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On the Topic of

CURRENT CHALLENGES TO THE RULE OF LAW

PRE-FACE TO THE TOPIC

Over forty UN entities today provide rule of law expertise in more than 15 countries, and over 1,300 rule of law organizations have been formed to assist in the establishment of rule of law globally[1]. Despite that, tragedies have been occurring all over the globe, and norms of international law are being violated with impunity, indicating a failure of the international rule of law in many spheres. Establishment of international rule of law has therefore, become the greatest policy challenge of the international community. This challenge is as complex and varied as the components of Rule of Law itself; as different people and entities promoting Rule of Law have different goals in mind.

Due to limitations of time and of the present theme of this lecture, I would like to limit myself to discussing only four broad areas that currently, on an international level, pose the biggest challenges before the States of the Asian and African Continents, in terms of the establishment of international rule of law; which are namely:

a) Violent Extremism and Terrorism;

[1]Akhila Kolisetty, "Book Review: Introduction to the International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward", *Harvard Human Rights Journal* (2014) <http://harvardhrj.com/2015/02/book-review-the-international-rule-of-law-movement-a-crisis-of-legitimacy-and-the-way-forward/ >

b) International Law in Cyberspace;
c) Marine Bio-diversity beyond National Jurisdictions; and
d) Refugee Crisis.

I will now address each of these sub-topics briefly.

I. VIOLENT EXTREMISM AND TERRORISM

In the years 1994 and 1996 the UN General Assembly through Resolutions had made two Declarations pledging to eliminate terrorism through co-operation between nations, namely, a) the **1994** ***Declaration on Measures to Eliminate International Terrorism*** (Resolution 49/60 of 9 December 1994); and b) the **1996** ***Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*** (Resolution 51/210 of 17 December 1996). Subsequently, after more negotiations, in 1996 the General Assembly, in Resolution 51/210 of 17 December finally decided to establish an **Ad Hoc Committee to develop a comprehensive legal framework of conventions dealing with international terrorism**.This mandate has continued to be revised and renewed on an annual basis by the General Assembly through its Resolutions, on the agenda item "Measures to eliminate international terrorism".

The said Ad Hoc Committee negotiated several texts resulting in the adoption of two treaties till now:

a) The ***International Convention for the Suppression of the Financing of Terrorism*** adopted by the General Assembly in Resolution 54/109 of 9 December 1999; and
b) The ***International Convention for the Suppression of Acts of Nuclear Terrorism*** adopted by the General Assembly in Resolution 59/290 of 13 April 2005.

By the end of 2000, work had begun on a **draft comprehensive convention on international terrorism**, and currently the work is continuing under a Working Group established under the Sixth Committee of the General Assembly.

Subsequently, the UNGA adopted another important Resolution 68/127 in this regard, entitled '**A World Against Violence and Violent Extremism**', in 2013, strongly condemning violent extremism in all its forms and manifestations, denouncing sectarian violence, and recognizing the need for a comprehensive approach to countering violent extremism while addressing the

conditions conducive to its spread. Thereafter, the UN Security Council passed **Resolution 2178** on 24 September 2014, stressing on the importance of addressing the threat posed by foreign terrorist fighters and strengthening international cooperation. The last important document in this regard is the Report of the U.N. Secretary General to the UN General Assembly entitled '**Plan of Action to Prevent Violent Extremism**', which I will be explaining in some details now.

ESSENTIAL PRINCIPLES ENUNCIATED BY THE 'PLAN OF ACTION TO PREVENT VIOLENT EXTREMISM'

A. Explaining Violent Extremism

The UN Secretary General, Ban Ki Moon, while presenting his report on "Plan of Action to Prevent Violent Extremism" to the UNGA in 2015 stated that violent extremism is a diverse phenomenon, without a clear definition. It is neither new nor exclusive to any region, nationality or system of belief. Nevertheless, in recent years, terrorist groups such as Islamic State in Iraq and the Levant (ISIL), Al-Qaida and Boko Haram have shaped our image of violent extremism and the debate on how to address this threat. Holding territory and using social media for the global and real-time communication of their ideas and exploits, they have re-shaped our understanding of extremism and international terrorism. Abductions, enslavement of minority populations, arbitrary executions, massacres and acts of terrorism committed with impunity in a State of anarchy are some examples of their modus operandi. These acts patently violate fundamental tenets of international law[2].

Violent Extremism and Terrorism

Elements of 'violent extremism' have been associated with and conceptually linked with acts of terrorism perpetrated by non-State actors. In its Resolution 2178 (2014), the Security Council made explicit the link between violent extremism and terrorism: "violent extremism including radicalization, recruitment and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters can be conducive to terrorism". In that Resolution, the Council "calls upon Member States to enhance efforts to counter this kind of violent extremism", recognizing that "international cooperation and any measures taken by Member States to prevent and combat terrorism must comply fully with the Charter of the United Nations"[3].

[2] UN Secretary General, "Plan of Action to Prevent Violent Extremism", UN Doc. A/70/674 (2015).
[3] S/RES/2178 (2014), operative paragraphs 15 and 18.

At AALCO, there is a view that violent extremism is basically a construct which is intimately connected to the concept of 'radicalization'. Thus, even though violent extremism is a separate conceptual entity from terrorism, and both the notions manifest themselves in different ways; it is because of the essential components of the former such as radicalization, violent extremism has come to be seen as an environmental substrate of terrorism, in the sense that the existence of violent extremism breeds terrorism[4].

B. Modern Approaches Towards Tackling Violent Extremism and Terrorism

It is in sync with the above-mentioned conceptual linkage between violent extremism and terrorism that has shaped the present day approach towards combating the combined effects of violent extremism and terrorism.

The 2015 UN Secretary General's Report on the "Plan of Action to Prevent Violent Extremism"[5] states that the current global strategy to counter violent extremism consists of treading a path beyond the current security-based counter-terrorism approach - and trying to take up measures to prevent violent extremism, by directly addressing the drivers of violent extremism, along with taking up holistic steps such as development and peace-building. The international community now believes that the nuisance of violent extremism can be eliminated only by eliminating its root-causes, and that it cannot be defeated by military actions alone.

The UN Secretary General further noted that curbing and controlling the pathways towards radicalization is a complex task as that there is little uniformity in the processes of radicalization. However, the detailed and continued study of the subject has yielded certain trends and patterns, called 'push' and 'pull' factors. 'Push' factors include deficiencies in societies such as lack of socio-economic opportunities, marginalization and discrimination, poor governance, institutional violations of human rights, prolonged and unresolved conflicts, and radicalization in prisons, which have driven certain people who have suffered these discriminations to tread the extreme paths. 'Pull factors' on the other hand, denote the individual and subjective motivating of people that have led to their radicalization. Most of the times it is the combination of both the above factors that have distorted the beliefs and ideologies of these people, and they have ended up being recruited to such extremist causes. Therefore, a holistic (involving social, economic as well as political measures) approach needs to be taken at the national, regional and international levels, in order to provide a sustainable solution to this notorious menace.

[4] "Violent Extremism and Terrorism (Legal Aspects)", AALCO/55/Headquarters (New Delhi)/2016/SD/S 9, p. 11.
[5] *Supra* note 2.

The Secretary General's recommendations strongly indicate towards the fact that it is the establishment of Rule of Law alone at all levels, that can completely eliminate this great hazard. He recommended that the national plans ought to be developed in a multidisciplinary manner, to include inputs from a wide range of governmental, civil society and private sector actors. The national plans should also promote respect for principles of equality and equal protection under the law and develop effective, accountable and transparent institutions at all levels. Further, national legal frameworks ought to be reformed to enable the effective rehabilitation and re-integration of persons who had been engaged in violent extremism, and also, most importantly, promote religious tolerance through co-operation with religious leaders and education-based and community-driven efforts. However, it is obvious that this will be an impossible task unless other problems in the society, such as poverty, discrimination, gender inequality, corruption, disrespect for human rights, hindrances in economic growth, etc. are tackled together with the core problem of terrorism and violent extremism, in a holistic manner.

ROLE OF INTERNATIONAL HUMANITARIAN LAW IN CURBING TERRORISM

The branch of public international law known as the International humanitarian Law or IHL broadly regulates activity during armed conflict and situations of occupation. Even though it is also known as the law of war and armed conflict, it is distinct from the body of law called *jus ad bellum*, which is enshrined in the UN Charter, and which regulates the conditions under which force may be used, namely in self-defense and pursuant to UN Security Council authorization. The International Committee of the Red Cross (ICRC) defines IHL as a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.[6]

IHL does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered "terrorist" if they were committed in peacetime.

It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. The "**principle of distinction**", as this rule is known, is the cornerstone of IHL. Derived from it are many specific IHL rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks or the use of "human shields". IHL also prohibits hostage taking. **IHL, however, specifically identifies deliberate acts of violence against civilians or civilian objects for the purposes of gaining definite military advantages during times of armed conflicts as** '**war crimes**' instead of '**terrorism**'. Though it **explicitly prohibits acts of terrorism as well - as acts of violence which do not have a definite military advantage, and**

[6] "Advisory Service on International Humanitarian Law", ICRC (2004), <https://www.**icrc**.org/eng/assets/files/other/what_is_**ihl**.pdf>.

the primary purpose of which is to spread terror among the civilian population, during an armed conflict – for example, campaigns of shelling or sniping of civilians in urban areas.

Nevertheless, IHL is only applicable in armed conflicts. And there are parties to an armed conflict, which may be two or more States, States and armed groups or just armed groups. These parties usually have a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL. The equality of rights and obligations under IHL enables all parties to a conflict to know the rules within which they are allowed to operate and to rely on similar conduct by the other side. Examples of armed conflicts are the specific aspects of the fights that were launched against terrorism after the attacks against the United States on 11 September, 2001[7]. **However, much of the ongoing violence taking place in other parts of the world that is usually described as "terrorist" is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology**. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterized as party to any type of armed conflict.

Even though counter-terrorism responses nowadays have blurred the lines between armed conflict and terrorism, it is important to remember the difference in the normative regimes governing armed conflicts and terrorism.[8] **The ICRC states that norms of IHL, as such do not apply to such acts of violence, termed as terrorism.** A crucial difference is that, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while *any* act of violence designated as "terrorist" is always unlawful. There is no such terrorist act that can be exempt from prosecution. Lawful attacks during armed conflicts cannot be termed as "terrorist", as criminalizing lawful attacks would create conflicting obligations at the international level, and would be contrary to the rationale of IHL. **The ICRC states that terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war.**

In terms of law applicable to captured combatants too, in cases of acts of violence termed as terrorism, 'prisoner of war' status would not appertain to such combatants. Their status is to be governed by the domestic law of the detaining States and international human rights law.

The ICRC itself as an institution, however, has a right of humanitarian initiative under the Statutes of the International Red Cross and Red Crescent Movement under which it has access to persons detained on suspicion of terrorist activities. Some of the existing international conventions on terrorism allow these rights to the ICRC[9].

[7] "International Humanitarian Law and Terrorism: Questions and Answers", ICRC (2011) <https://www.icrc.org/eng/resources/documents/faq/**terrorism**-faq-050504.htm>.
[8] "Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", ICRC (2015) <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>.
[9] *Supra* note 7.

There is a general consensus, nonetheless, that norms of IHL as well as the human rights laws do apply to armed non-State actors (ANSAs), acting as one of the parties during the armed conflicts[10]. ANSAs to be governed by norms of IHL, however, have to have the requisite level of organization[11]. The non-international armed conflicts, where there is usually conflict between the State/s on the one hand, and armed group/s on the other, or between armed groups, are regulated by Article Three – common to all the four Geneva Conventions, and Additional Protocol II. Situations of occupation are governed by the Fourth Geneva Convention and Additional Protocol I. ANSAs operate in international armed conflicts as well, which are governed mainly by the four Geneva Conventions and Additional Protocol I. Norms of IHL would apply to "foreign fighters"[12] too, in case if as per the facts on the ground these fighters have a nexus to an ongoing armed conflict[13].

"Combatant status" as well as "prisoner of war status" is, however, not applicable to actors involved in hostilities in non-international armed conflicts. Also, not all conflict situations, termed commonly in the political parlance as the "global war on terror", can be considered to be armed conflicts to be regulated by the norms of IHL. Each of the conflicts has to be assessed as per the ground realities, in order to decipher whether or not the conflict situation in question is an international armed conflict or a non-international armed conflict, over which norms of IHL would accordingly apply[14].

ASIAN-AFRICAN CO-OPERATION IN COMBATING VIOLENT EXTREMISM

The UN Secretary General in his 2015 Report on the plan of action to prevent violent extremism had expressly noted that the spread of violent extremism has especially affected the developing countries, hindering their ability to reach the Millennium Development Goals, as well as hard won developmental progress. Besides rampant spread of crimes of genocide, crimes against humanity and war crimes (especially crimes on women have been on a rise), violent extremism has also led to unprecedented displacement of persons and refugee crises; the brunt of which is largely borne by the developing world.

He further stated that defining the terms "terrorism" and "violent extremism" is the prerogative of Member States. He further therein recommended the strengthening of sub-regional and

[10] "International Humanitarian Law", International Justice Resource Centre <http://www.ijrcenter.org/international-humanitarian-law/ >. See also, ICRC (n 7).
[11] Annyssa Bellal, Giles Giacca, et al., "International Law and Armed Non-State Actors in Afghanistan*",* *International Review of the Red Cross*, 93 (881) (2011), p. 54.
[12] "Foreign fighters" are nationals of one country who travel abroad to fight alongside a non-State armed group in the territory of another State. The phenomenon of "foreign fighters" being involved in hostilities has exponentially increased over the past few years.
[13] *Supra* note 8 at 19.
[14] *Supra* note 10.

regional organizations, monitoring of arms trafficking, intergovernmental communication and cooperation, particularly emphasizing on the exchange of information and the establishment of early warning centers.

Also, during the discussion of the Plan of Action in the UNGA's seventieth session, the one unanimous view was that all Member States must agree on a common strategic approach to fighting violent extremism and terrorism; that they must not lapse into bureaucratic and cyclical practices, but rather demonstrate the political will and commitment to closing ranks and making a determined effort to overcome the challenge.

Therefore, the item entitled "International Terrorism" was placed on the agenda of the AALCO early during its Fortieth Session held in New Delhi from 20-24 June 2001, upon a reference made by the Government of India. It was felt that consideration of this item at AALCO would be useful and relevant in view of the afore-mentioned factors, and in the context of the on-going negotiations on this topic in the Ad Hoc Committee of the United Nations on elaboration of the Comprehensive Convention on International Terrorism. During its Forty-First Annual Session held in Abuja, Nigeria in 2002, AALCO organized a comprehensive Special Meeting on "Human Rights and Combating Terrorism" with the assistance of Office of the High Commissioner for Human Rights (OHCHR). Pursuing the matter further, the AALCO Secretariat has monitored the progress that the UN Ad Hoc Committee on elaboration of the Comprehensive Convention on International Terrorism has made till date, and as an important milestone in its endeavors published a paper in this regard entitled, "A Preliminary Study on the Concept of International Terrorism" in 2006, through its Centre for Research and Training (CRT).

At the Fifty-Fourth Annual Session (2015) held in Beijing, AALCO Member States discussed the scourge of violent extremism and the havoc that this phenomenon is wreaking across Asia, Africa and the Middle East. In particular, violent extremist groups such as ISIL, Boko Haram and Al Qaeda were denounced, along with their activities and other terrorist attacks in Kenya, Pakistan and Somalia. There was consensus among States that measures must be taken at the regional level to enhance cooperation in combating violent extremism and violent extremist groups, in addition to bilateral measures, capacity building and information sharing. To this end, the importance of UN Security Council Resolution 2178 was also emphasized.

Most importantly, pursuant to the POA's discussion in the UNGA's seventieth session, AALCO has formulated a 'Draft Resolution on AALCO Principles and Guidelines to Combat Violent Extremism and Manifestations, 2016, which has been presented before all its Member-States, at its recently concluded 55th Annual Session held in New Delhi, for them to co-operate and work together in this regard.

II. INTERNATIONAL LAW IN CYBERSPACE

A SUITABLE MODEL FOR REGULATION IN CYBERSPACE

From the very inception of internet, there has been a debate over whether there should be regulation or de-regulation within this new field of activity called cyberspace. That is, whether it is possible and feasible to regulate the internet, or whether it is essentially a free place, a virtual terra nullius?[15]

The popular view in the nineties was that the cyberspace should be independent, without any outside regulation. It was stated that not only is it impossible and futile for the State to regulate the internet, but it is also undesirable that the same happens, as the State may face legitimacy problems for the same[16]. It was further, and more importantly stated that the internet must be regulated by what is known as 'self-governance'. That is, cyberspace must be governed not by remote, unaffected national legislators, but by cyberspace users themselves, with the help of 'internet etiquettes' developed and accepted over time by cyberspace participants and business persons[17]. These libertarian claims were subsequently contested both on descriptive as well as normative fronts, by the confronting community, called the traditionalists who believed that it is only the State that is the appropriate regulatory body to manage the internet. These traditionalists, on the other hand, had to deal with other complex issues, which were mainly in connection with conflict of laws.

The result was an approach that is a mixture of national laws and self-community rules. This hybrid regulation, was symbolized at the first instance by the Internet Corporation for Assigned Names and Numbers (ICANN), and was meant to assure legitimacy, flexibility as well as enforceability needed for internet regulation.

ICANN is an international non-profit private body headquartered in California, United States of America (U.S), which controls the domain name system, the distribution of IP addresses, establishment of standards for internet protocols, and the organization of the root-server system[18], and is subject to the U.S jurisdiction and authority.

[15] L.J. Gibbons, "No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace", *Cornell Journal of Law and Public Policy* 6 (1997) at 499.
[16] J.T. Delacourt, "The International Impact of Internet Regulation", *Harv. Int'l. L. J.* 38 (1997).
[17] D.R. Johnson, "Law and Borders – The Rise of Law in Cyberspace" *Stanford L. Rev.* 48 (1996) at 1367.
[18] ICANN is in fact recognized as the final authority on matters of domain names by WIPO (F.C. Mayer, 'The Internet and Public International Law – Worlds Apart?' *EJIL* 12 (2001) at 617).

THE MULTI-STAKEHOLDER MODEL

Ideally speaking, the cyberspace is a Common Heritage of Mankind, and therefore, shouldn't be under the authority and control of any one nation. Therefore, the UN General Assembly in the year 2001, vide its Resolution 56/183, endorsed the holding of the **World Summit on the Information Society (WSIS)** in two phases, in order to set up **a coordinated system for international internet governance** (the Geneva and Tunis phases). **Principle 6** of the **Geneva Declaration of Principles** states that "**The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, and civil society and international organizations**"[19]. One of the most important outcomes of the WSIS was produced during its second phase in 2005 in Tunisia, which was the convening of a new forum for multi-stakeholder policy dialogue, called the **Internet Governance Forum (IGF)**.

The ICANN was initially a unique experiment in novel forms of governance and the representation of the global internet user community. It continues to perform its functions by associating with various stakeholders through a bottom-up, consensus-driven multi-stakeholder model of consultation. This multi-stakeholder model has been taken forward by the WSIS and IGF. However, unlike ICANN that has often come under criticism for its lack of accountability, the IGF operates on the principles of transparency and inclusiveness and seeks to bring together diverse voices and experts in a bottom-up and inclusive fashion to address plethora of challenges in governing the Internet[20].

LATEST DEVELOPMENTS

1) A conspicuous lack of accountability and transparency, and an excessive exercise of influence by the United States on its policy making and administration, and limited influence of other countries, has brought severe criticisms over ICANN, and demands for transfer of its functions to an intergovernmental organization like the International Telecommunications Union (ITU). The ITU Plenipotentiary Conference held recently in 2014 in Busan, Republic of Korea, was expected to produce significant outcomes, in terms of mandating the ITU with greater responsibilities in respect of the above.

[19] Declaration of Principles of the World Summit on the Information Society, Geneva, Paragraph 48.
[20] "International Law in Cyberspace" (AALCO/55/New Delhi (Headquarters)/2016/SD/S17).

However, that failed to materialize due to strong objections mostly from a few developed nations preferring the retention of the existing multi-stakeholder model[21].

The U.S., on the other hand, through its Commerce Department's National Telecommunications and Information Administration (NTIA), in accordance with the decisions taken at the 54th meeting of ICANN in 2015, has indicated that it is ready and prepared to transit key Internet domain name functions to the global multi-stakeholder community (privatization process), by which NTIA's remaining legacy role will end. According to the recent proposals submitted by the ICANN in this regard, ICANN's accountability will be significantly enhanced, and there will be a replacement of NTIA's historic stewardship under the IANA functions contract with direct agreements between the operator of the IANA functions and the customers specifying the terms for performance. Nevertheless, the plan does not replace NTIA's role with a government-led or intergovernmental organization solution.

2) The 10th annual Internet Governance Forum was held from November 10-13, 2015 in João Pessoa, Brazil, with the overarching theme of "Evolution of Internet Governance: Empowering Sustainable Development." The event reportedly succeeded in giving some 4,000 online participants, from 116 developed and developing countries, the opportunity to engage directly with 2,400 on-site attendees in debates that addressed the challenges, as well as opportunities for the future of the Internet. Subsequently, in 2015 itself, the UN General Assembly reviewed the progress of the work of the WSIS, in terms of the goals and objectives with which it was formed (WSIS + 10 Review). The WSIS + 10 Resolution, which was adopted as a result of the review process, is a complex and diplomatically delicate text, covering digital development and establishing a strong link with the 2030 Agenda for Sustainable Development[22]. The outcome represented a positive vision by re-committing to the Tunis Agenda and the principle of a multi-stakeholder model for Internet governance[23]. Further, recognizing the role that the IGF plays, the WSIS+10 Outcome Document renewed its mandate for ten years.

DELIBERATIONS AT AALCO

Due to the various complex challenges which the field of regulation of cyberspace poses, and because of the implications it may have in the continents of Asia and Africa, the People's

[21] Monika Ermert, "ITU Plenipotentiary Conference: Internet Governance Diplomacy on Display" *available at*: http://www.ip-watch.org/2014/11/05/itu-plenipotentiary-conference-internet-governance-diplomacy-on-display/ (Last Visited on Aug 08, 2016).
[22] "Rough Consensus & Ambiguous Compromise in Global Digital Politics", http://www.huffingtonpost.com/entry/rounh-consensus-ambigious_b_8848952.html?section=india (Last Visited on Aug 07, 2016).
[23] UN Doc. A/70/L.33, http://workspace.unpan.org/sites/Internet/Documents/UNPAN95735.pdf, Para 8.

Republic of China at the 53rd Annual Session of AALCO proposed "International Law in Cyberspace" as an agenda item.

Two major issues were identified during the discussions:

a) The first issue is with regards to the usage of the nomenclature, 'cyber warfare' for cyber attacks on the internet, and the question of whether the provisions of International Humanitarian Law (IHL), and other public international law concepts such as *jus ad bellum*, *jus in bello*, and the law of State Responsibility etc. would apply to it.

   To this end the NATO Cooperative Cyber Defense Centre of Excellence (CCDCOE) took the first step by institutionalizing and consolidating the international law applicable to cyber warfare through its Tallinn Manual Process, which it introduced in 2009. The **Tallinn 1.0** was a non-binding academic product, which covered issues of sovereignty, State responsibility, *jus ad bellum*, international humanitarian law and the law of neutrality, in an effort to bring clarity to the complex legal issues surrounding cyber operations[24]. However, it drew criticism for its lack of global representation. The Tallinn Manual 2.0 is on track, and is expected to be far more influential than the previous edition, as besides other additions, its creation process has involved a meeting of International Group of Experts with legal advisers from European, North and Latin American, African, and Asian and Asia-Pacific[25]. Moreover, the United Nations Group of Government Experts (UNGGE) on cyberspace also, in 2013, recognized the applicability of existing international law in cyberspace[26].

b) The second issue is with regards to multilateral versus multi-stakeholder approaches towards the regulation of the internet. The ICANN began the multi-stakeholder approach in regulating the cyberspace, which has been kept alive, and practices related to it evolved by the WSIS and IGF. In the recent WSIS +10 review process under the premises of the UN General Assembly, nations remained divided on the question of whether intergovernmental or multi-stakeholder approach should be the way forward in the matters of governance of the cyberspace[27].

[24] The Tallinn Manual on the International Law Applicable to Cyber Warfare, Cambridge University Press, 2013.
[25] "35 States attend Tallinn Manual Consultations", <https://ccdcoe.org/35-States-attend-tallinn-manual-consultations.html> (Last Visited on Aug 08, 2016).
[26] "Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security", UN Doc. A/68/98, <http://www.un.org/ga/search/view_doc.asp?symbol=A/68/98> .
[27] *See* Press Release, https://www.intgovforum.org/cms/press/igf2015-press/549-final-press-release-igf2015/file (Last Visited on Aug 08, 2016).

In the end the Member-States noted the importance and inevitability of inter-regional processes such as the ICANN and Tallinn Manual 2.0, and hoped to include the participation of Asian-African States in them. And lastly, the forum unanimously stressed on the need to develop a transparent and balanced global mechanism for the governance of the Internet in pursuance of equity and bridging the "digital divide" existing among States.

III. PROTECTION OF MARINE BIO-DIVERSITY BEYOND NATIONAL JURISDICTIONS

MEANING AND SCOPE OF THE TERM 'MARINE BIO-DIVERSITY BEYOND NATIONAL JURISDICTIONS' (MBBNJ)

Biodiversity has been defined by the United Nations Convention on Biodiversity, 1992 (CBD) as 'The variability among living organisms from all sources, including, inter alia [among other things], terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems'[28].

'Marine-Biodiversity'

Marine bio-diversity is a relatively new subject-area that has substantially caught the attention of the international community in recent years, as it comprises of, firstly, vital resources essential for human well-being, and secondly, underpins a wide range of ecosystem services on which life depends. The oceans cover 70% of the planet's surface area, and marine and coastal environments contain diverse habitats that support an abundance of marine life. Life in our seas produces a third of the oxygen that we breathe, offers a valuable source of protein and moderates global climatic change. Moreover, marine fish and invertebrates are among the last sources of wild food on the planet, providing over 2.6 billion people with at least 20% of their average per capita protein intake. And the genetic resources in the oceans and coasts are of great actual interest for present as well as potential commercial uses.

[28]Article 2 of the United Nations Convention on Biodiversity, 1992.

The international community has become increasingly aware of this wide range of services provided by marine ecosystems and of the rich biodiversity of pelagic and benthic ecosystems beyond the limits of national jurisdiction, namely in the high seas and the Area (a term given by the United Nations Convention on the Law of Seas, 1982 (UNCLOS), to the international sea bed); and therefore, has over the past few years been taking steps to regulate the area of marine biodiversity preservation, beyond the national jurisdictions of the States.

'Beyond the Limits of National Jurisdiction'

The term 'beyond the limits of national jurisdiction' implies the **high seas and the Area**, as stated above. According to Article 86 of UNCLOS, which is also widely regarded as the 'Constitution for the Oceans', and which deals with a wide range of issues on ocean affairs, the **high seas** are all parts of the sea that are not included in the exclusive economic zone (EEZ), in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. And according to its Article 1, the **Area** is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

The UNCLOS states that all States enjoy conditional freedoms over the high seas, including freedoms of navigation, fishing and marine scientific research. The high seas freedoms also apply to the Area except as regards deep-sea mining there, which is regulated by the International Seabed Authority (ISA) an international body established under UNCLOS. The regulation of activities on the high seas takes place on the basis of flag State jurisdiction meaning that each State is responsible for regulating the activities of vessels that fly its flag. A different regime of 'State sponsorship' applies to deep-sea mining activities in the Area.

LEGAL REGULATION OF MBBNJ

The UNCLOS, as stated above, recognizes that the freedoms on high seas are conditional. It specifically mentions that fishing and related activities are to be carried on with the precaution that the living resources of the high seas can be conserved and managed. Most importantly, **Article 194 of the UNCLOS**, which now acts as a guiding principle in the international jurisprudence of marine bio-diversity protection beyond national jurisdictions (MBBNJ), states that **the countries have the obligation to take all necessary measures to protect and preserve the marine environment, and simultaneously ensure that the marine activities under their**

jurisdiction or control do not damage the marine environments of other States' jurisdiction, or in the ABNJ[29].

Even though the UNCLOS recognized that principles of marine environmental law must develop in tandem with the general law of the seas; in practice, however, developing a system of environmental protection in areas beyond national jurisdiction (ABNJ) in tandem with the principles of law of the seas as prescribed under UNCLOS is a complex task due to the varying natures of the scales and trajectories of the two regimes. Moreover, recent conservation norms such as environmental impact assessment (EIA), marine protected areas (MPAs), marine spatial planning and development mechanisms, including technology transfer and capacity buildings are concepts that are yet to be fully developed within the UNCLOS regime. Therefore, a separate legal regime to conserve and protect the marine bio-diversity beyond national jurisdictions is underway.

THE GLOBAL ENVIRONMENTAL LAW APPLICABLE TO MBBNJ

Ten years after the adoption of the UNCLOS, when the Rio Declaration was adopted by the United Nations Conference on Environment and Development (UNCED) in 1992, it yet again endorsed Principle 21 of the Stockholm Declaration as well as Article 194 of the UNCLOS, in Principle 2 of the Declaration.

A number of bio-diversity related Conventions are applicable to the MBBNJ.

1) CBD, 1992: The Convention has two broad objectives –

    a) The conservation of biodiversity, and

    b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources

    For our purposes, specifically, Article 5 of the Convention is of special significance. It states that contracting parties are required to co-operate directly or through competent international organizations, in respect of the areas beyond the national jurisdiction, for the conservation and sustainable use of biological diversity. The obligation relating to ABNJ herein, however, falls short of a concrete obligation to sustainably use its components[30].

[29] Paragraph 2 of Article 194 embodies certain principles of Principle 21 of the Stockholm Declaration.
[30] "Marine Biodiversity Beyond National Jurisdiction: An Asian African Perspective" (*The AALCO Secretariat*, New Delhi, 2016), p. 18.

2) The Convention on the Conservation of Migratory Species of Wild Animals, 1979 (CMS): This Convention was designed to cater to many of the sea birds and marine mammals migrating through the ABNJ, and therefore, plays an important role in conserving marine species across the ABNJ.

3) Agreement on the Conservation of Albatross and Petrels (ACAP): Convened under the aegis of the CMS, it mandates State Parties to enhance the conservation status of albatrosses and petrels including the restoring of their habitats.

LACUNAES IN THE EXISTING INTERNATIONAL REGULATORY REGIME

As is already clear from the previous parts of the lecture, a number of principles and rules exist in a range of international instruments that can be applied to the conservation and sustainable use of marine bio-diversity. However, when viewed together they reflect a disjunctive and fragmentary approach to the aim of conservation and sustainable use of marine biodiversity in ABNJ. Further, variable compliance standards among flag States on marine pollution obligations, and the lack of monitoring and enforcement in the ABNJ, compound the obstacles to achieve an integrated system for the conservation and sustainable use of marine biodiversity[31].

GLOBAL INITIATIVES TAKEN TO REGULATE THE MBBNJ

In order to address the aforementioned gaps in the current institutional framework that tries to conserve and make sustainable use of MBBNJ, a number of global and regional initiatives have been in addition been undertaken. The thrust behind considering new approaches for the strengthening of the legal and institutional regime for the conservation and sustainable use of marine bio-diversity had its genesis in the **United Nations Informal Consultative Process**

[31] Robin M. Warner, "Conserving Marine Bio-diversity in Areas beyond National Jurisdiction: Co-evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude et al.,*The Oxford Handbook of the Law of the Sea* (OUP Mar, 2015), p. 769.

on Oceans and the Law of the Sea (UNICPOLOS), which was formed in 1999, and which has facilitated a large range of discourses related to this topic since then.

a) The BBNJ Working Group

The most important of the international efforts in this regard is the 'Bio-Diversity beyond National Jurisdiction' Working Group (BBNJ Working Group), established by the United Nations General assembly in 2004, after taking into consideration the recommendations made at the fifth meeting of the UNICPOLOS in 2004.

A set of universal principles have underpinned the discourse within the BBNJ Working Group. These include the precautionary and ecosystem approaches, and a prior Environment Impact Assessment (EIA) to be followed as a mandatory obligation[32].

Specifically, destructive fishing practices have been marked out as the single largest threat to conserving MBBNJ. States have expressed an urgent desire to outlaw these practices through institutional frameworks like the IUU and the FAO. However, there has been a lack of consensus between States throughout the meetings of the BBNJ Working Group on the determination of legal status, access, and benefit sharing of the marine genetic resources in the ABNJ; in the sense that there is a broad consensus on the principles governing the use of such resources, but no agreement on the legal and institutional framework for the enforcement of those principles.

b) The CBD Initiatives on the Conservation and Sustainable Use of MBBNJ

The CBD has promulgated multiple processes to lay down a broad framework for the protection of marine bio-diversity; by particularly laying down criteria for the identification and description of 'Ecologically or Biologically Significant Areas' (EBSAs) in need of protection in open ocean waters and deep sea habitats.

In 2008, the 9th Meeting of the Conference of Parties (COP 9) of the CBD adopted certain criteria for identifying EBSAs like uniqueness/rarity, biological productivity, biological diversity, naturalness, etc. The 10th CBD COP in 2010 agreed on conducting workshops to determine descriptions of EBSAs. These workshops have been largely successful.[33].

[32] "Report of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction", UN Doc A/63/79 (2008), Annex I.

[33]"Report of the Eleventh Meeting of the Conference of the Prties to the Convention on Biological Diversity", UNEP/CBD/COP/11/35 (2012), Annex- Decision XI/17.

In its Resolution 69/292 of 19th June, 2015 the UN General Assembly decided to create an international legally binding instrument under the UNCLOS for the conservation and sustainable use of MBBNJ. A Preparatory Committee established by the UN General Assembly for this purpose is currently carrying out this task, following the recommendations made by the 'Ad Hoc Open Ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction', in this regard.

CONTRIBUTION OF AALCO

AALCO had played a significant role in the formation of UNCLOS, as has mentioned by me in the previous lectures. It believes that the Asian-African States can also play a key role in the shaping of the international regime to regulate and preserve the MBBNJ. Therefore, as per the mandate directed to the AALCO Secretariat at its 54th Annual Session in 2015 to undertake a comprehensive and concise study in this regard, so that the Member-States may be apprised of the legal issues pertaining to this area, AALCO published a study entitled "Marine Biodiversity beyond National Jurisdiction: An Asian African Perspective" in 2016.

IV. REFUGEE CRISIS

The international system of refugee protection fundamentally consists of the Office of the United Nations High Commissioner for Refugees (UNHCR), which was created in 1950, the United Nations Convention relating to the Status of Refugees (The 1951 Refugee Convention), which was adopted in 1951, and the Additional Protocol that was added to the 1951 Convention in 1967, removing its temporal and geographical limitations. Although related to the Convention, the Protocol is an independent instrument, accession to which is not limited to States parties to the Convention.

The 1951 Convention is basically a post-Second World War instrument, originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. The Convention sets out the rights and obligations pertaining to people who have been obliged to leave their own country and are in need of international protection because of a 'well-founded fear of persecution' on account of their 'race, religion, nationality, membership of a particular social group or political opinion.'[34] The Convention, however, does not apply to all the persons

[34] Article 1 of 'The 1951 Convention Relating to the Status of Refugees'.

as mentioned above under all circumstances. That is to say, the Convention will not apply to them when there are serious reasons for considering that they have committed war crimes or crimes against humanity, serious non-political crimes, or are guilty of acts contrary to the purposes and principles of the United Nations. The Convention also does not apply to those refugees who benefit from the protection or assistance of a United Nations agency other than UNHCR, such as refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Nor does the Convention apply to those refugees who have a status equivalent to nationals in their country of asylum.

The UNHCR, on the other hand, is tasked with promoting international instruments (including the Refugee Convention), and supervising their application for the protection of refugees. The UNHCR fulfills this task by co-operating with States in the exercise of its functions.

It is important to note that the Convention is both a status and rights-based instrument and is underpinned by some fundamental principles, namely, a) **non-discrimination**, b) **non-penalization** and c) ***non-refoulement***.

a) Non-Discrimination Principle

The Convention provisions are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination.

b) Non-Penalization Principle

According to the Convention, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules. Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum.

c) *Non-Refoulment* Principle

The principle of *non-refoulement* entails that no one shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. The principle is so fundamental that no reservations or derogations may be made to it (claimed by some as a norm of *Jus Cogens* under international law).

Finally, the Convention lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favorable treatment. Such rights include access to the courts, to primary education, to work, and the provision for documentation, including a refugee travel document in passport form[35].

DRAWBACKS OF THE 1951 CONVENTION

One of the major criticisms that the Convention continues to face is in relation to its narrow definition of the term 'refugee'. Even the 1967 Protocol could not extend the definition beyond the Convention's traditional and outdated criteria of race, religion, rationality, social group or political opinion. International Refugee Organization's (IRO) (predecessor of the 1951 Convention on Refugees) criteria to determine refugees was to the contrary much broader, and included two broad conditions:

a) that the asylum seeker must have lost the protection of his country, and
b) that he must not have alternative nationality.

The regional refugee Conventions after the 1951 Convention, such as the OAU of 1969, or the Cartagena Declaration of Latin America of 1984 also extended the definition of refugee to accommodate the realities of displacement.

The 1951 Convention, which is by and large a cold war relic, continues to be the major legally binding international instrument that provides specific protection to refugees. In recent years assertions that the 1951 Convention is outdated have become more commonplace than ever before. Whereas, there is no denying that the 1951 Convention symbolizes a staggering achievement, which marks the realization of the human right to asylum in cosmopolitan law; however, the Convention is neither any longer fit for purpose it was created, nor universally accepted. It is a widely held view today that the Convention is not working for the Non-western States who were excluded from the original institutionalization of international refugee management and who now deal with the majority of the world's refugees[36].

[35] "Introductory Note by United Nations High Commissioner for Refugees: Convention and Protocol Relating to the Status of Refugees", Geneva, 2010 available at: www.**unhcr**.org/protect/PROTECTION/3b66c2aa10.pdf (Last Visited on Aug 8, 2016).
[36] Lucy Mayblin, "Historically European, Morally Universal? The 1951 Geneva Convention on the Status of Refugees" (2010), *available at*: http://www.e-ir.info/2010/03/28/historically-european-morally-universal-the-1951-geneva-convention-on-the-status-of-refugees/ (Visited on Mar 13, 2015).

The refugee protection system is significantly weakened by its less than universal application. By 2015, a total of 148 countries have ratified the 1951 Convention and/or its 1967 Protocol[37]; however, more than 40 per cent of refugees under UNHCR's mandate are hosted by States that had not acceded to the instruments. The refugee treatments in States differ from full entitlements and enjoyment of social and economic rights, to strict limitations upon these rights, including long-term encampment, and detention intended as a deterrent. Violations of the Convention range from denial or failure to uphold refugees' socio-economic rights to egregious acts of *refoulement*. It must be noted here that the principle of non-*refoulement*, which protects people from being returned to the frontiers of a country where they would be placed at risk on account of their race, religion, nationality, membership of a particular social group or political opinion is today well-placed as a principle of customary international law, and therefore, binding on all States, whether or not signatory to the '51 Convention. In spite of this it has been openly contravened frequently. When States do not accede to the Refugee Convention, or fail to live up to their obligations under it or enter reservations to the text, the potential for a system of mutual understanding and collaboration is weakened[38].

On the 50th Anniversary of the '51 Convention in the year 2001, the UNHCR Standing Committee proposed a series of consultations with States and other interested parties to explore the meaning and content of this regime. This process was known as the Global Consultations on International Protection. Next, in 2002 'Convention plus Initiative' was launched to formulate a normative framework for burden sharing between States in hosting and managing refugees. It is hard to say, however, that the Initiative met its objectives.

ASIAN-AFRICAN PERSPECTIVES

Due to the aforementioned gaps in the international law in refugee protection, the Asian and African regions have been working towards a regional solution to the refugee problem, as a substantial part of this problem originates from and has to be dealt within broadly these two regions.

According to former UNHCR Deputy High Commissioner for Refugees, Alexander Aleinikoff, as many as eighty percent of the world's displaced come from and are cared for in developing countries. Economic situations exacerbate the refugee problems, complicating the settlement and resettlement procedures. AALCO, being the oldest and the largest body representing the two largely developing regions of Asia and Africa, has been associated with this subject since 1964, when the topic was introduced in its agenda at the behest of its Member State, Arab Republic of

[37] States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 protocol, UNHCR, *available at*: http://www.unhcr.org/protection/basic/3b73b0d63/States-parties-1951-convention-its-1967-protocol.html?query=States%20parties%20to%20the%20Convention (Last Visited on Aug 09, 2016).
[38] Joan Fitzpatrick, "Revitalizing the 1951 Convention" *Harvard Human Rights Journal* (1996).

Egypt. AALCO has been keenly involved in this area and has made distinguished contributions in the field, which are listed below as follows:

a) Adoption of the "Principles Concerning the Treatment of Refugees" in 1966 at its Eighth Annual Session, which are commonly known as 'Bangkok Principles'.
b) Improving upon the Bangkok Principles an addendum was adopted in 1970 at AALCO's Eleventh Session held in Accra, containing an elaboration of the 'right to return' of any person who, because of foreign domination, external aggression or occupation, has left his/her habitual place of residence.
c) Another addendum was added to the Bangkok Principles in 1987 at the Twenty-Sixth Session held in Bangkok, when the 'Burden Sharing Principles' were adopted.
d) In the year 2001 a revised text of the Bangkok Principles was adopted.
e) It adopted "A Framework for the Establishment of a Safety Zone for Displaced Persons in Their Country of Origin" in 1995. It pertains to an area within a Country to which Internally Displaced Persons (IDPs) and prospective refugees can flee to secure assistance and protection. It incorporates some twenty principles that provide for: the aim of the establishment of safety zone; the conditions for establishment; the supervision and management of the zone; the duties of the Government and of the conflicting parties involved; and the rights and duties of the displaced persons.
f) After being so mandated at one of its Annual Sessions, it submitted "A Model Legislation on the Status and Treatment of Refugees" to its Thirty- Fourth Annual Session held at Doha in 1995. The draft emphasized the need to provide for the rights and duties of refugees; rules for the determination of refugee status; mechanisms to address the refugee exodus etc.
g) A special study was undertaken along with UNHCR on "The Problem of Statelessness: An Overview from the African Asian and Middle Eastern Perspective", which was released during the Forty-Sixth Annual Session that took place at Cape Town, Republic of South Africa in 2007.

CONCLUSION

The four broad areas discussed in this lecture are areas where international law is lagging behind the actual developments that have, and are continually taking place practically. These areas are also such which as of date are the most crucial for the regions of Asian-African continents, as has been mentioned above in the lecture. Therefore, my suggestion is that the attention of the

international community needs to be drawn towards these areas, through more deliberations and consensus-building between nations of these two regions; as not only are they of a critical concern to these two regions of Asia and Africa in particular, but also because our views need to be concretely represented, when the international law in these areas takes a final shape.