific crimes listed in the Convention, based on a prosecute-or-extradite approach (*autdedereautjudicare*).

Draft article 17
Relationship with special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations.

Draft article 18
Matters related to disaster situations not regulated by the present draft articles

The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles.

Draft article 19
Relationship to the Charter of the United Nations

The present draft articles are without prejudice to the Charter of the United Nations.

15. The Report discusses the most recent and comprehensive treaties adopted at a regional level: (i) the 2005 ASEAN Agreement on Disaster Management and Emergency Response, and (ii) the SAARC Agreement on Rapid Response to Natural Disasters of 2011. The importance has been discussed with respect to draft Article 17 on the "Relationship with Special Rules of International Law" which states that the special rules of international law applicable in disaster situations shall supersede this draft Article in the event of inconsistency. Draft article 17 on the relationship between the draft and special rules of international law mirrored the wording of draft article 17 of the draft articles on diplomatic protection. Draft Article 18 is a paramount feature, which deals with "Matters related to disaster situations not regulated by the present draft articles". This provision presupposes that rules of international law shall be the governing rules during disaster situations. Thus, it is

evident that the general principles of international law governing respect for sovereignty, territorial integrity and political independence of the affected State, shall be given primacy and shall remain inviolable.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-EIGHTH SESSION (2013)

16. At the Sixth Committee of the UN General Assembly at its Sixty-Eighth Session[61], there were deliberations on mainly two draft articles on this topic;*Draft article 5 ter* on Cooperation for disaster risk reduction, and *Draft article 16* on Duty to reduce the risk of disasters. There was support expressed for the inclusion of draft article 5 ter. It was stated that the correlation between "measures" and "appropriate measures" under draft article 16, when read together with the obligation to cooperate in draft article 5, may lead to greater role for international organizations than earlier practice. It was consistently argued that while taking the required measures at pre-disaster phase, cooperation must be extended to enhance the resilience of the affected populations and communities to disasters. Certain other suggestions were also provided, which included, providing an overt cross-reference to draft article 16. It could also indicate in the commentaries that cooperation may also include joint projects and programmes, cross-border planning, the development of methodologies and standards, capacity-building, the exchange of expertise and good practices and the exchange of risk analysis and information. Support was also expressed for the proposal to incorporate the draft article into draft article 5.

17. While support was expressed for draft article 16, it was viewed that the question of disaster prevention should not distract the Commission from post-disaster assistance. The duty to reduce the risk of disasters was based on the contemporary understanding of State sovereignty, encompassing not only rights, but also the duties of States towards their citizens. The duty also accorded with the obligation of States to respect, protect, and fulfill human rights, in particular the right to life. With regard to paragraph 1, it was viewed that there existed a legal obligation to take measures. On the other hand, the existence of such a "duty", as also indicated in the title of the draft article, was disputed. The view was expressed that if States were under a positive obligation, it was one of means and not of result. Thus, the article simply acknowledged the fact that many States accept an obligation to reduce the risk of disasters, which was evident from various multilateral, regional and bilateral agreements and national legal frameworks. It was noted that account had to be taken of the fact that not all States have the capacity or resources to take "necessary and appropriate" measures.

18. As regards paragraph 2, it was recalled that a wide range of practical measures should be undertaken by public and private sector actors, given that such measures would vary by disaster. It was also proposed that the reference to the dissemination of risk and past loss information should not be absolute and ought to be guided by each State's existing laws, rules, regulations and national policies. Further suggestions included making specific reference: to multi-hazard assessments, including the identification of vulnerable people or communities, and the pertinent infrastructure, in relation to the relevant hazards; to practical pre-emptive measures that assist people or communities in reducing their exposure and

[6161] See http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/666 for the report.

enhancing their resilience; and to assessing and reducing the vulnerability of communities faced with natural hazards.[62]

[62] Ibid.

V. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. At its fifty-eighth session, in 2006, the Commission, 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[63].

2. At its fifty-ninth session, in 2007, the Commission decided to include the topic in its programme of work and to appoint Mr. Roman A. Kolodkin as Special Rapporteur for the topic[64].

3. At the sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur[65] 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. The Commission did not consider the topic at the sixty-first session.

4. 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[66].

5. At the sixty-third session in 2011, the Commission considered the second[67] and third reports[68] 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.

6. At the sixty-fourth session in 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no

[63]See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257. For the syllabus on the topic, see *ibid*., annex C.

[64]See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

[65]Document A/CN.4/601. (seeAnalytical Guide)

[66]See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[67]Document A/CN.4/631. (seeAnalytical Guide)

[68]Document A/CN.4/646. (seeAnalytical Guide)

longer a member of the Commission. The Commission had before it the preliminary report of the Special Rapporteur[69].

7. At the sixty-fifth session in 2013, the Commission had before it the second report of the Special Rapporteur, in which, *inter alia*, six draft articles were presented, following an analysis of: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae.* Following the debate in plenary, the Commission decided to refer the six draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles1, 3 and 4.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SIXTH SESSION OF THE COMMISSION

8. At the sixty-fifth session, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661), which examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*. The report contained six proposed draft articles, dealing with the scope of the draft articles (draft articles 1 and 2), definitions (draft article 3), and the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6), respectively.

9. The Sixth Committee examined the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-eighth session of the General Assembly. States generally welcomed the report and the progress made in the work of the Commission, and commended the Commission for submitting three draft articles to the General Assembly.

10. Be that as it may, at the Sixty-Sixth Session held in 2014, the Special Rapporteur submitted his Third Report on the topic that marks the starting point for the consideration of the normative elements of immunity *ratione materiae,* analysing in particular the concept of an "official". The concept of an "official" is particularly relevant to the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic. Due to this important and basic reason the Third Report assumes great importance. In the following paragraphs the salient features of this report are mentioned.

i. A Summary of the Third Report of the Special Rapporteur

11. The Report of the Special Rapporteur has clearly identified that the normative elements that make up this type of immunity should be deduced from these three characteristics; based on the method followed with regard to immunity *ratione personae,* they should be identified as follows:

[69]Document A/CN.4/654. (seeAnalytical Guide)

- The subjective scope of immunity *ratione materiae*: what persons benefit from immunity?

- The material scope of immunity *ratione materiae*: what types of acts performed by these persons are covered by immunity?

- The temporal scope of immunity *rationemateriae*: over what period of time can immunity be invoked and applied?

12. It needs to be underlined here that while there is broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*, the material and subjective scope of such immunity is the subject of a broader discussion and still gives rise to controversy, not only in the doctrine but also in jurisprudence and practice. Determining the meanings of the expressions "official" and "acts performed in an official capacity" therefore requires detailed analysis.

13. It needs to be understood here that the analysis of the concept of an "official" poses two types of different yet complementary and interrelated questions. The first is substantive in nature and concerns the criteria used to identify persons who may be covered by immunity from foreign criminal jurisdiction. The second is primarily language related and concerns the choice of the most suitable term for designating persons who, in general, meet the above-mentioned substantive criteria. The Report deals with both the issues.

ii. Criteria for identifying persons who enjoy immunity

14. The general scope of the concept of an "official" has not been defined in international law. However, because the definition of that term (and related terms) is different in each country's legal order, national definitions are of little use in defining the concept or even in choosing the most suitable term for referring to this category of persons. The Commission has already analyzed these elements in relation to persons having immunity *ratione personae*, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. In doing so, it has also identified the elements which characterize these persons and justify their being recognized as having such immunity.

15. The issue of immunity from foreign criminal jurisdiction has not been considered extensively by national criminal courts. Indeed, there are only a few criminal cases in which there has been a reference to "officials" other than a Head of State, a Head of Government or a Minister for Foreign Affairs, and these have been limited to only a handful of States. On the other hand, this limited practice in criminal proceedings is counterbalanced by more abundant practice in civil proceedings which, although outside the scope of the present topic, is of relevance when it comes to identifying persons whom States deem to be covered by some form of immunity from jurisdiction.

16. It should be noted that in the cases where foreign officials have been afforded immunity from criminal jurisdiction *ratione materiae*, national courts have linked that immunity from jurisdiction to their status as agents of the State. As a general rule, national courts do not set out the criteria for identifying a person as an "official", except for references to the performance of public functions or to actions as an agent of the State, in its name or on its behalf.

17. Several international courts have directly or indirectly pronounced on matters involving the immunity of State officials from foreign criminal jurisdiction, notably the International Court of Justice, which has heard cases related to the issue on two occasions and has therefore had to consider the wide variety of persons holding certain State positions who could fall within the concept of an "official". In the *Arrest Warrant* case, for instance, the Court considered the immunity from foreign criminal jurisdiction of the Minister for Foreign Affairs of the Democratic Republic of the Congo and, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it considered the immunity from foreign criminal jurisdiction of the President of the Republic, the *procureur de la République* and the Head of National Security of Djibouti.

18. Although the concept of an "official" is not defined in general international law, it is possible to find treaties that use the term or more broadly refer to categories of persons that might be covered by the concept. The Third Report of the Special Rapporteur focuses exclusively on a set of multilateral treaties that are particularly relevant to the topic under discussion, either because they contain provisions on the immunity from jurisdiction of a State or its officials, or because they use the concept of State official as an essential element for defining the legal regime which they establish.

19. It should also be borne in mind that the Vienna Convention on Diplomatic Relations accords particular importance to the special connection between the aforementioned categories of persons and the State, namely nationality. Although that connection is not critical for the performance of diplomatic, administrative, technical or service functions in a diplomatic mission, it has a bearing on the regime applicable to immunity from jurisdiction and is relevant to the topic discussed in the present report.

20. For instance, the Convention on Special Missions, which follows a similar pattern to the Vienna Convention on Diplomatic Relations, applies to the head of mission, the members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff. It also includes the category of "representative", defined essentially by the special representative capacity conferred on that person by the State, regardless of the category into which the person falls. It should be noted that the Convention never uses the term "official".

21. The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted on 14 March 1975, sets out in its article 1 the various categories of persons who are governed by the legal regime it establishes. Among them are not only the head of mission and the head of delegation, but also other members of the mission or delegation. This category includes the members of the diplomatic staff of the mission or delegation, the members of the administrative and technical staff, and the members of the service staff.

22. The main characteristic of the Vienna Convention on Consular Relations is that it makes a distinction between "consular officers" and "consular employees", the sole categories on which it confers immunity from jurisdiction. The term "consular officer" means: "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions".

23. With regard to international treaties which define conduct that could constitute a crime, regardless of its connection with international relations, reference to the category of

officials appears very early in treaty practice. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, for example, expressly mentions in its article 4 "rulers, public officials or private individuals", in referring to persons who can commit the crime of genocide. Although the Convention contains no definition of these concepts, the reference to "rulers" and "public officials", as opposed to "private individuals", points to the existence of two categories of persons, the first acting in an official capacity and the second in a private capacity. Article 4 does not, however, provide any other information to help differentiate between "rulers" and "public officials", or to help deduce the criteria for determining whether they are acting in an official capacity or not.

24. The Draft Articles on Responsibility of States for Internationally Wrongful Acts contain several provisions that are germane to the present report, especially the articles in chapter II, concerning attribution to a State of conduct by persons and entities. These provisions are interesting because they refer to different categories of persons (or entities) which act in the name and on behalf of the State and which therefore fall within the concept of an "official" analysed in the present report. With this in mind, it should be noted that articles 4 and 5 of the draft articles refer to two separate categories, described respectively as "organs of a State" and "persons or entities exercising elements of governmental authority" though not organs of a State.

25. On the basis of the study of the practice existing in this area, the Report reaches to a number of conclusions as regards determining the criteria for identifying what constitutes an official for the purposes of the draft articles on immunity from foreign criminal jurisdiction, namely:

- The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be *de jure* or *de facto*;

- The official acts internationally as a representative of the State or performs official functions both internationally and internally;

- The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.

26. These identifying criteria apply both to those State officials who enjoy Immunity *ratione personae* (Heads of State, Heads of Government and Ministers for Foreign Affairs) and to those who enjoy immunity *ratione materiae* (all other officials).

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBERS STATES ON THIS TOPIC AT THE UN GENERAL ASSEMBLY AT ITS 68TH SESSION HELD IN 2013

27. A delegate was of the view that it is well established and undisputed and that under international law Heads of State, Heads of Government and Ministers for Foreign Affairs are deemed to represent the State by the sole fact of the functions they exercised, without it being necessary for the relevant State to confer special powers on them. Immunity granted to them stood justified on the grounds that when they are outside the territory of their respective

States they must be able to perform their functions free from any impediment. However, drawing attention to the current conduct of international affairs, the delegate pointed out that senior state officials other than 'troika' are indeed regularly commissioned to represent their states in international relations and to participate in international forums outside their territory. In his view this relatively new model of international diplomacy did merit special attention of the international community and deserved to be safeguarded under international law.

28. Another delegate stressed the need to strike a balance between the protection of the well-established norm of immunity of representatives of States from the jurisdiction of foreign States and the avoidance of impunity for serious crimes in accordance with the sovereign equality of States, immunity and territorial integrity, as well as the recent developments in international law. In his view, to strike that delicate balance, the state of the law must be thoroughly investigated and understood. Specifically, the existence of immunity in State law and practice, the extent of such immunity and available exceptions, if any, must be critically assessed.

29. While stating that the fight against impunity was inextricably linked to the common aspiration to guarantee fundamental human rights and to ensure that justice was served, he made a reference to judgment of the ICJ in the *Arrest Warrant* case which in his view provided a starting point to assess the current state of the law on the question of immunity of State officials.

30. Another delegate took almost the same position as that of the South African submission to the commission. His delegation also supported the Commission's view that immunity from foreign criminal jurisdiction was strictly procedural in nature, as had been affirmed by the International Court of Justice in the *Arrest Warrant* case. He expressed his concern on broadening the scope of the immunity to other officials because it would make it difficult to determine exactly who was entitled to it and hoped for the clarification of the term officials and criminal jurisdiction. Lastly his delegation stated for the clear guidance by the commission to protect the common aspiration of the entire humanity against international crimes as all-encompassing immunity could hinder international efforts against impunity.

31. A delegate while tracing the basis for the topic to the notion of sovereign rights, stated that the topic of immunity of State officials from foreign criminal jurisdiction raised a fundamental question regarding two underlying principles of international law: respect for State sovereignty and the fight against impunity. While tracing the developments that have occurred in this area, he pointed out that 'International criminal law' had developed since the end of the Second World War, and that trend had been accelerated and reinforced in 1990s with the creation of ad-hoc tribunals. The establishment of the International Criminal Court had been one of the symbolic events which showed that the notion of the "fight against impunity" had become part of the mainstream of international relations. He was of the view that these developments have tended to limit immunity for the sake of achieving international justice. In this regard he added that in its deliberations, the Commission must strike a balance between the notions of a "fight against impunity" and "State sovereignty".

32. Another delegate affirmed the Commission's understanding that the rules regulating the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations were treaty- and custom-based special rules. Although the Commission had decided not to include explicit reference to international

conventions and instruments, she was of the view that identification of the regimes under which the special rules fell would provide greater clarity in understanding the nature and scope of immunity besides discouraging unilateral expansion of the scope of immunity from foreign criminal jurisdiction beyond the realm of treaties and custom.

33. While noting that there is universal acceptance as regards the immunity given to the "troika", who enjoy immunity from the criminal jurisdiction of foreign States by virtue of functional necessity and their capacity as representatives of the State abroad, she added that applying the same criteria would entitle a few other high-ranking officials (especially Minister of Defense and International Trade) as well to enjoy immunity from criminal jurisdiction of foreign states. In this regard, her delegation requested the Special Rapporteur to consider and analyse the views of States on the matter as a basis for the formulation of appropriate proposals.

34. Another delegate stated that Thailand granted immunity from criminal jurisdiction to the persons indicated in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, to which it was a party. It also accorded immunity to persons covered by host country agreements between Thailand and intergovernmental organizations. While noting that Thai Courts had no experience in dealing with the immunity of foreign officials (though it was a party to Convention on Special Missions), the delegation wished to reserve its position on the Commission's work on the topic until a later stage, when it could judge whether that work achieved the right balance between according immunity to State officials and preventing impunity of such officials from foreign criminal jurisdiction.

35. On immunity *ratione personae*, his delegation was of the view that the immunity enjoyed by Heads of State, Heads of Government and ministers for foreign affairs was not subject to dispute and something that had long been recognized by the ICJ, as for immunity *ratione materiae*, his delegation wished to emphasize that international law must recognize the immunity granted by the domestic law of a State to government agents or law enforcement officials for acts undertaken to maintain law and order but without the intent to commit human rights violations.

36. Another delegate stated that in determining the rules of immunity the Commission must take into account the provisions of international law more specifically customary principles of international law, and not domestic laws. She gave the parameters of determining the state officials to get protection under the present draft articles irrespective of the unilateral or international organizational practice. She urged for the reconsideration of the definitions of the terms "criminal jurisdiction", "immunity from foreign criminal jurisdiction", "immunity *ration personae*" and "immunity *rationemateriae* which have been proposed by the Special Rapporteur in her second report (A/CN.4/661) .

37. She narrated the position of Malaysia that, immunity *ratione personae* should be enjoyed only by the so-called "troika", i.e., a country's Head of State, Head of Government and Minister for Foreign Affairs. It could not support the extension of immunity to other officials without a strong basis. At the same time, she stated that the categories of persons considered to be Heads of State and Heads of Government should be defined and she suggested that the definition should include sovereign rulers who acted as Heads of State, such as, in Malaysia's case, the King. Apart from the King, under the Federal Constitution of Malaysia State-level rulers were accorded immunity from criminal and civil actions. She concluded by stating that, there should also be further study of the relationship between

immunity and impunity for heinous crimes under international law, such as torture and genocide.

38. While commending the draft articles proposed by the Commission to be succinct (and characterized by clear logic and impartiality), the delegate observed that the Special Rapporteur had rightly defined the scope of the topic as immunity of State officials from the criminal jurisdiction of another State, thus excluding immunity of State officials from the jurisdiction of international criminal tribunals and immunity of officials such as diplomatic agents and consular officials covered under special rules.

39. While there was a general understanding in the international community that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae*, international practice did not exclude the possibility of personal immunity for other high-level officials. In this regard, he drew attention to the *Arrest Warrant* case, where the International Court of Justice (in his view) had not in any way restricted immunity *ratione personae* to the so-called troika.

40. Another delegate of Indonesia stated that the concept of immunity is a highly sensitive issue (particularly the question of exception to immunity) which needed to be addressed with caution. Before discussing exceptions, however, there was a need to address and understand the basic concept, principles and rules of immunity to which exceptions might apply. In this regard his delegation looked forward to further study and deliberations on the matter by the Commission. While stating that under customary international law, only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity, he clarified that at the current stage, his delegation was of the view that there were insufficient grounds in practice and in international law for extending immunity *ratione personae* to high-ranking officials other than the troika.

41. The delegate further added that the extent of the power and authority granted to individual high-ranking officials would vary depending on each country’s organizational structure and decisions at the national level.

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

A. BACKGROUND

1. At its sixtieth session, in 2008, the International Law Commission (ILC) decided to include the topic "Treaties over time" in its programme of work, on the basis of the recommendation of a Working Group on the long-term programme of work, and to establish a Study Group in 2009[70]. At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over Time, chaired by Mr. Georg Nolte[71].

2. At its sixty-second session in 2010, the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte. 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 Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction. It recommended that a request for information be included in Chapter III of the Commission's report and be also brought to the attention of States by the Secretariat. The Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation concerning the request for information from States.

3. At the sixty-third session in 2011, the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction, by examining the section of the report which addressed the question of possible modifications of a treaty by subsequent agreements and practice, and the relation of subsequent agreements and practice to formal amendment procedures, as well as a working paper on evolutionary interpretation. The Study Group then began its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained therein. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions on such issues as reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation.

4. At its sixty-fourth session, in 2012, the Commission decided to change, with effect at the next session, the format of the work on this topic and its title as suggested by the Study Group. The Commission also decided to appoint Mr. Georg Nolte as Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to interpretation of treaties”.

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[70]See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus on the topic, see *ibid*., annex A.

[71]See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 218-219.

5. At the sixty-fifth session in 2013, the Commission had before it the first report of the Special Rapporteur, which, *inter alia*, contained four draft conclusions relating to the general rule and means of treaty interpretation; subsequent agreements and subsequent practice as means of interpretation; the definition of subsequent agreement and subsequent practice as means of treaty interpretation; and attribution of a treaty related practice to a State. Following the debate in plenary, the Commission decided to refer the four draft conclusions to the Drafting Committee. Upon consideration of the report of the Drafting Committee, Commission provisionally adopted draft conclusions 1 to 5.

B. CONSIDERATION OF THE TOPIC AT THE SIXTH-SIXTH SESSION OF THE COMMISSION

6. At this Session held in 2014, the Special Rapporteur on the topic Mr. Georg Nolte had presented the Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties that covers the following aspects of the topic:

7. The identification of subsequent agreement s and subsequent practice (II.);

- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);

- The form and value of subsequent practice under article 31 (3) (b) (IV);

- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V);

- Decisions adopted within the framework of Conferences of State Parties (VI);

- And the possible scope for interpretation by subsequent agreements and subsequent practice (VII).

8. This report, which is contained in document A/CN.4/L.833, also reproduces the text of the draft conclusions provisionally adopted by the Drafting Committee at this Session. The Drafting Committee devoted five meetings, from 26 to 28 May and on 2 and 3 June, to its consideration of the draft conclusions regarding this topic. It examined the six draft conclusions that were presented by the Special Rapporteur in his second report (A/CN.4/671), together with a number of reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to concerns raised, or suggestions made, during the Plenary with respect to certain draft conclusions.

9. In the following pages a brief summary of the second Report of the Special Rapporteur is given within the scope of the titles identified above:

i. The identification of subsequent agreements and subsequent practice (II.);

10. Subsequent practice under articles 31 (3) (b) and 32 must be "in the application of the treaty" and sub sequent agreements under article 31 (3) (a) must be "regarding the interpretation of the treaty or the application of its provisions". Although there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty, every application of a treaty presupposes its interpretation — even if the rule in question may

appear to be clear on its face. Therefore, conduct "regarding the interpretation" of the treaty and conduct "in the application" of the treaty both imply that one or more States parties assume, or are attributed, a position regarding the interpretation of the treaty. It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that it is the only legally possible one under the treaty and under the circumstances.

11. It may be recalled here that in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court. The characterization of a subsequent agreement or subsequent practice under articles 31 (3) and 32 as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This can be illustrated by examples from judicial and State practice.

12. The jurisprudence of the International Court of Justice provides a number of examples where, what at first sight may have appeared relevant, was ultimately not found to be a pertinent subsequent agreement or practice, and vice versa. Thus, on the one hand, the Court did not consider a "Joint Ministerial Communiqué" to "be included in the conventional basis of the right of free navigation" since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties." The Court has held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice, which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.

13. When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, inter alia, by referring to the subsequent practice of the parties, the Tribunal found that this treaty contained an implicit obligation of compensation in case of non-return.

ii. Possible effects of subsequent agreements and subsequent practice in interpretation

14. Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interpretation of a treaty in a particular case, that is, in the interactive process, which consists of placing appropriate emphasis on the various means of interpretation in a "single combined operation". The taking into account of subsequent agreements and subsequent practice under articles 31 (3) and 32 may thus contribute to a clarification of the meaning of a treaty in the sense of a specification (narrowing down) of different possible meanings of a particular term or provision, or the scope of the treaty as a whole (1. and 2. a)), or to a clarification in the sense of confirming a wider interpretation or a certain scope for the exercise of discretion by the parties (broad understanding) (1 and 2 b)). The specificity of a subsequent practice is often an important factor for its value as a means of interpretation in a particular case, depending on the treaty in question (3).

15. International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty. Subsequent agreements and

subsequent practice mostly enter their reasoning at a later stage. The taking into account of subsequent agreements and subsequent practice can contribute to the identification of the "ordinary meaning" of a particular term in the sense of confirming a narrow interpretation of different possible shades of meaning of this term. This was the case, for example, in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons".

16. On the other hand, there are also cases where variation of subsequent practice has contributed to prevent a specification of the meaning of a general term according to one or the other of different possible meanings. In the Intergovernmental Maritime Consultative Organization (*IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship owning nations" permitted different interpretations (determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to other provisions in the Convention.

17. State practice outside of judicial or quasi -judicial contexts confirms that subsequent agreements and subsequent practice can contribute to clarifying the meaning of a treaty by either narrowing the range of conceivable interpretations or by indicating a certain margin of discretion which a treaty grants to States.

iii. Form and value of subsequent practice under article 31 (3) (b)

18. The Commission has recognized that subsequent practice under article 31 (3) (b) consists of any "conduct" in the application of a treaty which may contribute to establishing an agreement regarding the interpretation of the treaty. Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as practices by non-state entities which fall within the scope of what the treaty conceives as forms of its application.

19. It is clear that subsequent practice by all parties can establish their agreement regarding the interpretation of a treaty. Such practice need not necessarily be joint conduct. The International Court of Justice, has not formulated such an abstract definition of subsequent practice as a collective activity under article 31 (3) (b). The Court has rather applied this provision flexibly, without adding any further conditions.

iv. Agreement of the parties regarding the interpretation of a treaty

20. The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31 (3) (a) and (b), and other subsequent practice as a supplementary means of interpretation under article 32, is the "agreement" of the parties regarding the interpretation of the treaty concerned. It is the agreement of the parties, which gives the means of interpretation under article 31 (3) their specific function and value for the interactive process of interpretation under the general rule of interpretation of article 31.

21. Conflicting positions expressed by different parties to a treaty exclude the existence of an agreement. This has been confirmed, inter alia, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.

22. The fact that States implement a treaty differently does not, as such, permit a conclusion about the legal relevance of this divergence. Such difference can reflect a disagreement over the (one) correct interpretation, but also a common understanding that the treaty permits a certain scope for the exercise of discretion in its implementation. Treaties characterized by considerations of humanity or other general community interests, such as human rights treaties or the Refugee Convention, presumably aim at a uniform interpretation as far as they establish minimum obligations and do not leave a scope for the exercise of discretion to States. The International Court of Justice has recognized the possibility of expressing agreement regarding interpretation by silence or omission by stating in the case concerning the *Temple of PreahVihear* that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".

23. The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held that:

24. Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts à titre de souverain. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.

25. A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may also signify their agreement to not apply the treaty temporarily, or on a practical arrangement (modus vivendi).

C. DECISIONS ADOPTED WITHIN THE FRAMEWORK OF CONFERENCES OFSTATES PARTIES

26. States use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation. There is some debate regarding the legal nature of Conferences of States Parties. For some, such a conference "is in substance no more than a diplomatic conference of States". Other commentators describe them as autonomous, institutional arrangements. In any case, it can be said that Conferences of States Parties reflect different degrees of institutionalization. At one end of the spectrum are those which are an organ of an international organization (e.g. those under the Organization for the Prohibition of Chemical Weapons, WTO, and the International Civil Aviation Organization) and in which States parties act in their capacity as members of that organ. Such Conferences of States Parties are outside the scope of the present report, which does not address the subsequent practice of international organizations. At the other end of the spectrum are those Conferences of States Parties, which are provided for by treaties, which foresee more or less

periodic meetings of States parties for their review. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty.

27. The Conference of States Parties performs a variety of acts, the legal nature and implications of which depend, in the first place, on the treaty concerned. For the purpose of the present report, the most important distinction concerns the measures which a Conference of States Parties can adopt "to review the implementation of the treaty" and amendment procedures. Specific powers to review certain provisions are spread throughout the different treaties, sometimes referring to "guidelines" to be developed and proposed by a Conference of States Parties, and sometimes establishing that Conference of States Parties shall define "rules and modalities".

28. The examples demonstrate that decisions of Conferences of States Parties may under certain circumstances embody subsequent agreements under article 31 (3) (a) and, a fortiori, subsequent practice under articles 31 (3) (b) and 32. Such decisions do not, however, automatically constitute a subsequent agreement under article 31 (3) (a) since it must always be specifically established. This is not the case where the parties do not intend that their agreement has any legal, but only political significance.

D. TEXTS AND COMMENTARIES OF DRAFT CONCLUSIONS 6 TO 10 PROVISIONALLY ADOPTED BY THE DRAFTING COMMITTEE AT THE ILC SESSION 2014

i. Draft Conclusion 6 :Identification of subsequent agreements and subsequent practice

29. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3 requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

30. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

31. Draft conclusion 6 is entitled "Identification of subsequent agreements and subsequent practice", as originally proposed. It is the first draft conclusion which addresses the ways in which subsequent agreements and subsequent practice should be approached by interpreters more specifically than through the first five draft conclusions already provisionally adopted by the Commission. Like other draft conclusions, it is not overly prescriptive and should be seen more as a practice pointer to assist the interpreter in his or hers endeavors. The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified as such. The content and structure of this draft conclusion were revisited by the Drafting Committee in light of comments made during the debate in the Plenary and consists of three paragraphs.

32. Paragraph 1 reminds the interpreter that the identification of subsequent agreements or subsequent practice, for the purpose of article 31, paragraph 3, of the Vienna Convention

on the Law of Treaties requires particular consideration concerning the question whether the parties, by an agreement or practice, have taken a position regarding the interpretation of a treaty or whether their conduct has been motivated by other considerations. In the latter case, the subsequent agreement or subsequent practice would not be relevant for the purpose of article 31, paragraph 3. Only if a subsequent agreement or subsequent practice is regarding the interpretation of a treaty can it have the effects attributed to it under article 31, paragraph 3. This is the core element of paragraph 1 and it is addressed in the first sentence.

33. The purpose of paragraph 2 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3. It intends to reflect the fact that the Vienna Convention has recognized that the treaties within its scope shall also be interpreted by taking into account less formal agreements and practice.

34. Paragraph 3 addresses the identification of subsequent practice under Article 32. This paragraph was added in response to the concerns expressed during the Plenary debate that dealing with subsequent practice under articles 31 and 32 of the Vienna Convention in the same provision, as originally proposed, would blur the distinction between the two articles. It was deemed important not to give the impression that subsequent practice of just one or some of the parties were comparable for purposes of treaty interpretation to subsequent agreement or subsequent practice that falls within the scope of article 31, paragraph 3. Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.

ii. Draft Conclusion 7: Possible effects of subsequent agreements and subsequent practice in interpretation

35. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion, which the treaty accords to the parties. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

36. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

37. Draft conclusion 7 is entitled “Possible effects of subsequent agreements and subsequent practice in interpretation”, as originally proposed by the Special Rapporteur. The text provisionally adopted by the Drafting Committee is based on paragraph 1 of draft conclusion 7 as proposed by the Special Rapporteur in his second report. In light of the debate in Plenary, the Special Rapporteur proposed to deal with the content of paragraph 2 of the text initially presented by him, which addressed the value of subsequent agreements and subsequent practice, in a separate draft conclusion. The text of draft conclusion 7 also contains elements of what was originally containedin draft conclusion 11.

38. Paragraph 1 of draft conclusion 7 describes the possible effects of subsequent agreements and subsequent practice in interpretation. The purpose is to indicate that subsequent agreements and subsequent practice may contribute to a clarification of the meaning of a treaty.

39. Paragraph 2 of draft conclusion 7 concerns possible effects of subsequent practice in interpretation in the context of article 32. While paragraph 2 sets out the same main idea that is contained in paragraph 1, the Drafting Committee decided to treat article 31, paragraph 3, and article 32 in two separate provisions in order to maintain the distinction between these two articles.

40. Paragraph 3 is based on paragraph 2 of draft conclusion 11 as originally proposed by the Special Rapporteur. This paragraph primarily addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation. It is intended as a practice pointer and formulates a presumption that the parties to a treaty, by subsequent agreements or subsequent practice, do not intend to modify the treaty but to interpret it. It aims to remind the interpreter that subsequent agreements may serve to amend or modify a treaty but that such subsequent agreements fall under article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3.

iii. Draft Conclusion 8: Weight of subsequent agreements and subsequent practice as a means of interpretation

41. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity. The weight of subsequent practice under article 31, paragraph 3 (b) depends, in addition, on whether and how it is repeated. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

42. Draft conclusion 8 addresses the question how far subsequent agreements and subsequent practice demonstrate the common understanding of the parties as to the meaning of the terms of a treaty. The purpose is to provide the interpreter with an indication as to the circumstances under which subsequent agreements and subsequent practice would have more or less value as means of interpretation. Draft conclusion 8 identifies some criteria that may be useful to take into consideration in order to identify the interpretative value, or weight, which a particular subsequent agreement or subsequent practice should play in the process of interpretation in a particular case.

43. Naturally, the weight accorded to subsequent agreements and subsequent practice must be viewed in relation to other means of interpretation. The formula "common, concordant and consistent", which was employed in the text of draft conclusion 8 as originally proposed, gave rise to concern during the plenary debate as not being sufficiently well-established or having the risk of being misconceived as overly prescriptive. This formula has therefore not been retained in the draft conclusion.

44. Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) of the said article from a more general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation

depends, inter alia, on its clarity and specificity. Paragraph 2 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice depends on whether and how it is repeated. This formula brings in the elements of time and frequency intended to indicate to the interpreter that something more than just mere repetition of a practice may be necessary for such practice to be of interpretative value in the context of article 31, paragraph 3 (b). Paragraph 3 sets out the same main idea that is contained in paragraphs 1 and 2 and addresses the weight of subsequent practice under article 32 in treaty interpretation.

iv. Draft Conclusion 9: Agreement of the parties regarding the interpretation of a treaty

45. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty, which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

46. The text provisionally adopted by the Drafting Committee is based on paragraphs 1 and 2 of draft conclusion 9 as proposed by the Special Rapporteur in his second report. Draft conclusion 9 as provisionally adopted by the Drafting Committee consists of two paragraphs. Whereas paragraph 1 refers to what is general for article 31, paragraph 3 (a) and (b), paragraph 2 addresses only subsequent practice under article 31, paragraph 3 (b). While the different meaning attributed to the term "agreement" in subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary, paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

47. Paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty; in order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it.

48. Paragraph 2 of draft conclusion 9 is based on the second sentence of paragraph 2 of the original draft conclusion 9 and has only been slightly refined. This paragraph addresses the question of whether all the parties to a treaty must have actively engaged in a practice to give effect to article 31, paragraph 3 (b), or whether it may be sufficient if some parties have remained silent in the face of a common practice by other parties.

v. Draft Conclusion 10: Decisions adopted within the framework of a Conference of States Parties

49. 1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

50. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a nonexclusive range of practical options for implementing the treaty.

51. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

52. Draft conclusion 10 addresses a particular form of action by States, which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties. In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term Conference of States Parties for the purpose of the draft conclusions and paragraph 2 recognizes the primacy of the respective rules that govern them. Organs of international organizations are excluded from the definition.

53. The paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and the rules of procedure. The word "any" was inserted by the Drafting Committee in this sentence to better clarify that rules of procedure of Conferences of States Parties will apply, if any, given that there might be situations where there are no specifically adopted rules of procedure. The aim of the second Sentence of paragraph 2 is to lay down the principle that decisions of Conferences of States Parties may indeed constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention.

54. The purpose of paragraph 3 is to call on the interpreter to make the necessary distinction between the substance of a decision, which may or may not be regarding the interpretation of a treaty, and its form, which may or may not reflect agreement in substance. In order to address concerns relating to decisions adopted by consensus at Conferences of States Parties, the phrase "including by consensus" was introduced in order to dispel the notion that consensus would necessarily be equated with agreement in substance. While the question of consensus would be further elaborated in the commentary, the intention was not to provide a definition thereof but to describe what it entails, in principle, and the problems it can generate in the context of treaty interpretation under the Vienna Convention.

E. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY AT ITS SIXTY-EIGHTH SESSION IN 2013

55. With respect to provisional application of treaties, it was stated that the relevant rules had never been clarified or unified, and that the relevant provisions of the Vienna Convention on the Law of Treaties were short on details. States were uncertain whether or how to resort

to provisional application, and disputes had occurred in that context. This in the view of the delegate necessitated the study on the topic, which should be based on an in-depth review of the relevant international and national practice. According to the delegate the areas that the Commission should focus on:

56. Whether a signatory State would become bound by the treaty as a consequence of provisional application; whether the rights and obligations under a treaty would expire upon the unilateral decision of a State to terminate provisional application; and, once a treaty had entered into force, what the relations were, in terms of rights and obligations under the treaty, between States that continued to apply it provisionally and States that had completed the domestic process for ratification. It was also observed that the Commission should study the relationship between provisional application and national constitutions and legislation.

57. According to one delegate the Commission's debate on the topic of provisional application of treaties had addressed important issues, including whether it was appropriate for the Commission to seek to promote provisional application and whether provisional application would circumvent domestic procedures, in particular constitutional procedures. While looking forward to further discussions aimed at deepening the understanding of the topic it was stated that the legal effects of the provisional application of treaties deserved great attention.

58. While citing the Free Trade Agreement between the Republic of Korea and the European Union (signed in 2010 and applied provisionally as from l July 2011) to be an example of provisional application of treaties, one delegation noted that the question of the legal effects of provisional application should be clarified and that the Commission should undertake an in-depth review of whether the legal regime of the 1969 Vienna Convention on the Law of Treaties should be directly applied to the case of provisional application. It was also observed that in addition to article 25, the Commission should examine the application of *pactasuntservanda* (article 26), internal law and observance of treaties (article 27), provisions of internal law regarding competence to conclude treaties (article 46) and treaties and third States.

59. In his view, ILC's work on this deserved particular attention, in view of the practical difficulties associated with articles 31 and 32 of the Vienna Convention on the Law of Treaties. By identifying and clarifying the scope and role of various agreements and practices related to the interpretation of treaties, the Commission would be able to provide States with appropriate guidelines in that regard, he added.

60. A delegate suggested that it would useful if the study on this issue addressed the various legal implications of provisional application and relations between the State parties to the treaty, including the extent of international responsibility incurred by a State vis-à-vis other State parties for violation of an obligation under a provisionally applied treaty. The delegate agreed with the idea that the study should take the form of guidelines with commentaries, to serve as guidance for States.

61. Another Delegate stated that consideration of this was important as it would clarify the legal consequences of provisional application and related legal issues. While stating that Article 25 of the 1969 VCLT was the correct basis for developing a set of guidelines on provisional application, he added that given the complexity of the topic, some of the issues raised by the Commission were controversial. He was of the view that more research needed

to be carried out on State practice, judicial decisions and arbitral awards relating to the provisional application of treaties. With respect to the legal effects, it would be essential to consider the relationship between the provisional application of treaties and the requirements under constitutional law for the entry into force of the treaty, as provisional application could lead to a conflict between international law and the constitutional law of contracting States. For reasons of legal certainty, any guidelines on the topic should set out conditions for the provisional application of treaties that would prevent or minimize the potential of such conflict. Finally he clarified that the Commission should decide on the final form of the topic only after it had made significant progress in its work. Its aim should not be to encourage States to provisionally apply treaties, but rather to provide them with guidance on the issues involved. States ultimately enjoyed the sovereign right to make any decision concerning the provisional application of treaties, he opined.

62. One delegate supported the view that a subsequent agreement was an authentic expression of the will of the parties and that subsequent agreements could take whatever form the parties to the original treaty might choose. His delegation reserved its position regarding the accuracy of the statements in paragraph (6) of the commentary to draft conclusion 3. The treaty terms mentioned in the accompanying footnotes 92 to 95 were those cited by Judge Guillaume in his Declaration in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* , which represented the Judge's personal view and did not necessarily reflect the judgments of the courts or tribunals concerned. His delegation also reserved its position regarding the accuracy of the reference to the term "watershed", which the Commission had added in footnote 92, although it was not mentioned in the Judge's Declaration. With regard to paragraphs 2 and 3 of draft conclusion 4, his delegation looked forward to clarification at a later stage of the work on the topic of the reasons for the selection of the word "conduct" as part of the definition of subsequent practice. Regarding draft conclusion 5, paragraph 2, his delegation would appreciate further explanation regarding conduct by non-State actors that might be relevant when assessing the subsequent practice of parties to a treaty. In order for such conduct to be relevant, it would have to be demonstrated with a degree of certainty that it did not conflict with the manner in which States parties intended to interpret the treaty.

63. One delegate noted that draft conclusions 1 and 2 aimed to set out the general aspects of the legal framework in respect of treaty interpretation. Her delegation appreciated the importance of those draft conclusions in guiding treaty interpretation to the extent that they restated the rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties and affirmed the legal status of those rules. With regard to draft conclusion 3, given that support for an evolutive approach to treaty interpretation varied across international courts and tribunals, her delegation was of the view that caution must be exercised in determining the presumed intention of parties at the conclusion of a treaty in order to avoid distorting or departing in any way from the letter and spirit of the treaty.

64. Concerning the definitions put forward in draft conclusion 4, the clear distinction between "subsequent practice" and "other subsequent practice" in the context of article 31, paragraph 3 (b), and article 32 of the Vienna Convention was certainly helpful. However, her delegation would like further clarification as to the rationale for accepting the conduct of one party as subsequent practice under article 32 and the adequacy of such subsequent practice as a supplementary means of treaty interpretation in support of article 31. With regard to draft conclusion 5, her delegation noted the affirmation that only conduct that was attributable to parties to a treaty could be accepted as subsequent practice relevant to treaty interpretation.

On the understanding that the phrase "assessing the subsequent practice" in paragraph 2 was used in a broad sense as covering both identification of the existence of subsequent practice and determination of its legal significance, she had reservations about the inclusion of non-State actors, particularly where the conduct in question was not attributable to parties to the treaty.

65. Another Delegate stated that the Special Rapporteur's first report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties seemed to reveal a conceptual metamorphosis over the years since the inception of the topic as "Treaties over time" in 2008. Originally intended as a study of the subsequent practice of States parties to a treaty aimed at determining the criteria for discerning such practice, the work had increasingly shifted towards interpretation of treaties. The draft conclusions presented by the Special Rapporteur were visible evidence of that trend. The current approach could be described as "dynamic" or "evolutionary" interpretation of treaties, rather than static interpretation — i.e., applying the methods set out under articles 31 and 32 of the 1969 Vienna Convention to determine the intention of the parties at the time of the treaty's conclusion. In such an approach, the temporal element prevailed.

66. Despite the references in the draft conclusions to the interpretation of treaties in accordance with the Vienna Convention, however, the Commission appeared to have failed to include the temporal element. What the Commission should do, in his delegation's opinion, was to seek to discover the intention of the States parties that might underlie or go beyond the actual provisions of the treaty. The question was not only to determine what factors might have played a role in bringing some States parties to ignore or modify certain provisions of a treaty. That was called "subsequent practice" and should not be confused with interpretation of treaties. The Commission's mandate was to determine under what conditions such subsequent practice by some States parties could be considered as having acquired the consent of the other parties to a treaty, thus making a provision of the treaty obsolete or changing it profoundly. That was different from the interpretation of a treaty when the meaning and scope were unclear or could be interpreted in different ways, leading to different results.

67. The commentaries to the draft conclusions contained many references to non-State actors, and there seemed to be some confusion about the role that such actors could play in the formation of customary international law through the influence they might have on the practice of some States and their decision to apply the treaty in a narrow or broad manner. That was a question that went beyond the scope of the topic he added.

VII. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

A. BACKGROUND

1. The basis of this brief is the Second Report on the Identification of Customary International Law by the Special Rapporteur, Sir Michael Wood, submitted before the International Law Commission at its Sixty-Sixth Session.[72]

2. The topic 'Formation and Evidence of Customary International Law' was placed on the ILC's programme of work in 2012 when the preliminary report of the Special Rapporteur.[73] At the Sixty-Fifth Session of the ILC in 2013, the Commission held a general debate on the basis of the Special Rapporteur's First Report[74] and on the memorandum by the Secretariat on the relevant previous work of the ILC.[75] The Commission subsequently decided to change the title of the topic to 'Identification of Customary International Law' at this session.[76]

3. From the debate and the informal consultations, the Special Rapporteur drew the following conclusions:

a. There was general support for a "two-element approach" involving: (i) an assessment of general practice; and, (ii) acceptance of that practice as law;
b. The primary reference materials for the topic would be the approach of States and international courts and tribunals, particularly the ICJ;
c. The outcome of the work should be a of a practical nature, in the form of 'conclusions', and not overly prescriptive;
d. The relationship between customary international law (CIL) and other sources of international law, particularly treaties and general principles, would have to be deal with. Additionally, there was interest in looking into "special" or "regional" CIL;
e. That *jus cogens* would not be dealt with as a part of CIL.

4. The Sixth Committee at its 2013 debate stressed the need to address the question of relative weight to be accorded to State practice and *opiniojuris*, and, while welcoming a discussion on the relationship between sources of international law noted that the question of hierarchy of sources should be a separate consideration.

5. At its 2013 session, the ILC requested States "to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and sub-regional courts". Nine States have thus far made written contributions, and further contributions would be welcomed.

[72] A/CN.4/672
[73] A/CN.4/663, para. 1
[74] A/CN.4/663
[75] A/CN.4/659
[76] A/CN.4/SR.3186

6. While the Special Rapporteur's First Report dealt with identifying the basic materials to be consulted for the topic, the Second Report seeks to cover central questions concerning the approach to the identification of rules of "general" customary international law, in particular the two constituent elements (State practice and *opiniojuris*) and how to determine whether they are present. The draft conclusions therein concern the method(s) for identifying rules of customary international law and do not enter upon the actual substance of such rules. The Report contains detailed discussions of both constituent elements of CIL, which the Special Rapporteur thought prudent given the close relationship between them, and which will be continued in the subsequent Third Report.

B. SCOPE AND OUTCOME OF THE TOPIC

Draft Conclusion 1
Scope

1. *The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.*
2. *The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (jus cogens).*

7. In presenting the above conclusion, the Special Rapporteur noted that the present topic aimed to offer practical guidelines, particularly to those who are called upon to identify rules of customary international law and who may or may not be specialists in public international law, in a methodological sense, and not to determine the substance of the rules of customary international law. It was also important that the work on the topic would not enter into matters relating to other sources of international law, as well as *jus cogens*, which, it was decided, would be the subject of a separate topic.

C. USE OF TERMS

Draft Conclusion 2
Use of terms
For the purposes of the present draft conclusions:

(a) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;
(b) "International organization" means an intergovernmental organization;
(c) ...

8. In the First Report, the Special Rapporteur had referred to Article 38.1(b) of the Statute of the ICJ when proposing a definition for "customary international law". However, this was met with some opposition from members of the Commission who felt that it might be seen as relying too heavily on the Statute, which was, in terms, only applicable to the ICJ. Consequently the Special Rapporteur proposed in the Second Report to draw upon the language of the ICJ, without directly referring to it.The advantage of this approach is that such a definition would maintain the key concepts, such as "a general practice" and "accepted as law", which has been seen to be the basis of the approach of the ICJ, as well as other courts, tribunals, and states has been widely relied upon for nearly a century.

9. The other term the Rapporteur thought useful to define was "international organization", whereby the definition used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, as well as the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Rapporteur also felt that as the topic proceeded further terms would probably need to be defined and thus thought it desirable to include a saving clause.

D. BASIC APPROACH: TWO CONSTITUENT ELEMENTS

Draft conclusion 3
Basic approach
To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

Draft conclusion 4
Assessment of evidence
In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances.

10. In pursuance of the "two element" approach, the Special Rapporteur, citing Wolfe, noted that, "Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear."[77]

11. The Special Rapporteur also noted the repeated reiteration of the presence of the two elements in various ICJ judgments.[78] Furthermore, the recognition of the elements was also present in various bilateral and multilateral treaties, as well as other tribunals and in the writings of scholars, thus cementing its importance and eliminating alternative approaches that emphasize or eliminate one constituent element. The Rapporteur noted that there have been suggestions in the literature, and occasionally echoed in practice, that in such fields as international human rights law, international humanitarian law and international criminal law, one element may suffice in constituting customary international law, namely *opinion juris*. However, the Rapporteur concluded that the better view is that this is not the case.

12. The Special Rapporteur then stated that all evidence must be considered in its context and that great care must be taken in reviewing primary evidence or by looking at subsidiary means. Particular circumstances must be prepared in determining a 'relevant practice' and different weight may be given to different evidence. Citing Treves, the Rapporteur noted, "particularly significant are manifestations of practice that go against the interest of the State

[77] K. Wolfke, Custom in Present International Law, pp. 40-41

[78] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012; *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969; *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986; P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12, No. 2 (2013)

from which they come, or that entail for them significant costs in political, military, economic, or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy, etc",[79] while less significance may be given to off-the-cuff remarks made in the heat of the moment.

E. GENERAL PRACTICE

Draft conclusion 5
Role of practice
The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft conclusion 6
Attribution of conduct
State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

Draft conclusion 7
Forms of practice
1. *Practice may take a wide range of forms. It includes both physical and verbal actions.*
2. *Manifestations of practice include, among others, the conduct of States "on the ground", diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences.*
3. *Inaction may also serve as practice.*
4. *The acts (including inaction) of international organizations may also serve as practice.*

Draft conclusion 8
Weighing evidence of practice
1. *There is no predetermined hierarchy among the various forms of practice.*
2. *Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.*

Draft conclusion 9
Practice must be general and consistent
1. *To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.*
2. *The practice must be generally consistent.*
3. *Provided that the practice is sufficiently general and consistent, no particular duration is required.*

[79] T. Treves, "Customary International Law", in *Max Planck Encyclopedia of Public International Law*, para. 30

4. *In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.*

13. Turning to the objective element (practice) of the two-element approach, the Rapporteur noted that this plays an essential role in defining and limiting CIL. States are the primary subjects of international law and the conduct of States is of primary importance for the identification of CIL.

14. For the purpose of attribution of practice to a State, the actions of all branches of Government – including the executive, legislative, judicial or any other branch – may be considered relevant. The conduct of *de facto* organs of the State might also be considered. The Rapporteur also, however, noted the practical difficulty in ascertaining the practice of States, and the issues of dissemination and location of practice. He stated that this issue would be dealt with in greater detail in the Third Report.

15. The Special Rapporteur further opined that defining 'State practice' only in relation to situations falling within the domain of international relations is too narrow an approach, and instead noted, "every act of State is potentially a legislative act." Such acts could comprise both physical and verbal (either written or oral) conduct. However, the Rapporteur further stressed caution in assessing what States say as words cannot always be taken at face value, and that sources must be reliable and unequivocal, and should reflect the consistent position of the State concerned.

16. While stating that practice and its evidence takes a vast number of forms, the Special Rapporteur opined that it would be impractical to list all the numerous types of materials which reveal State practice on each of the many problems arising in international law. However, it would be helpful to indicate some of the main types of practice relied upon by States, courts, tribunals and writings. Thus, the following non-exhaustive list of categories was proposed:

a. Physical actions of States – examples include atmospheric nuclear tests, passage over territory, granting diplomatic asylum and so on;
b. Acts of the executive branch – including executive orders, official Government/State statements before national or international courts, etc.;
c. Diplomatic acts and correspondence –including protests against the practices of others States in the form of notes verbale, etc.;
d. Legislative acts –including constitutional or other legislative provisions in a comprehensive sense;
e. Judgments of national courts – these are of value as evidence of practice even if they do not otherwise serve as evidence of customary international law itself.The value of decisions varies with the highest courts carrying more weight and reversed judgments unlikely to indicate practice.
f. Official publications in fields of international law – including military manuals and instructions to diplomats;
g. Internal memorandums by State officials – these however are generally confidential and may represent personal views as much as official ones;
h. Practice in connection with treaties – including negotiation, ratification, implementation, etc., as well as other obligations taken on through legal instruments;

i. Resolutions of organs of international organizations –this concerns practice of States in connection with the adoption of resolutions by international organizations, i.e. voting, abstentions, explanations, etc.

17. However, the Special Rapporteur clarified that excessive reliance must not be placed on the decision-making processes of international organizations to identify State practice, and iterated that the matter would be dealt with in greater detail in the Third Report. In brief, the Rapporteur stated that the in assessing the practice of international organizations the distinction should be made between practice relating to the internal affairs of the organization and the practice of the organization in its relations with States, international organizations and others. The latter activity of the organizations was concluded to be the relevant one in assessing State practice. Furthermore, distinction must also be drawn between the products of the organizations' secretariats and intergovernmental organs.

18. The Special Rapporteur also made special note of international organizations such as the European Union (EU) to which member States have transferred certain exclusive competences. The Rapporteur concluded that in such cases, the actions of such organizations must be considered equivalent to State practice because denying their actions the status of State practice would effectively render the member States unable to contribute to State practice as they had transferred the relevant decision-making and action-taking powers to the organization.

19. Regarding the role of non-State actors, the Rapporteur concluded that while their roles are important in promotion and observance of international law, their actions could not be considered 'practice' for the purposes of CIL. Similarly, the decisions of international courts and tribunals cannot, by themselves, constitute 'practice' but play a role as a subsidiary means for the determination of the law.

20. The Rapporteur also pointed out that much of State practice, such as classified exchanges between Governments, is not made publicly available for some time and would consequently not contribute much to general customary international law. However, such practices could possibly contribute to the development of regional, special or local rules of CIL.

21. While stating that there is no predetermined *a priori* hierarchy of the manifestation of practice, in many instances the executive branch of Government is the primary speaker for the State in international affairs. However, different positions may be adopted by the separate branches of Government and furthermore, in federal systems there may be conflict between the practices of sub-State organs. Therefore, the approach here must be cautious.

22. In relation to the requirement of 'generality' of practice, the Special Rapporteur opined that practice does not need to be unanimous or universal, but sufficiently extensive or widespread. A "head count" type of quantitative analysis is not the answer here, but rather the answer lies in looking at whether an overwhelming majority of States has applied the practice when given the opportunity. The prior practice of States that are especially affected by a proposed principle of CIL must also be given special consideration and weight.

23. The relevant practice of States must also be consistent to some extent, and where there is a great deal of fluctuation in the conduct of the State, the Rapporteur concluded that a

rule of CIL cannot be said to arise. However, here too complete uniformity of practice is not a necessity but emphasis must be on a general consistency of practice.

F. ACCEPTED AS LAW

Draft conclusion 10
Role of acceptance as law

1. *The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.*
2. *Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.*

Draft conclusion 11
Evidence of acceptance as law

1. *Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.*
2. *The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences.*
3. *Inaction may also serve as evidence of acceptance as law.*
4. *The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.*

24. The second necessary element of CIL is of course the subjective element (*opinion juris*), or the acceptance of a general practice as law. This requires that the practice in question be motivated by a "conception [...] that such action was enjoined by law."[80] It is the requirement that the States in question believe that there is some form of legal compulsion to apply a principle or perform an action and it distinguishes mere practice or usage from custom.[81]

25. The Rapporteur noted that to identify the presence of the required subjective element, other motivating factors for an act or practice – such as courtesy, political expediency, convenience or tradition – must be eliminated. States must have accorded deference to a rule as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity or solely by the need to comply with treaty obligations. Actions in compliance with treaty obligations do not necessarily indicate the presence of *opinion juris*. Conversely, however, actions in compliance with the rules of a treaty by a non-Party may indicate the presence of *opinion juris.* The practice of States does not justify the formulation of any general rule of

[80] M. O. Hudson, The Permanent Court of International Justice, 1920-1942: a Treatise (New York, Macmillan, 1943), p. 609

[81] *Case concerning Right of Passage over Indian Territory* (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, at p. 120 (Dissenting Opinion of Judge Chagla)

law where such States are in a position to select a practice appropriate to their individual circumstances and have thus not recognized a specific practice as obligatory.

26. Hearkening back to the history of the notion of *opinion juris* the Rapporteur stated that scholars had long wrestled with long-standing theoretical problems associated with attempting to capture in exact terms the amorphous process by which a pattern of State conduct acquires legal force. In particular, there has been some debate over whether the subjective element involves belief or merely the consent of States. There is also the seemingly paradoxical question of how a new rule of CIL can emerge if a requirement is the conviction on the part of States that the practice already has the force of law.

27. Pointing to the treatment of the subjective element of CIL by the ICJ, the Rapporteur elucidated that the court had imported notions such as, "a feeling of legal obligation", "a sense of duty" and other similar phrases. The Rapporteur thus concluded that the subjective element refers to the requirement that the practice in question has occurred in such a way as to show a general recognition that a rule of customary international law or legal obligation is involved, and that "accepted as law" may be a better and clearer term to use than *opiniojuris.*

28. The Rapporteur noted that evidencing the subjective element might depend upon the nature of the rule and the circumstances in which the rule falls to be applied. A large number of concordant acts, or the fact that such cases have been occurring over a considerable period of time won't suffice to establish its existence. These facts may give rise to the acceptance of the practice as law, but do not embody such acceptance in and of themselves.

29. While the easiest way, according to the Rapporteur, to ascertain whether a State considered a given rule to be a law is through its express statements, through a branch of the Government to that effect, evidence may be found in a variety of other ways. To this extent, the Rapporteur offered another non-exhaustive list of possible sources:

a. Intergovernmental (diplomatic) correspondence;
b. Jurisprudence of national courts;
c. Opinions of Government legal advisors;
d. Official publications in the fields of international law;
e. Internal memorandums by State officials;
f. Treaties –especially in cases where the treaty purports to be declaratory of CIL, or their status with regard to signatures, ratification, reservations etc.;
g. Resolutions of deliberative organs of international organizations;

30. As with the objective element, the Rapporteur also applied the same standards of consistency to the subjective element.

G. FUTURE PROGRAMME OF WORK

31. The Rapporteur announced that the Third Report, due in 2015, would continue the discussion of the two elements of CIL and their relationship. The Third Report would also cover aspects such as the role of treaties, resolutions of international organizations and conferences, as well as the "persistent objector" rule and "special" or "regional" CIL. The Special Rapporteur continues to aim to submit a final report in 2016, with revised draft

conclusions and commentaries in light of the debates and decisions of 2014 and 2015, but acknowledged that this is an ambitious work programme.

H. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY AT ITS SIXTY-EIGHTH SESSION IN 2013

32. Among the delegates, there was general support for the change of the title of the topic to "Identification of Customary International Law" from "Formation and Evidence of Customary International Law". The delegations also welcomed the "two-element" approach, although several delegates stressed the need to address the relative weights accorded to the objective element (State practice) and the subjective element (*opinion juris*), as well as the temporal aspects of these elements.

33. A number of delegations also encouraged the consideration of the relationship between customary international law and regional customary international law. Support was expressed for the study of "bilateral custom", as well as the relationship between non-binding norms and the formation of rules of customary international law. States were also generally of the opinion that the exclusion of *jus cogens* from the scope of the study was prudent but there was some difference of opinion between delegations about the issue of whether it was viable to determine a hierarchy of sources of international law within this study, or whether such a project should be a part of a separate topic.

34. Concerning the range of materials to be considered, a number of delegations encouraged the study of State practice from all regions of the world while reiterating that State practice is essential to the topic.Several delegations acknowledged, however, that very few States systematically compile and publish their practice. Certain delegations urged the Commission to proceed cautiously in its analysis of State practice, particularly with respect to decisions of domestic courts. With regard to the decisions of international and regional cours, some delegations indicated that such decisions should be approached with caution. A number of delegations also supported the proposal to consider the role of the practice of international organizations.

35. Regarding the outcome of the Commission's work on the topic, several delegations welcomed the proposed elaboration of conclusions with commentarieswhile observing that such an outcome could be of practical value for judges and practitioners. The formulation of a set of guidelines was also proposed with support for the emphasis on terminological clarity and the development of a glossary of terms. However, there was broad agreement that the Commission ought not to be overly prescriptive in its work, with delegations noting that the flexibility of customary international law must be preserved.

VIII. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. BACKGROUND

1. The environmental effects of armed conflict are well known, and may be long-term and irreparable and prevent the effective rebuilding of a society. While the protection of environment in armed conflicts has traditionally been viewed through the lens of the laws of armed conflict – i.e. international humanitarian law –this may be a narrow perspective as the range of laws applicable during an armed conflict are broader than just humanitarian law. These other applicable laws include international human rights law and international environmental law, which has been recognized by the International Court of Justice (ICJ). The ICJ also famously noted, in the advisory opinion on *Legality of the Threat Or Use Of Nuclear Weapons*,[82] that environmental considerations must be considered in wartime. In the *Nuclear Tests* (New Zealand v. France) case the Court stated that its conclusion was "without prejudice to the obligations of States to respect and protect the natural environment."[83]

2. Consequently, at its Sixty-Third session in 2011, the Commission included the topic "Protection of the environment in relation to armed conflicts" in its work programme, on the basis of the recommendation of the working group on the long-term programme of work and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic. After holding informal consultations at the Sixty-Fifth session, the Special Rapporteur presented an oral report to the Commission. The Commission also agreed to formulate a request to States to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply in times of international or non-international armed conflict.

3. At the Sixty-Eight session of the Sixth Committee of the General Assembly, the majority of States welcomed the addition of the topic to the work programme of ILC, though concerns were raised about the scope of the topic and its ramifications beyond the topic of environmental protection in relation to armed conflict. There was also general consensus that the outcome of the work on the topic was draft guidelines in stead of draft articles.

4. This brief will seek to summarize the details discussed at the Sixty-Sixth session of the ILC which are namely, the practice of States and international organizations with regards to human rights and the environment, followed by a discussion of the relationship of the aforementioned topic with other topics addressed by the Commission, including those on the present agenda. The report will then look at relevant treaty provisions and pre-existing environmental concepts, to further facilitate the future programme of work.

[82] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996

[83] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, I.C.J. Reports 1995, p. 288, para. 64.

B. THE PRACTICE OF STATES AND INTERNATIONAL ORGANIZATIONS

5. Subsequent to the Commission's request for States to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply in times of international or non-international armed conflict, five countries responded, namely Botswana, Czech Republic, El Salvador, Germany and Mexico. The Special Rapporteur also obtained information through communication with States and international organizations on some of the national legislations, which seek to substantiate claims of state practice and practices of other international organizations towards harboring environmental interests even at the time of conflicts.

6. States which responded to the Commission and the Special Rapporteur's request included: Botswana, El Salvador, Mexico, Germany, the United States of America, the People's Republic of China, Denmark, Finland, Norway, and Sweden. Additionally, responses were also received from Department of Peacekeeping Operations and Department of Field Support of the United Nations, as well as the North Atlantic Treaty Organization (NATO).

7. However, the limited information obtained from States thus far with respect to the practice and policies in peacetime and during international peace operations was not enough to claim that a general universal practice exists. Nor was it possible to establish evidence of customary international law. Yet, it signals an awareness and clear ambition on the part of States and international organizations to take environmental considerations into account when planning and conducting military operations in peacetime.

C. PURPOSE OF THE REPORT

8. The aim of the Preliminary Report by the Special Rappoteur was to provide an introductory overview of phase I of the topic, namely the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). Consequently, it did not address measures to be taken during an armed conflict or post-conflict measures per se.

9. In framing the report, the Special Rappoteur took into account:

a. The views expressed during the informal consultations in the Commission;
b. The views expressed by States in the Sixth Committee of the General Assembly;
c. The written information submitted by States in response to the request by the Commission included in chapter III of the report on the work of the Commission at its sixty-fifth session; and,
d. The information obtained through direct communication with States and international organizations.

10. The Report also aimed to deal with the relationship between this topic and certain topics already discussed by the Commission such as:

a. The effects of armed conflicts on treaties;
b. Non-navigational uses of international watercourses;
c. Shared natural resources;
d. Prevention of transboundary harm arising rom hazardous activities.

11. The Preliminary Report also aimed to develop the content of phase I by identifying existing legal obligations and principles arising under international environmental law that could guide preventive measures taken to reduce negative environmental effects resulting from a potential armed conflict. The Special Rapporteur, however, noted that it would be premature to attempt to evaluate the extent to which these rules may continue to apply (or be influential) in situations of armed conflict and post-armed conflict. Ultimately, it was the aim of the Special Rapporteur to confine the Report to the most important principles, concepts and obligations, rather than trying to identify which conventions continue to apply during an armed conflict.

D. REFLECTIONS ON THE SCOPE AND METHODOLOGY

12. The Special Rapporteur maintained that the topic be approached from a temporal perspective, rather than from the perspective of particular regimes of international law, such as environmental law, the law of armed conflict and human rights law. It was thus proposed that the Commission proceed to consider the topic in three temporal phases: before, during and after an armed conflict (phase I, phase II and phase III, respectively), in order to make the topic more manageable. The Special Rapporteur also maintained that the focus should be on phase I and phase III. There was some divergence of opinion within both the Commission and Sixth Committee, with variousparties opining that phase II was the most important of the three phases.

13. The Special Rapporteur also iterated that the Commission has no intention to, nor is in a position to, modify the law of armed conflict or address situations where environmental pressure contributes to the outbreak of armed conflict. It was merely proposed that the work of the Commission focus on identifying and clarifying the guiding principles and/or obligations relating to the protection of the environment which arise under international law in the context of (a) preparation for potential armed conflict; (b) the conduct of armed conflict; and (c) post-conflict measures in relation to environmental damage. Additionally, the Special Rapporteur also expressed reluctance to address protection of cultural heritage as this is a highly regulated area.

14. Furthermore, the effects of particular weapons would not be addresses, nor should be, according to the Special Rapporteur, because the laws applicable would deal with all weapons on the same legal basis. The Special Rapporteur also expressed the need for caution

in approaching questions regarding refugee law, as this is an important aspect of the topic, but a particularly complex issue.

E. USE OF TERMS – DRAFT SUGGESTIONS

15. With a view to facilitate discussion via-a-vis seek approval, the special rapporteur sought to draft the following definitions:
    a. "Armed conflict"
    b. "Environment"

16. After considering the definition of "armed conflict" in the Tadić judgment of the ICTY as well as the prior definition by the Commission, the following use of the term is suggested by the Special Rapporteur:

> "Armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups or between such groups within a State."

17. The Commission noted that there was no internationally accepted definition of environment, but found it useful to adopt a "working definition". The Commission had previously defined "environment" in its work on principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities as follows:

> "Environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape."

18. As the Special Rapporteur believes that the definition contained in the principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities is a meaningful point of departure, the following definition of the term "environment" was therefore suggested based largely on the previous definition:

> "Environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape."

F. SOURCES AND OTHER MATERIAL TO BE CONSULTED

19. The Special Rapporteur stated that the work on this topic will necessarily draw upon, inter alia, treaty law, State and organization practice, customary international law, general principles of international law, decisions of courts and tribunals, and legal writings.

20. The Special Rapporteur had been particularly engaged in searching for scholarly writings on the topic from various diverse regions in order to form a comprehensive opinion. She thus encouraged colleagues in the Commission and delegates in the Sixth Committee of the General Assembly to provide the Special Rapporteur with information.

G. RELATIONSHIP WITH OTHER TOPICS ADDRESSED BY THE COMMISSION AND TREATY PROVISIONS

i. Convention on the Law of the Non-navigational Uses of International Watercourses (1997)

21. The Convention on the Law of the Non-navigational Uses of International Watercourses (1997) expressly provides for the protection of international watercourses and installations in time of armed conflict. Specifically, Article 29 of that Convention makes it clear that "international watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules."

22. As reflected in the commentary, armed conflict may "affect an international watercourse as well as the protection and use thereof by watercourse States". In these circumstances, the rules and principles that regulate armed conflict apply. The commentary specifies examples of such rules and principles embodied in various conventions. These examples include: the Hague Convention of 1907 Concerning the Laws and Customs of War on Land; Protocol I additional to the Geneva Conventions of 12 August 1949; and the Martens clause. While these Conventions are not directly applicable in non-international armed conflicts, the Commission seemed to suggest that the obligation to protect, however unspecified, is germane in non-international armed conflict.

ii. Articles on the law of trans boundary aquifers (2008)

23. The articles on the law of transboundary aquifers also provide specific protection during armed conflict under article 18. Of particular relevance here, the article asserts that, "Trans boundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

24. Importantly, both the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles on the law of trans boundary aquifers are applicable in situations of both international and non-international armed conflict. Notwithstanding the fact that the law of armed conflict applies, the duty to cooperate remains. Both conventions make it clear that human needs take priority over other uses.

iii. Articles on the effects of armed conflicts on treaties (2011)

25. This work takes as its starting point the presumption that the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties, as provided for in the articles on the effects of armed conflicts on treaties (art. 3). This finding has two implications: the first is that treaties are not automatically terminated or suspended during an armed conflict. That is to say, various treaties not automatically devoid of those rights and obligations confer States that are parties to a conflict. The second is that a treaty may well be terminated or suspended.

iv. Principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities (2006)

26. The 2006 principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities define "damage" as including significant damage caused to persons, property or the environment. This includes loss or damage by impairment of the environment; the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; and the costs of reasonable response measures. Relevantly, the commentary to principle 4 provides an exception to liability for prompt and adequate compensation if the damage was the result of an act of armed conflict, hostilities, civil war or insurrection.

v. Environmental principles and concepts

27. The Special Rapporteur noted that the references to environmental law principles or human rights are made for the purpose of convenience. They are not meant to assert that they are self-contained regimes. The environmental law principles and concepts that are of relevance to the present topic are imprecise and vague and seldom offer clear-cut answers and solutions. The Rapporteur then moved on to to recall the most prominent lines of development that have taken place since the adoption of the ENMOD Convention (1976) and Protocol I additional to the 1949 Geneva Conventions (1977).

Sustainable development

28. The Special Rapporteur stated that sustainable development is the necessary link between the protection of the environment and its resources and the needs of the human beings. It has a clear intergenerational element. Whatever resources are to be used, they are supposed to be used in a manner that ensures that such resources last for longer than a limited period of time, that is, for more than one generation. However, divergent views exist as to whether this concept has legal implications or mere socio-economic implications.

29. The International Court of Justice had addressed this in the Gabcíkovo-Nagymaros case (1997).The Court did not take a position on the legal status of sustainable development, but in his separate opinion Vice-President Weeramantry took the clear position that sustainable development is a legal principle and "an integral part" of international law. The World Trade Organization (WTO) Panel and Appellate Body have also remarked on the concept of sustainable development. For example, in European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, the Appellate Body noted that the concept was one of the objectives that member States may pursue in accordance with the preamble to the WTO Agreement.

Prevention and precaution

30. The Special Rapporteur noted that the principle of prevention is the fundamental tenet on which international environmental law rests with its roots tracing back to the Trail smelter case. It is closely linked to the principle of precaution. The principle of prevention is recognized as customary international law and is applied mostly in a trans boundary context. It is included in international treaties and recognized in case law (including the Pulp Mill and Gabcikovo-Nagymaros cases referred to above). For example, the European Union has codified the precautionary principle along with the preventive principle in article 191 (2) of the Treaty on the Functioning of the European Union. The WTO has dealt with the principle in several cases. In EC — Hormones, the European Community proposed that the precautionary principle should be regarded as a "general customary rule of international law or at least a general principle of law".

31. Different techniques can be applied to meet the requirements of the precautionary principle, such as prohibition of substances or techniques, applying best technology available, performing environmental impact assessments (EIAs), imposing environmental quality standards, conservation measures, or integrated environmental regulation.

Polluter pays

32. The Special Rapporteur specified that the polluter-pays principle dates back to the Trail smelter and Chorzów factory cases. It is probably an accurate reflection to state that the principle was "originally devised to allocate the cost of pollution prevention and control measures, "has matured into a formidable strategy for the protection of the environment, human health and safety, resource management and generally ensuring environmentally sustainable activities." The polluter-pays principle is applicable both in inter-State relations and in the context of civil liability regimes.

Environmental impact assessment

33. Environmental impact assessment (EIA) is part of the work to prevent environmental harm from occurring. It does not impose substantive environmental standards or indicate what results are to be achieved. Despite this, the obligation to undertake EIAs has become part of both national and international law. The Special Rapporteur noted that one of the most prominent conventions in this respect is the 1991 Convention on Environmental Impact Assessment in a Trans boundary Context.

34. These measures are to be fully integrated into the project and its costs. The case provides support for the imposition of a general requirement for an EIA under international law, as well as underscoring the increasing importance that is being placed on the duty of prevention. The requirement of EIAs has also been described as "very prevalent" in the previous work of the Commission.

Due diligence

35. The Special Rapporteur noted that due diligence is a multifaceted concept in international law that is both applicable in peacetime and in situations of armed conflict. There is a considerable amount of case law that refers to "due diligence" and its historical roots date back centuries. Its application is not merely limited to circumstances involving aliens in State territory. It is relevant in international investment law, human rights law, and even in the context of the laws of armed conflict.

36. The standard of due diligence constitutes an obligation of conduct rather than an obligation of result, as has been noted by the Commission previously in its work on the draft articles on prevention of trans boundary harm from hazardous activities, as well as by the International Law Association's Study Group on Due Diligence. In this regard, it is interesting to note that the International Tribunal for the Law of the Sea held that taking precautionary measures was a part of due diligence in their seabed mining advisory opinion.

Human Rights and the Environment

37. The Special Rapporteur emphasized that human rights cannot be enjoyed in a degraded environment. However, it does not automatically follow that there exists a customary law rule establishing an individual human right to a clean environment. The link between a clean environment and the enjoyment of human rights is indirect and secured through other established rights, such as the right to health, food and acceptable living conditions.

38. The European Convention on Human Rights does not contain a general right of protection of the environment as such, but environmental issues have been found to implicate other rights. For example, the European Court of Human Rights has previously held that certain acts constitute a violation of the right to life or health, as well as the right to respect

one's home and one's private and family life. Some decisions in the context of the Inter-American system refer to the disclosure of information to the peoples concerned. Inherent in the requirement to consult the public is an obligation to disclose information. Decisions relating to the environment within the Inter-American system (Court or Commission) refer to a series of rights belonging to the American people, such as the right to property, to freedom of movement and residence, to humane treatment, to judicial guarantees, and to judicial protection. The communication of the African Commission on Human and Peoples' Rights in the Ogoniland case clarifies the obligation of States to take reasonable measures to prevent environmental harm. In addition to the obligation to avoid direct participation in the contamination of air, water and soil, the African Commission's communication also outlines the obligation to protect the population from environmental harm.

Indigenous people and environmental rights

39. The Special Rapporteur noted that indigenous people have a special relationship with their traditional land. They hold their own diverse concepts of development that are based on their traditional values, visions, needs and priorities. Therefore, it is important to note that article 16 of the International Labour Organization (ILO) Convention No. 169 (1989) deals explicitly with the displacement of indigenous peoples. One of the most important rules in the Convention is found in article 16 (1), which states that indigenous peoples shall not be removed from their lands.

40. In cases where relocation was necessary, indigenous peoples should have the right to return as soon as the reason for which they had to leave is no longer valid. For example, in the case of a war, or natural disaster, they can go back to their lands when it is over. In cases where such unavoidable relocation becomes a permanent situation, indigenous peoples have the right to lands of an equal quality, in addition to legal rights relating to the land they previously occupied. This may include rights relating to the agricultural potential of the lands and legal recognition of ownership to that land.

H. FUTURE PROGRAMME OF WORK

41. The Special Rapporteur proposed that the Second Report would focus on the law applicable during both international and non-international armed conflict and would discuss in greater detail issues of human and indigenous rights. The Special Rapporteur also proposed that the Second Report would contain proposals for guidelines, while the Third Report, due in 2016 would focus on post-conflict measures.

42. The Special Rapporteur also specifically proposed that the Third Report would focus on post-conflict measures, including cooperation, sharing of information and best practices, and reparative measures.The Special Rapporteur finally concluded by stating that it would

also be of assistance if States were to provide examples of national legislation relevant to the topic and case law in which international or domestic environmental law has been applied.

I. SUMMARYOF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-EIGHTH SESSION (2013)

43. The inclusion of the topic was generally welcomed by AALCO Member States at the Sixty-Eighth Session of the Sixth Committee of the UNGA, with some States also welcoming the novel temporal approach adopted by the Special Rapporteur. There was also general support for the idea that the appropriate outcome of the work of the Special Rapporteur should be in the form of non-binding draft guidelines which wouldn't impede relevant political considerations.

44. Among the substantive suggestion made at the Sixth Committee Session regarding the topic was the point that that international law should envisage provisions to encourage States to move military objectives far from ecologically fragile zones. Therefore, it was suggested that the Commission should focus specifically on measures that States, particularly those engaged in armed conflicts, would have to take, once the hostile activity ended, in order to rehabilitate the environment.

45. It was also suggested that the Commission should also address, among other things, issues related to demining. It should be the duty of State or non-State actors that had undertaken the mining to communicate, once the active hostility ended and within the framework of ceasefire agreements, the information they posses on the position of planted mines. Similarly, solutions should be sought to rehabilitate, where appropriate, the negative impact of refugee camps on the environment, which at times was very serious.

IX. PROTECTION OF THE ATMOSPHERE

A. BACKGROUND

1. At the sixty-third session of the International Law Commission (2011), the Commission endorsed the inclusion of the topic "Protection of the atmosphere" in its long-term programme of work.[84]

2. The topic "Protection of the Atmosphere" was decided to be included at its sixty-fifth session of the International Law Commission in 2013. Mr. Shinya Murase was appointed as the Special Rapporteur for this topic. This topic was included in its programme on the understanding that it shall not interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range trans boundary air pollution. It was the understanding that the topic shall not deal with, but is also without prejudice to, questions such as, liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. Certain specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States, shall be excluded from the study. It was also agreed that this project should not attempt to "fill" gaps in the existing treaty regimes. The outcome of this project would be in the form of draft guidelines.[85]

B. CONSIDERATION OF THE AGENDA ITEM AT THE SIXTY-SIXTH SESSION OF THE COMMISSION

3. The Special Rapporteur Mr. Shinya Murase submitted his first report on this topic. The first report lays down three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3). In preparing this report, the Special Rapporteur has provided thorough background of the topic, such as its historical development and the sources of law relevant to it, as well as attempted to explain the rationale of the topic and the basic approaches, objectives and scope of the project. The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law; sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law are referred to.

4. At the Sixty-eighth session of the UN General Assembly (2013), vide its resolution 66/98, noted the report of the International Law Commission on the work of its sixty-third session, which inter alia, took note of the inclusion by the Commission of the topic "Protection of the atmosphere" in its long-term programme of work. There is a majority view that protection of atmosphere is a matter of growing concern for the international community

[84]See A/66/10, annex B.
[85] See A/68/10, para. 168.

despite being mindful of the ongoing political negotiations on drafting an outcome of legal nature to address commitments under the climate change regime. Some Member States of AALCO have expressed their keen interest[86] in this subject, while cautioning that the highly technical nature of this subject may render this exercise futile[87].

5. The report highlights four goals of this proposed project in the progressive development and codification of international law.

- to identify the status of customary international law, established or emerging, examining the gaps and overlaps, if any, in existing law relating to the atmosphere
- to provide appropriate guidelines for harmonization and coordination among treaty regimes within and outside international environmental law.
- to clarify a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere.
- to establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of trans boundary and global protection of the atmosphere. The report further states that the purpose of this project was not to mould "shame and blame" matrices for potential polluters but on the contrary, to explore possible mechanisms of international cooperation to solve the problems of common concern.

Draft guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs"

6. The report states that there are three core international issues concerning the atmosphere, namely, air pollution, ozone depletion and climate change. These issues relate to the troposphere and the stratosphere, even when major contributing factors may be different in each case. For example, factors such as the residence time. While traditional air pollution constituents does have a residence time of days to weeks, greenhouse gases (GHGs), such as carbon dioxide and nitrous oxide, and compounds destroying the stratospheric ozone layer, may have residence times that often exceed a century.

7. There is a need to consult the scientific experts in framing a definition of the atmosphere because the definition of atmosphere, must be clear and inclusive. A question arises as to whether to include the upper atmosphere, which comprises of the mesosphere and thermosphere, within the definition of the "atmosphere" as proposed in Draft Guideline 1.

[86] For detailed deliberations on this topic, See A/C.6/66/SR.27 (People's Republic of China, Nigeria and Sri Lanka). For First report on Protection of the Atmosphere in A/CN.4/667.
[87] Islamic Republic of Iran, Ibid.

While comparing with the concept "climate change" as per the definition provided under Article 1 (2) of the United Nations Framework Convention on Climate Change (UNFCCC), it is clear that it would be incorrect to characterize the changes in temperature in the mesosphere as "climate change". While the Special Rapporteur acknowledged that the understanding of changes in the upper atmosphere may be limited by a lack of scientific data, the absence of such data meant that an attempt to formulate a protective regime for the upper atmosphere would be overly ambitious. It is thus essential that in order to remove the reference to the troposphere and stratosphere from the definition in Draft Guideline 1, the Commentary to the same must clarify the atmosphere's relationship to outer space.

Draft guideline 2
Scope of the guidelines

(a) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the earth's natural environment;
(b) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their interrelationship.

8. The main concern has been, in this regard, with reference to anthropogenic environmental degradation, in other words, damage caused due to human activities to natural and human environment. It is an essential fact that to know the gravity of this subject, reference to the issues such as trans boundary air pollution and climate change, is imperative. However, these issues should only be referred to in order to build an 'understanding' of the subject holistically, and should not be intended to be part of substantive discussion. It is also viewed that the principles of international environmental law that have evolved over the years through the judgments of the international courts and tribunals and customary practices of the States, focused on the 'precautionary approach' rather than the 'principle of prevention'. The need of the hour is 'to prevent' any harm to the atmosphere because the impact of atmospheric pollution could be on all levels of human existence. The reason why these principles stand significant in this topic should be read with the categorisation of 'protection of atmosphere as a common concern of humankind', which reiterates that the atmosphere is a natural resource, which is common to all, and shared by everyone, that has to be preserved. Due to its link between climate change and trans boundary air pollution, the atmosphere is also required to be accorded the legal status of a 'common concern for humankind', which is well-explained in draft guideline 3.

9. The concept "deleterious substances" is very exhaustive. And the term "energy", as it relates to the import of pollutants to the atmosphere, should include radioactive and nuclear emissions because the word "energy" not only appears in the Convention on Long-Range Trans boundary Air Pollution, but also in the UN Convention on the Law of the Sea (UNCLOS) which also defines "pollution" in Article 1, paragraph 1(4) to include "the introduction of substances **or energy** into the marine environment." Thus it is important to at

least refer to the question of "energy" pollution broadly conceived. There is a close inter-linkage with other areas of international law such as law of the sea, biodiversity (desertification, forestry and wetlands), as well as international trade law and international human rights law.

Draft guideline 3
Legal Status of the Atmosphere

(a) The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind;
(b) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law.

10. In order to determine the legal status of the concept atmosphere, an analysis of five concepts is necessary, namely, atmosphere as (i) airspace, (ii) shared or common natural resources, (iii) common property, (iv) common heritage and (v) common concern (common interest). The report discusses in detail various categories in which atmosphere would be considered. Therefore, atmosphere must be considered as natural resource, which ought to be preserved, and caution must be to prevent any further harm to the atmosphere. Hence, "it is not the atmosphere but rather the *protection* of the atmosphere that is a common concern." The report states that this project endeavors to establish a cooperative framework for atmospheric protection, not to establish common ownership or management of the atmosphere. This narrow application of the concept of "common concern" is consonance with existing applications of the concept in international environmental law. It reflects the understanding that it is not a particular resource, whether beyond the jurisdiction of states, such as the climate system, or within a state's territory, as in the case of biodiversity, that is common, but rather that threats to that resource are of common concern. The legal principle *sic utere*could be imported to the concept of atmospheric protection, because it was recognized in the eighth preambular paragraph of the UNFCCC, as well as in Article 2(2)(b) of the 1985 Vienna Convention on the Protection of the Ozone Layer. The import of the *sic utere* principle into international environmental law attests to the linkage between transboundary harm, and global issues surrounding atmospheric protection.

X. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

A. EXPULSION OF ALIENS

1. The issue of expulsion of aliens has been an important and controversial issue in the national politics of many nations. In 2004, the ILC included this topic on its agenda and appointed Maurice Kamto (Cameroon) as ILC Special Rapporteur. Kamto has submitted nine reports analyzing the law in this area and proposing a series of draft articles that partly codify and partly progressively develop the law. The Commission was particularly fortunate to have had at its disposal the services of an extremely well qualified and experienced Special Rapporteur, Mr. Maurice Kamto, who has put much of his energy and intellectual talent into conceptualizing and developing the international regime of the expulsion of aliens.

2. After several years of development of those articles through discussions in the ILC's plenary sessions and in its drafting committee, thirty-two draft articles were adopted on "first reading" during the sixty-fourth session (2012), together with commentaries. Moreover, 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. As on 20th March 2014, thirteen Countries had submitted their written comments to the Commission[88].

3. The issue of expulsion of aliens is mainly governed by national laws, subject to respect for a limited number of relevant rules of international law. The latter derive from a number of disparate sources, and different States will have different international obligations concerning the expulsion of aliens in accordance with the relevant multilateral agreements to which they are party. Given this position, a delicate balance needed to be struck between respect for the sovereign rights of States to deal with aliens found in their territory and the rules of international law that seek to preserve a modicum of rights and dignity for aliens.

4. The draft articles recognize a general right of states to expel aliens from their territory, but only "in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights. The draft articles on the expulsion of aliens are based on the premise that every State has the right to expel aliens. However, this right is subject to general limitations, as well as specific substantive and procedural requirements. These limitations had already been clarified in the arbitral practice before the Second World War. In addition, contemporary human rights law has had a significant impact on the law relating to the expulsion of aliens.

5. Be that as it may, the draft articles do raise a number of concerns.

Firstly, the draft articles adopted do not merely seek to codify existing law, they do go a step further and develop international law (existing in this area) progressively. Few of the key aspects of the draft articles appear to be deviating from the existing international law. For

[88] Republic of Korea was the only Member State of AALCO that had submitted its written comments to ILC on this issue.

example draft article 24 on the principle of non-refoulement that requires that the expelling state not to expel an alien to a State where there are substantial grounds for believing that he or she may be subjected to torture or to cruel, inhuman or degrading treatment. Though the principle of non-refoulement is recognized in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), its grounds refer exclusively to torture and do not include any other offence. Whereas the draft articles refer to (besides torture) cruel, inhuman or degrading treatment as well. This is an area of progressive development that may not be consistent with the existing legal regime.

Secondly, draft article 6 dealing with the prohibition of the expulsion of refugees raises few concerns. It is to be noted that the draft article 6, paragraph 2, deals with the prohibition of the expulsion of unlawfully present aliens while their application for refugee status is being considered. This appears to be significantly extending the obligations under article 13 of the International Covenant on Civil and Political Rights and article 32 of the Convention relating to the Status of Refugees, which apply only to aliens lawfully in the territory of the State. The commentary's explanation of this provision is not satisfactory, as it states that the provision only applies to individuals who actually meet the definition of a "refugee" under international law; however, the provision is premised on the fact that the individual's refugee status is still in question.

Thirdly, draft article 7 that deals with the "Rules relating to the expulsion of stateless persons" raises some issues. Whether this article, which deals with the prohibition of the stateless persons, is in tune with the current practice of states is doubtful. It needs to be underlined here that draft article 7 is based on article 31 (1) of the 1954 Convention relating to the Status of Stateless Persons. At present, fewer than 80 States are parties to that Convention, and the practice of many non-parties does not conform to article 31 (1). There are states where a stateless person who is in violation of their immigration laws is subject to removal even in the absence of grounds of national security or public order.

Fourthly, draft article 10 that deals with the prohibition of disguised expulsion does create some concerns. It is intended to indicate that a state does not have the right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a formal expulsion decision. This article lacks clarity and thus could overly limit the right of a state with regard to expulsion for important questions regarding the various elements necessary to recognize a case of disguised expulsion are yet to be thoroughly addressed by States or international tribunals.

Fifthly, regarding the final outcome of the work of ILC in this area, it needs to be underlined here that draft articles would be most appropriate (form of outcome) as a set of principles or guidelines representing international best practice, rather than adopting any sort of binding instrument. The Commission could also convert these draft articles into "policy guidelines" or "best practices". Given the fact that several multilateral treaties already exist on this issue how much support would be forthcoming for negotiating a new Convention based on these draft articles remains questionable.

B. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDRE SUT JUDICARE)*

6. Concerns about terrorism, human rights violations and transnational crime have come to predominate in today's increasingly globalized international community. Yet parallel human rights concerns prevent a State from exposing those alleged to have been involved in such crimes to torture or other gross violations of human rights, both in the custodial State or elsewhere. The potentially contradicting desires to avoid impunity for offenders and to ensure the individual's entitlement to protection against refoulement has given a more central role to the *aut dedere aut judicare* obligation.

7. This obligation requires a State either to extradite an accused who is present on its territory or to prosecute him or her. The purpose of this obligation is to ensure that those who are accused of certain international crimes are brought to justice in accordance with internationally accepted standards of criminal procedure by providing for effective prosecution by a court with competent jurisdiction. The obligation appears in various forms in more than 30 multilateral treaties proscribing criminal conduct often seen as a "common threat to mankind", in numerous bilateral and multilateral extradition treaties and, according to some writers; it may exist in customary international law. Given its essential position in the emerging legal regime against impunity, and its inclusion in States' armoury of international criminal law enforcement mechanisms, it is not surprising that the International Law Commission ("ILC") has found the issue ripe for consideration.

8. The Final Report of the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*) the purpose of which is to summarize the conclusions and recommendations of the Working Group on the topic holds a lot of importance. Specifically the issue whether there exists an obligation to extradite or prosecute under customary law is an important issue. Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Working Group has decided not to have the outcome of the Commission's work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

9. AALCO would like to record its appreciation to the open-ended Working Group under the Chairmanship of Mr. Kriangsak Kittichaisaree for its report on the obligation to extradite or prosecute (*aut dedere aut judicare*). Owing to the great diversity in the formulation, content, and scope of the obligation to extradite in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute. In addition, the principle of *aut dedere aut judicare* is neither equivalent nor synonymous with the principle of universal jurisdiction. It needs to be remembered here that the obligation to extradite or prosecute is sometimes invoked as the basis for exercising universal jurisdiction. However, obligation to extradite or prosecute is not equivalent to universal jurisdiction. Obligation to extradite or prosecute is a treaty obligation, which is applicable only among States parties to that treaty. When treaties provide for the obligation to extradite or prosecute, they always at the same time provide for specific conditions under which the obligation applies and different treaties provide for different conditions of its applicability.

C. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

10. On *Protection of Persons in the Event of Disasters*, the AALCO Secretariat welcomes the four draft articles that have been proposed in the Seventh Report of the Special Rapporteur. Specifically on Draft Article 14 bis, which speaks about the protection to relief personnel, equipment and goods, it is observed that providing sufficient legal protection for these relief personnel, equipment and goods should be without placing an undue burden on the affected State during situations of vulnerability. The affected State's obligation in that context was one of conduct and not of result. Such obligation centred on the positive measures that the affected State had to take to prevent attacks on and mitigate risks to the safety and security of relief workers, including any risks that might result from acts by the State's own organs or agents. However, it should not go to the extent of arguing for immunity from their jurisdiction to relief personnel. That had no basis in general international law, and several of the instruments cited in the report made it clear that the duty of protection was distinct from the issue of immunity. It was therefore important to clarify in the commentary to draft article 14 bis that its scope was confined to measures designed to ensure the safety and security of relief personnel and their equipment and goods and did not extend to immunity. The affected State and relief actors involved must be left to resolve the question of immunity in their bilateral and multilateral agreements. The proposal to replace the term "necessary measures" with "appropriate measures" was a clear indication on the measures to be included in the commentary. Further, the affected State's international obligation to "ensure the protection" of relief organizations under article 14 bis should be limited by the State's capacity during the disaster. In some major disaster situations, the State's ability to meet its basic obligations towards its citizens was questionable at best. Therefore, the wording should not be intended to create a more mandatory framework.

D. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

11. AALCO appreciates the considerable efforts made by the Special Rapporteur Ms. Concepcion Hernandez in producing Reports on the topic. The Third Report on the topic which was submitted at the ILC's sixth-sixth session held at 2014, marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in particular the concept of an "official". It is to be noted here that the proposed draft article 5 that the Special Rapporteur has come up with in his third report argues that 'State officials who exercise governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction'.

12. The normative elements that make up this type of immunity should be deduced from these three characteristics; based on the method followed with regard to immunity *ratione personae* they should be identified as follows:

(a) The subjective scope of immunity *ratione materiae*: what persons benefit from immunity?

(b) The material scope of immunity *ratione materiae*: what types of acts performed by these persons are covered by immunity?

(c) The temporal scope of immunity *ratione materiae*: over what period of time can immunity be invoked and applied?

13. Although these three elements are accepted in general terms in relation to immunity *ratione materiae*, their meanings are not uniform. Thus, while there is broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*, the material and subjective scope of such immunity is the subject of a broader discussion and still gives rise to controversy, not only in doctrine but also in jurisprudence and practice. Determining the meanings of the expressions "official" and "acts performed in an official capacity" therefore requires detailed analysis. In any event, it should be noted that the three aspects mentioned above constitute the "normative elements" of immunity from foreign criminal jurisdiction *ratione materiae* and thus must be considered together, without the possibility of excluding any of them when defining the legal regime for this type of immunity.

14. It needs to be underlined here that this topic should not be considered solely in terms of codification. Rather it is both legally appropriate and practically convenient to formulate provisions *de lege ferenda* taking due account of the requirements of the current state of international affairs.

15. AALCO recognizes the fact that times have changed. Today international affairs/foreign affairs is conducted by a wide range of state officials apart from the traditional state officials such as Heads of State, Heads of Government and the Minister of Foreign Affairs whose representative capacity to act at the international level and whose immunity from foreign criminal jurisdiction remains well-anchored under international law. Today's conduct of international affairs, where a wide range of state officials other than the 'troika' are regularly commissioned to represent their states in international affairs and international fora, does demand that special attention must be given to this issue (of going beyond 'Troika') by the international community.

16. Be that as it may, AALCO also recognizes that international law has not advanced to the point where the scope of immunity *ratione personae* could be understood to include other high-ranking officials per se. Hence, bearing in mind the evolution of international relations, and the fact that States are no longer represented by the "troika" alone, the Commission should explore, through consultation with States, whether such immunity is indeed limited to the "troika" or could be extended to other senior officials. In any such exercise, a number of factors have to be taken into account that include the current state practice prevailing in various parts of the world in this area, the judicial opinion emanating from domestic jurisdictions, the opinion of scholars etc. In closing, the question of whether immunity applies only to Heads of State, Heads of Government and Ministers for Foreign Affairs requires further consideration and analysis.

E. SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

17. The topic "Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties" (previously known as Treaties Overtime), raises a large number of interesting issues.

18. First, when considering this area of the law, it is easiest to focus on the use of subsequent conduct by *international courts and tribunals*, as was done in the first two reports of the Study Group. That focus, however, provides a very limited window on the overall relevance of subsequent conduct for treaty law. As is the case for contracts and statutes in national law, the vast majority of interpretations and applications occur away from courts and tribunals, and the approach there taken may well differ from what is expected from third-party dispute settlers.

19. Second, while there are many examples of the use of subsequent conduct by international courts and tribunals, as identified in the reports prepared for the Study Group, there are also many treaty cases that have been decided *without* any use of subsequent conduct. To truly ascertain the relative importance of this issue for treaty law, it is necessary to take account of not just situations where subsequent conduct has been used, but also situations where it could have been used but was not.

20. The use of subsequent practice to interpret treaties has certainly been a feature of international case law, as demonstrated in several cases before the ICJ., some cases before the PCIJ., the case law of the European Court of Human Rights, and the case law of the permanent and *ad hoc* international criminal tribunals. Once there is a settled practice for interpreting a provision in a particular way, it becomes difficult for one party to the treaty to attempt to press for an alternative interpretation and, if the matter were placed before a tribunal, that party may find itself estopped from doing so based on its conduct. Yet it is interesting that the use of subsequent practice by dispute settlers is far from common or systematic.

21. The Introductory Report by Professor Nolte maintained that the character of the agreement as bilateral or multilateral does not seem to matter in the context of the jurisprudence of the ICJ or *ad hoc* tribunals. That is a very interesting observation and suggests that careful attention should be given to whether basic intuitions on this factor are correct. At the same time, it is important to keep in mind that the use of subsequent conduct by global dispute resolution may not be reflective of the use of subsequent conduct by States generally in their practice.

22. The second Report of the Special Rapporteur, which incorporates within itself six draft conclusions presented by him, represents an important piece of work. Draft conclusion 6, which is entitled "Identification of subsequent agreements and subsequent practice", is the first draft conclusion which addresses the ways in which subsequent agreements and subsequent practice should be approached by interpreters more specifically than through the first five draft conclusions already provisionally adopted by the Commission. Draft conclusion 7deals with possible effects of subsequent agreements and subsequent practice in interpretation. Draft conclusion 8, which deals with weight of subsequent agreements and subsequent practice as a means of interpretation, addresses the question how far subsequent agreements and subsequent practice demonstrate the common understanding of the parties as to the meaning of the terms of a treaty. Draft conclusion 9 deals with Agreement of the parties regarding the interpretation of a Treaty. All these conclusions are of vital importance.

F. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

23. The Identification of Customary International Law continues to be an extremely important topic on the agenda of the ILC from the perspective of Asian-African States. Given the history of exclusion of the Asian-African region from participation in the early and formative years of international law, the undertaking of this topic by the Commission continues to provide an opportunity for the countries from the Asian-African region to be involved in the process of the development of customary international law.

24. The AALCO Secretariat acknowledges the Special Rapporteur, Sir Michael Wood's, efforts in providing his detailed analysis of what is one of the broadest and theoretically densest topics in international law, as well as the great efforts with which he has engaged in research into the volumes of literature on the topic. The outcome of Sir Michael Wood's efforts is a set of lucid and concise draft conclusions and explanations that are, for the most part, self-explanatory and would ostensibly provide a clear elucidation of this fairly esoteric topic for a non-specialist to use.

25. Facilitating the work of the Special Rapporteur and the Commission on this topic should be of paramount importance to all States, particularly those in the Asian-African region, in order to participate in the process by which customary international law would ostensibly henceforth be identified and understood. This can be done by States proceeding to fill out and submit the questionnaire, which had been forwarded by the Commission in 2013. Despite the original due date for responses being 31 January 2014, further responses from States, even at this time or in the near future, would help inform and increase the depth of the evaluation of State practice for future reference by the Special Rapporteur and the Commission.

26. One of the recurring practical issues foreseen by the Special Rapporteur is the difficulty inherent in ascertaining both the objective element of CIL (general practice) as well as the subjective element (*opiniojuris*or 'acceptance as law'), due to difficulties in gathering information and a paucity in dissemination. Increased cooperation by States with the Commission in the form of providing the relevant information on these subjects would also doubtless ease the process of drafting more effective and accurate conclusions for future use.

27. A possible problematic issue arising in the Special Rapporteur's work thus far might be the absence of a hierarchical ranking of sources to be looked at to assess the evidence of State practice or *opiniojuris.* A tool such as a nominal hierarchical list of sources might prove useful in identifying the most important sources of evidence for CIL and weighing the relative merits and importance of these sources, and would likely significantly simplify the arduous task of definitively ascertaining State practice and/or *opiniojuris*.

28. The Draft Conclusions proposed by the Special Rapporteur reflect the vastness and complexity of the topic at hand, as well as the practical difficulties of the task of definitively identifying principles of customary international law. However, it is a big step in the direction of creating a condensed set of guidelines by which the identification of CIL may occur.

G. PROTECTION OF ENVIRONMENT IN RELATION TO ARMED CONFLICT

29. The inclusion of the topic of 'protection of environment in relation to armed conflict on the work programme' of the ILC is a timely one as there are currently a spate of environment-related issues currently under discussion by the ILC which may have elements of overlap between them – such as the environmental law principles of prevention, precaution, polluter pays, environmental impact assessment, etc. –which would ensure that increasing expertise in one topic will contribute to increased expertise in the others.

30. However, it seems that at this point the Report of the Special Rapporteur is merely laying preliminary groundwork without making any substantive headway into the topic itself, apart from the proposed definitions for 'Armed Conflict' and 'Environment'.

31. However, facilitating the work of the Special Rapporteur in this topic would also require the provision of details of peace-time environment-protection measures undertaken by the military and armed forces of various countries to provide the Rapporteur material to inform her draft conclusions about "phase I" of the project.

32. The Rapporteur has also chosen a novel approach to the topic with the decision to follow three separate phases (phase I, II, III) corresponding to the periods before, during, and after an armed conflict. The Special Rapporteur contends that phases I and III are the most important in her opinion to be addressed which may appear counterintuitive. However, the actual period of armed conflict may itself be well covered in a legal sense due to the presence of various laws of armed conflict, including the Geneva Conventions, which regulate environmental damage during a conflict, thereby reducing the need for additional statutes or conventions.

33. However, the relative importance of the three temporal phases proposed by the Special Rapporteur may be a matter of opinion that varies from State to State. Connected to this is the notion that the handling of refugees and displaced persons is an important factor in the prevention of environmental damage during a conflict. This is a sensitive topic, but it may be prudent for there to be a necessity for concerned parties to have plans in place, during all three temporal phases of a conflict, to handle and successfully relocate persons displaced by a conflict, and particularly during phase II.

34. Additionally, there is the question of how such guidelines may be enforced during an asymmetrical conflict or transnational armed conflicts, where such rules or guidelines would face the same problems of enforcement that international humanitarian law is generally faced with.

H. PROTECTION OF THE ATMOSPHERE

35. With regard to the definition of atmosphere, the AALCO Secretariat views that this could be elaborated upon by including an 'Explanation' clause to this draft guideline. This explanation could consist of details of the atmospheric layers above the earth, and other gaseous substances forming part of the atmosphere. However, this could be added while elaborating upon the guidelines. On scope of the guidelines, in order to prevent such disasters, it is viewed that international cooperation, alongside other key principles in international environmental law such as the no-harm principle, principle of equity,

sustainable development and common but differentiated responsibility (CBDR) must be the foundations on which this work should progress.

36. For the protection of atmosphere, the determination of the legal status is mandatory. The AALCO Secretariat supports the proposition of the Special Rapporteur and considers draft guideline 3 para 1 on this topic as the core feature of this debate on legal status, which would determine the course of further research on this topic. Hence, protection of atmosphere is to be legally classified as a "common concern of humankind".

ANNEX I: STATEMENT BY H. E. PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL, AALCO AT THE SIXTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION (ILC) (TUESDAY, 8TH JULY 2014)

Mr. Kirill Gevorgian, Chairman of the International Law Commission (ILC),
Distinguished Members of the ILC,
Ladies and Gentlemen,
It is a privilege for me as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to represent the Organization at this Session of the International Law Commission. The role of the ILC towards the progressive development and codification of international law alongside the efforts of the United Nations is well-recognised and I am honoured to be invited to address this distinguished gathering of legal luminaries.

Mr. Chairman,

The AALCO was envisaged towards making effective contributions in the field of international law. In pursuance of which, AALCO was statutorily mandated to follow the work and agenda items of 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.

Though the Annual Sessions of AALCO ideally should precede the Annual Sessions of ILC, in certain years due to unavoidable circumstances, the AALCO Sessions are convened after the ILC Annual Sessions. In view of the importance that the agenda items of ILC hold for the Asian-African States, considerable time is spent in discussing them at the Annual Sessions of AALCO. Thus, at the Fifty-Third Annual Session of AALCO which is scheduled to take place in Tehran, Islamic Republic of Iran in September 2014, a Half-Day Special Meeting on "Some Selected Items on the Agenda of the International Law Commission" is scheduled to be held in conjunction with the Annual Session. Hence, the inputs/opinions of AALCO Member States on certain agenda items of ILC, would be reflected on the basis of the views, raised by our Member States at other international fora, such as the Sixth Committee of the United Nations, or other international metings. The topics that I shall delve upon are:

- *Identification of Customary International Law (CIL);*
- *Protection of Atmosphere;*
- *Protection of Persons in the Event of Disaster; and*
- *Immunity of State Officials from Foreign Criminal Jurisdiction*

A. Identification of Customary International Law (CIL)

Mr. Chairman,

Allow me to begin with the topic Identification of Customary International Law (CIL). At AALCO's Fifty-Second Annual Session, held in New Delhi in September 2013; a Half-Day Special Meeting on "Selected Items on the Agenda of the International Law Commission" was convened. At that meeting delegates from Member States of AALCO expressed their interest in the ILC's work on this topic, as well as lauded the work that has already been done by the Commission thus far. These States also encouraged each other to continue compiling evidence of their State practice and *opiniojuris*, as well as answer the questionnaires submitted by the Commission in order to expedite the process of identifying customary principles of international law.

It was noted that this topic is particularly relevant and important due to the difficulty inherent in identifying existing rules of customary international law and applying them, particularly by domestic and national courts and other parties, such as judges, lawyers, arbitrators and legal advisors who may not have any formal training in international law. The work on this subject, is intended to simplify and expedite, the process by which customary principles of international law will become identifiable not only to legal scholars, but other persons who work in related fields of great importance to AALCO Member States.

Mr. Chairman,
The questions relating to the formation and evidence of customary international law, now renamed as Identification of Customary International Law, continue to be of great interest to the Member States of AALCO. Given the history of the Asian-African region as well as the notable lack of their participation in formative years of international law, the undertaking of this topic by the Commission provides a unique opportunity for inclusiveness of the practices of the Asian-African countries in the process of the development of customary international law. AALCO commends the Special Rapporteur, Sir Michael Wood, for his initiative in identifying and outlining all the areas that need to be addressed and deliberated upon in order to achieve a comprehensive understanding of customary international law. Several of these areas are of particular interest to Asian-African countries, some of them being:

> ***Firstly,*** the question of a heirarchy of sources of international law and the relationship between these sources, such as international tribunals and domestic courts. The focus of judgment-based evidence of CIL has historically been on the decisions of international tribunals, but while the task may be onerous, a truer sense of State positions on questions of CIL may be arrived at through the examination of their domestic legal practices as well as the decisions of regional and sub-regional courts. Additionally, within the decisions of the international tribunals, the importance of dissenting opinions and separate opinions is also an important question.
>
> ***Secondly,***the importance of statements delivered by Member States in international fora, as well as resolutions adopted by international and intergovernmental organizations. Statements made by Member States, as well as resolutions that they have voted on, may help in providing an accurate picture regarding the position of a State or States on a particular question of international law.
>
> ***Thirdly,*** the notion of flexibility within the context of the identification of CIL is an important one. The recognition of the constantly evolving nature of custom and practice and any set of rules for the identification must be flexible enough to account for this.

Mr. Chairman,

Some of the major comments and suggestions presented by Member States of AALCO, on this topic, during the Fifty-Second Annual Session of AALCO held last year (2013) were:

(1) As to whether the Special Rapporteur considered resolutions of international and regional organizations as customary international law and State practice **(Iran)**;

(2) The need to reflect upon the contributions of 'separate and dissenting opinions' of international courts and tribunals which also constituted customary international law **(Iran)**;

(3) The concept of *jus cogens* should be separated from the scope of the study **(India and China)**;

(4) That the AALCO Member States have to compile evidence of their State practice and *opinion juris*on the ILC agenda, as well as answer the questions posed by the ILC **(Japan)**;

(5) that the draft conclusions should be reflective of State practices from all principal legal systems of the world and from all regions and should be able to give guidance to international tribunals and practitioners as well as domestic courts and judges **(Malaysia)**;

(6) That the Commission could discuss the relationship between customary international law and treaties, as well as customary international law and general principles of law **(China)**;

(7) That a unified and clear guiding principle might serve the purpose and agreed for striking a balance between certainty and flexibility **(China)**.

The original timeline of work, which has been proposed by the Special Rapporteur Sir Michael Wood, may prove to be a challenging task, mainly because compiling the requisite information from States, regarding questions of State practice and *opinion juris*, and later on analyzing that information is likely to be an arduous and lengthy process.

Mr. Chairman,

In November 2013, the AALCO Secretariat had organised a two-day Workshop, jointly with the National University of Malaysia (UKM) in Bangi-Putrajaya, Malaysia, on selected agenda items of ILC. The Workshop witnessed participation from Member States, academia and students from the Universities in Malaysia. At the AALCO-UKM Workshop, three current members of the ILC reviewed the work of the ILC on three topics. At the Workshop, we had the privilege of listening to the views of three current ILC members - Prof. Shinya Murase, the Special Rapporteur for the topic Protection of Atmosphere; Dr. Hussein Hassouna from Egypt on the topic Protection of Persons in the Event of Disasters; and Mr. Narinder Singh from India on the Immunity of State Officials from Foreign Criminal Jurisdiction.

On behalf of AALCO, I would like to express our sincere gratitude to the three current members of the ILC for their presentation and participation at the Workshop.

Apart from me, the other distinguished speaker for the Workshop was Prof. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law. The Working Sessions were on:

(i) the ILC and its relationship with AALCO,

(ii) Formation and Evidence of Customary International Law/Identification of Customary International Law,

(iii) Protection of Atmosphere,

(iv) Protection of Persons in the Event of Disasters, and

(v) Immunity of State Officials from Foreign Criminal Jurisdiction.

The workshop was very successful, as these two institutions have agreed to host this Workshop annually, and to establish a Working Group to frame views on the agenda item "Formation and Evidence of Customary International Law". The Working Group on the topic "Identification of Customary International Law", as renamed by the Commission, is designed to facilitate the work of the Special Rapporteur Sir Michael Wood and more importantly recall the contributions of Asian-African States in the progressive development of International Law thus unearthing the repository of their contributions in customary international law. It would also be our endeavour to transmit the recommendations of AALCO Member States which includes their state practice and customary practices on various important issues that are raised by the Special Rapporteur.

Mr. Chairman,
AALCO, on its own part, has instituted a Working Group on the Identification of Customary International Law, whose purpose is to provide recommendations on this subject to the Special Rapporteur to be incorporated in the Work of the Commission.

The ultimate Objective of this Working Group is to evince a clear and coherent Asian-African stance that would reflect the custom and practices of AALCO Member States in international law, in order for them to be represented adequately in the work of the Commission. Considering the very short time left to achieve this, it was essential to bring together the best of minds and efforts for this purpose. The Working Group, which consists of several representative legal scholars of AALCO Member States, is scheduled to meet at AALCO's forthcoming Annual Session this year in order to discuss, in particular, the questions pertaining to State Practice and the interaction between Treaties and Customary International Law.

The AALCO Secretariat is currently engaged in preparing a background paper to assist the Working Group in achieving its objectives. This background paper will delve into the topics proposed by the Special Rapporteur for the forthcoming Report, particularly the evidence and identification of State practice and *opinion juris*, as well as the effect of treaties on CIL. The objective of this background paper is to provide a foundation in the existing literature for the use of the Working Group and to inform its recommendations to the ILC.

(i) Protection of Atmosphere

Mr. Chairman,

Allow me to congratulate Prof. ShunyaMurase, the Special Rapporteur for the topic on Protection of Atmosphere on presenting the First Report. The first report lays down **three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3).** There is a majority view that protection of atmosphere is a matter of growing concern for the international community despite being mindful of the ongoing political negotiations on drafting an outcome of legal nature to address commitments under the climate change regime. Some Member States of AALCO have expressed their keen interest (People's Republic of China, Nigeria and Sri Lanka) in this subject, while cautioning that the highly technical nature of this subject may render this exercise futile (Iran).

The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law; sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law are referred to. The concept "atmosphere" is defined in **draft Guideline 1**, which reads thus:

"the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs."

With regard to the definition of atmosphere, the AALCO Secretariat views that this could be elaborated upon by including an 'Explanation' clause to this draft guideline. This explanation could consist of details of the atmospheric layers above the earth, and other gaseous substances forming part of the atmosphere. However, this could be added while elaborating upon the guidelines.

Mr. Chairman,

It is an essential fact that to know the gravity of this subject, reference to the issues such as transboundary air pollution and climate change, is imperative. However, these issues should only be referred to in order to build an 'understanding' of the subject holistically, and should not be intended to be part of substantive discussion. It is also viewed that the principles of international environmental law that have evolved over the years through the judgments of the international courts and tribunals and customary practices of the States, focused on the 'precautionary approach' rather than the 'principle of prevention'. The need of the hour is 'to prevent' any harm to the atmosphere because the impact of atmospheric pollution could be on all levels of human existence. Thus, in order to prevent such disasters, the AALCO Secretariat views that international cooperation, alongside other key principles in international environmental law such as the no-harm principle, principle of equity, sustainable development and common but differentiated responsibility (CBDR) must be the foundations on which this work should progress.

Mr. Chairman,

The reason why these principles stand significant in this topic should be read with the categorisation of '*protection* of atmosphere as a common concern of humankind', which reiterates that the atmosphere is a natural resource, which is common to all, and shared by everyone, that has to be preserved. Due to its link between climate change and transboundary air pollution, the atmosphere is also required to be accorded the legal status of a 'common concern for humankind', which is well-explained in draft guideline 3. Hence, the AALCO Secretariat supports the proposition of the Special Rapporteur and considers draft guideline 3 para 1 on this topic as the core feature of this debate on legal status, which would determine the course of further research on this topic. The guideline reads thus:

"3 (a): The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind;"

Hence, protection of atmosphere is to be legally classified as a "common concern of humankind".

B. Protection of Persons in the Event of Disasters

Mr. Chairman,

At the outset, may I thank the Special Rapporteur for this topic Mr. Eduardo Valencia-Ospina, on presenting the Seventh Report on the "Protection of Persons in the Eventof Disasters". The report highlights the rationale for four draft articles (draft articles 14 *bis*, 17, 18 and 19). ***Draft article 14 bis***deals with the inclusion of *protection of relief personnel, equipment and goods*, which is a welcome measure. The Special Rapporteur explains in detail the need to extend protection to these relief personnel, equipment and goods, foreseeing the event of breakdown of the law and order situation in the affected State during the outbreak of a disaster. It is stated:

"A disaster can lead to a temporary breakdown in law and order in the affected State, thus raising the security threats posed for disaster relief personnel. Besides, the considerable value of equipment and goods belonging to international actors engaged in relief operations represents a tempting target for common criminals".

Taking into view this concern, this additional draft article has been incorporated within draft Article 14, which speaks about the duties of the affected State with regard to the 'facilitation of external assistance'. The categorisation of those relief personnel, equipment and goods that need protection, is in accordance with certain universal, regional, bilateral and non-binding legal instruments dealing with disaster relief. However, the AALCO Member States have been apprehensive about the term 'international organizations', and 'international non-governmental organizations' engaged in relief operations, with respect to their credentials and credibility.

The AALCO Secretariat appreciates the Report, which discusses the most recent and comprehensive treaties adopted at a regional level: (i) the 2005 ASEAN Agreement on Disaster Management and Emergency Response, and (ii) the SAARC Agreement on Rapid Response to Natural Disasters of 2011. The importance has been discussed with respect to ***draft Article 17*** on the "Relationship with Special Rules of International Law" which states that the special rules of international law applicable in disaster situations shall supersede this draft Article in the event of inconsistency. ***Draft Article 18*** is a paramount feature, which deals with "Matters related to disaster situations not regulated by the present draft articles". This provision presupposes that rules of international law shall be the governing rules during disaster situations. Thus, it is evident that the general principles of international law governing respect for sovereignty, territorial integrity and political independence of the affected State, shall be given primacy and shall remain inviolable.

On these notes, the deliberations at the AALCO Annual Session on this agenda item of the ILC, has witnessed the concerns raised by the Asian-African countries, in terms of the need for respect for the territorial integrity and the political independence of the affected States while extending external assistance. It was contended by the Member States during the deliberations, that there was no obligation on the affected State to seek assistance, and even if the affected State sought external assistance, due respect of its territorial integrity and political independence must be accorded.

The proposed draft Article 19 speaks of the relationship and interaction of these draft Articles with the Charter of the United Nations and reads that they are without prejudice to the Charter of the UN.

Mr. Chairman,
I believe that these proposed draft articles shall be deliberated at length at the forthcoming Annual Session and the combined views shall be transmitted to the Commission therafter.

C. Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

During its Sixty-fifth session (2013), the International Law Commission (ILC) continued its consideration of the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" by discussing the second report of the Special Rapporteur, Concepción Escobar Hernández. The Special Rapporteur had indicated that "owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lexlata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de legeferenda*." Further, she intends to maintain the distinction between immunity *rationae personae* (status-based immunity) and immunity *rationaemateriae* (functional immunity).

The second report (2013) proposed six draft articles, which were reworked and consolidated in the course of the sixty-fifth session, resulting in the preliminary adoption of three draft articles.[89] On that note, the Commission requested information from States "on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction.

During the 52nd Annual Session of AALCO (2013), these were the views of the Member States.

The topic must be approached from both lex*lata (*law as it is*)* and *lexferanda (*as it ought to be*)* and that (in his opinion), many states have endorsed the methodological approach adopted in the study which allows extending immunity beyond *Troika.* As regards the question of immunity *rationae personae*, granting immunity only to Heads of States, Heads of Government and Minister of Foreign Affairs, a delegate requested the Commission to take a special mission approach and in his view adopting such an approach had some grounding. He also highlighted the fact that in some judicial practices, some countries have granted immunity *rationae personae* to senior officials of government. He also substantiated this through reference to the ICJ decision given in the *Arrest Warrant*case which had favoured this approach (**Islamic Republic of Iran).**

89. Draft article 1 indicates the intended scope of the draft articles. It provides that the present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State and that the present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. Draft article 3 commences the treatment of immunity ratione personae and addresses which officials should receive such immunity. Draft article 4 addresses the temporal scope of immunity ratione personae and whether it relates to both official and private acts.

Due to their representational capacity of the State, some high-ranking State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika*, were entitled to immunity from criminal jurisdiction of foreign States, Thus, a similar logic could be extended to some other high-level state officials, especially, Ministers of Defence and Ministers of International Trade who also have come to represent States **(India and People's Republic of China)**.

The topic should focus on the immunities accorded under international law, in particular customary international law and not domestic law. With regard to draft Article 2, a delegate stated that criminal immunities granted in the context of diplomatic or consular relations, headquarters agreements or other treaties or similar arrangement should be excluded from the scope of the topic as they are settled areas of law **(Malaysia)**.

With regard to draft Article 3(d), the delegate viewed that all State officials should receive immunity and the word "certain" should be removed. While stating that "Official acts" should also be carefully defined, the delegate pointed out that with regard to Article 4, the sovereign rulers who act as Head of State in addition to the head of Government such as Prime Minister or President should be included under the definition of Heads of State or Heads of Government. With regard to the need to define the term "official" within the larger term "certain State officials", the delegate made the point that he was of the view that all State officials should be covered under the definition of the term "official". **(Malaysia)**

Mr. Chairman,
The AALCO Secretariat is of the view that there is a need to evolve a precise definition of the term "official" which is critical for the Commission. This is critical because this definition would have a great bearing to the definition of "official act" or "act performed in official capacity", the only acts covered by immunity *rationemateriae.* In this regard AALCO looks forward to the Third Report of the Special Rapporteur that would deal with this issue in the context of determining the normative elements of immunity *rationemateriae*.

AALCO also recognizes the fact that times have changed. Today international affairs/foreign affairs are conducted by a wide range of state officials apart from the traditional State officials such as Heads of State, Heads of Government and the Minister of Foreign Affairs whose representative capacity to act at the international level and whose immunity from foreign criminal jurisdiction remains well-anchored under international law[90]. Today's conduct of international affairs, where a wide range of State officials other than the '*troika'* are regularly commissioned to represent their states in international affairs and international fora, does demand that special attention and cautious approach must be given to this issue (of going beyond 'Troika') by the international community.

AALCO also recognizes that international law has not advanced to the point where the scope of immunity *ratione personae* could be understood to include other high-ranking officials per se. Hence, bearing in mind the evolution of international relations, and the fact that States are no longer represented by the "troika" alone, the Commission should explore, through consultation with States, whether such immunity is indeed limited to the "troika" or could it be extended to other senior officials. In any such exercise, a number of factors have to be

90. Indeed it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions. See, Armed Activities on the Territory of the Congo (New application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J.R EP. 6, para.46 (Feb. 3).

taken into account that include the current State practice prevailing in various parts of the world in this area, the judicial opinion emanating from domestic jurisdictions, the opinion of scholars etc. In closing, the question of whether immunity applies only to Heads of State, Heads of Government and Ministers for Foreign Affairs requires further consideration and analysis.

Ladies and Gentlemen,
These topics have been consistently deliberated at AALCO Meetings due to the importance attached to these topics by the Member States. Moreover, AALCO, as always, has regarded the work of the Commission as pertinent and will continue to follow the work of ILC as these agenda items pave the way for the progressive development and codification of international law. On behalf of AALCO, let me assure you that the Organization will continue to cooperate with the Commission bearing in mind the need to reflect the views of AALCO Member States in the field of international law.

I thank you.

ANNEX II: RESOLUTION ON HALF-DAY SPECIAL MEETING ON"SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION"

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

Havingconsidered the Secretariat Document No. AALCO/53/TEHRAN /2014/SD/S 1;

Havingheard 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 Islamic Republic of Iran, International Law Commission (ILC) and AALCO held on 16th September 2014 at Tehran, Islamic Republic of Iran;

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-Third Annual Session, and

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