



**STATEMENT DELIVERED BY H. E. PROF. DR. KENNEDY GASTORN,  
SECRETARY-GENERAL OF AALCO AT THE SECOND PART OF THE SIXTY-  
NINTH SESSION OF THE INTERNATIONAL LAW COMMISSION ON  
19<sup>TH</sup> JULY 2017**

Mr. Georg Nolte, the Chairman of the International Law Commission (ILC),  
Distinguished Members of the ILC,  
Ladies and Gentlemen,

At the outset, I would like to thank you for inviting AALCO to take part each year in your sessions. I would also like to congratulate you, Mr. Chairman and the distinguished Members of your Commission for your election last year in November.

It is indeed my privilege as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO or the Organization) to represent the Organization at this Session of the International Law Commission (ILC or the Commission). This is my first time to represent AALCO at the ILC session as I started my term of office on 15 August 2016.

AALCO fully recognizes the immense contribution that the ILC has made, in pursuance of its mandate, to the progressive development and codification of the international law, during the past seventy years or so. This recognition, along with the need to have an enhanced and continued cooperation between our two Organizations, was expressed by many Member States at the recently held Fifty-Sixth Annual Session of AALCO at Nairobi in May 2017. I am honoured to be invited to address this distinguished gathering of legal luminaries.

Mr. Chairman,

Let me take this opportunity to make few initial remarks about AALCO before I start dealing with the most important part of my presentation, which is the summary of the views of the Member States of AALCO on some selected agenda items of ILC articulated at the Fifty-Sixth Annual Session of AALCO held in May 2017.

AALCO is an intergovernmental organization working in the field of international law trying to articulate the legal concerns of its Member States which hail from Asia and Africa. At the time of its establishment in 1956, it had only seven Members and was intended to be a non-permanent committee for a term of five years. Its five-year term was extended on four occasions and it was made permanent in 1981. Over the years the membership of AALCO has grown to include 47 States from Asia and Africa. It now occupies an important position in the international legal community, both as an advisory body to its member States and as an essential mechanism for interregional co-operation and the exchange of information and views on matters with an international legal dimension. As a forum that has immense significance for the solidarity and interests of (primarily) the developing countries of Asia and Africa, AALCO has played a phenomenal role towards the emergence and concretization of a number of alternative ideas and practices in the field of international law reflecting the particular concerns of the developing world. It will continue to do so in the years to come as well.

Mr. Chairman,

As you are aware, one of the functions assigned to the Asian-African Legal Consultative Organization (AALCO) under its Statute is to study the subjects which are under the consideration of the Commission and thereafter forward the views of the Member States on them to the Commission. Fulfillment of this mandate set forth in the Statute has enabled to forge a close relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact

that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States. In view of the importance that the agenda items of ILC hold for the Asian-African States, considerable time is spent in discussing them at the Annual Sessions of AALCO.

At the Fifty-Sixth Annual Session, a Half-Day Special Meeting on “Some Selected Items on the Agenda of the International Law Commission” had been convened focusing on three specific agenda items found in the agenda of ILC, namely

- *Protection of Atmosphere;*
- *Jus cogens; and*
- *Immunity of State Officials from Foreign Criminal Jurisdiction.*

In the following pages, the inputs/opinions of AALCO Member States on these agenda items of ILC as revealed at the Fifty-Sixth Annual Session would be reflected.

First let me deal with the topic of Protection of Atmosphere.

### **Protection of Atmosphere**

As regards the topic “*Protection of the Atmosphere*”, in their deliberations on this topic at the Fifty-Sixth Session, the Member States of AALCO were requested to focus, among others, on the five new draft guidelines—draft guidelines 3, 4, 5, 6, and 7— that were adopted. Particularly, on draft guideline 3, which asserts the obligation of States to protect the atmosphere and draft guideline 5(a) that talks about the obligation of States to cooperate for the protection of the atmosphere.

### **Comments of AALCO Member States**

With respect to the topic of “Protection of Atmosphere” *many* delegations commended the work of Special Rapporteur, Prof. Shinya Murase and the Draft Guidelines adopted on the topic. They all acknowledged the importance of the

topic as representing a compelling issue being faced by the international community as a whole.

*Many delegations* brought attention to the question of “interrelationship” that this topic has with other fields of international law (like international trade and investment law, the law of the sea and human rights law), as discussed in his Fourth Report this year, and also scientific and technical considerations.<sup>1</sup> In this regard *one delegation* welcomed the decision of the Special Rapporteur to deal with the question of the interrelation of the law of the atmosphere with other fields of international law.<sup>2</sup> It was also added by the delegation that it assumed relevance in view of the entry into force of the Paris Agreement in November 2016. *Another delegation* noted that the effective protection of the atmosphere relied heavily upon scientific knowledge and in this regard, welcomed and encouraged the collaboration among scientists in this field as well as the development of regional and international mechanisms to support developing countries in terms of enhancing exchange of information and joint monitoring.<sup>3</sup>

*Some delegations* were of the considered view that ILC needs to take into account the special circumstances and real needs of the developing countries in dealing with this topic.<sup>4</sup> *One delegation* went on to add that doing so would be in consistent with other international instruments on protection of the environment such as the 1972 Stockholm Declaration, the 1992 Rio Declaration, and the 2015 Paris Agreement.<sup>5</sup>

A view was expressed that the adopted draft guidelines basically complied with the condition of understanding set by the Commission in 2013 and reflected fairly objectively the outcome of relevant studies on this issue. *The delegation* also expressed hope that the Commission will study more international practices under regional mechanisms in a comprehensive manner and continue its firm-footed effort to push ahead the work relating to the topic.<sup>6</sup>

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<sup>1</sup>I.R.Iran, P.R.China and VietNam, Fifty-Sixth Annual Session 2017.

<sup>2</sup>I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>3</sup>VietNam, Fifty-Sixth Annual Session 2017.

<sup>4</sup>P.R.China and VietNam, Fifty-Sixth Annual Session 2017

<sup>5</sup> Vietnam, Fifty-Sixth Annual Session 2017.

<sup>6</sup>P.R.China, Fifty-Sixth Annual Session 2017.

It was mentioned by *a delegation* that the task of the Special Rapporteur on this topic since the beginning, was neither aimed at filling all the existing gaps in the legal framework regulating protection of the atmosphere nor at providing a descriptive list of the existing principles of international environmental law.<sup>7</sup> The delegation went on to add that the work of the ILC has apparently attempted to strike a balance between the two, and that the final outcome on the work needed to properly reflect such a balance.

*Delegations* spoke on draft guideline 3 that stipulates an obligation to protect the atmosphere. *One delegation* recognized the importance of the obligation to protect the atmosphere through the effective prevention, reduction, or control of atmospheric pollution and degradation as stated under Guideline 3 and underlined the significance of the inclusion of environmental impact assessments in the domestic systems of States which helps ensure that proposed activities under their jurisdiction are in conformity with international standards.<sup>8</sup> *Another delegation* appreciated the Commission for undertaking analysis and precise discussion of the differentiated obligations related to the transboundary atmospheric pollution, as well as obligations related to global atmospheric degradation.<sup>9</sup>

A view was expressed that given the fact that the Paris Agreement of 2015 recalled the concept of the “common concern of humankind” in its Preambular Paragraph, the ILC should re-consider the 3<sup>rd</sup> Preambular paragraph of Draft Guidelines in the future sessions of the Commission.<sup>10</sup>

### **Jus Cogens**

As regards the topic “*Jus cogens*”, the Commission had before it in 2016, the First Report of the Special Rapporteur which addressed conceptual issues relating to peremptory norms (*Jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in

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<sup>7</sup> I.R.Iran, Fifty-Sixth Annual Session 2017

<sup>8</sup> Vietnam, Fifty-Sixth Annual Session 2017.

<sup>9</sup> Japan, Fifty-Sixth Annual Session 2017.

<sup>10</sup> Japan, Fifty-Sixth Annual Session 2017.

international law of the elements central to the concept of peremptory norms of global international law. The report further raised a number of methodological issues on which the Commission was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015. The Commission subsequently decided to refer draft conclusions 1 and 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft conclusions 1 and 2 provisionally adopted by the Committee, which was submitted to the Commission for information.

In their deliberations on this topic, the Member States of AALCO were requested to focus on few areas of critical importance: draft conclusions 1, 2 and 3 proposed by the Special Rapporteur. While draft conclusion 1 and 2 deal with the identification and legal effects of peremptory norms of general international law and the modification, derogation and abrogation of rules of international law, respectively, draft conclusion 3 is on the General nature of *Jus cogens* norms.

### **Comments of the Member States**

With respect to the topic of “*Jus Cogens*”, many delegations appreciated the work of Special Rapporteur, Prof. Dire Tladi and his first report on the topic. They all acknowledged the importance of the topic and expressed optimism that the work of ILC on this issue would contribute to an enhanced understanding of the concept and its normative features given the fact that there exists no clarity on its definition, constituent features and process of development and also because of the fact that elements of *Jus cogens* concerned major interests of all States whose rights, obligations and responsibilities are directly affected.<sup>11</sup>

With regard to the question of the identification of *Jus cogens*, a variety of views were expressed. *Few Delegations* pointed out the inherently difficult nature of determining the criteria for identifying *Jus cogens* norms.<sup>12</sup> A view was expressed that to identify *Jus cogens*, a comparative analysis of State Practice and

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<sup>11</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>12</sup> Japan, I.R. Iran, Fifty-Sixth Annual Session 2017.

judicial decisions is required.<sup>13</sup> It was suggested that the ILC clarify the implications of the basic elements of *Jus cogens* based on stock-taking of State practices and further elaborate on the relationship between *Jus cogens*, UN Charter as well as relevant UNSC resolutions.<sup>14</sup> Another view was expressed that the Special Rapporteur could focus on clarification of the scope and meaning of the two criteria defined by Article 53 of the Vienna Convention on Law of Treaties, 1969, namely acceptance and recognition of the norm by the international community of States as a whole and its non-derogability.<sup>15</sup>

As regards the methodology of the work of the Commission on the topic, *few Delegations* stated that it would not be prudent for the ILC to draw up a list of *Jus cogens* norms<sup>16</sup> and that it could be indecisive and changed only by a subsequent norm of general international law having the same character.<sup>17</sup> It was suggested that a more recommendable approach would be to collect and study State practice in this regard and based on that the Commission could clarify the specific criteria of *Jus cogens*.<sup>18</sup> A view was expressed that norms which ensure and consolidate the international public order do have the character of *Jus cogens*.<sup>19</sup> It was also pointed out that work on this topic should focus on codifying existing laws rather than developing new rules.<sup>20</sup> It was also considered desirable that the ILC analyze in detail the practice of this concept and then proceed to elucidate its substantial character.<sup>21</sup> A *delegation* supported the view of the Special Rapporteur that the draft conclusions would be the appropriate outcome on the topic.<sup>22</sup>

A view was also expressed that given the fact that the three “core elements” of *Jus cogens* as proposed by the Special Rapporteur differ from the basic elements defined in the VCLT 1969, there is a need to address few questions such as: is there a need for adding new core elements?; what is the basis of such addition; and

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<sup>13</sup> Rep.of Korea, Fifty-Sixth Annual Session 2017.

<sup>14</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>15</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>16</sup> I.R.Iran, P.R.China, Fifty-Sixth Annual Session 2017.

<sup>17</sup> I.R. Iran, Fifty-Sixth Annual Session 2017.

<sup>18</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>19</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>20</sup> P.R. China, Fifty-Sixth Annual Session 2017.

<sup>21</sup> Japan, Fifty-Sixth Annual Session 2017.

<sup>22</sup> India, Fifty-Sixth Annual Session 2017.

what implications would they have.<sup>23</sup> In this regard the delegate concerned also stated that the deliberations on this topic should be strictly in line with the Article 53 of the VCLT, 1969.

*One Delegation* brought attention to his Country's domestic law on treaties and pointed out that the law, which had been adopted in 2005 and revised last year, did recognize *Jus cogens* as a principle to be adhered to in the course of negotiating and entering into international treaties.<sup>24</sup>

Commenting on draft conclusion 7 that uses the phrase “international community of States as a whole,” a concern was expressed that the Special Rapporteur has ignored the relevance of “principal legal systems of the world” (in this provision) that would ensure fair geographical distribution. It was also added that lack of acceptance and recognition by a single State will be irrelevant if all principal legal systems describe a norm as a norm of *Jus cogens*.<sup>25</sup> It was also hoped by the delegation that the Special Rapporteur will cover the consequences of breach of a *Jus cogens* norm particularly in the light of Article 41 of the ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts, in his future work.<sup>26</sup>

*A Delegation* also encouraged the ILC to undertake further study to clarify the existence of regional *Jus cogens* and the effect of persistent objection in regards to *Jus cogens*.<sup>27</sup>

It should be noted that, the Special Rapporteur had released the Second report on subject in March 2017. The Second report is dedicated to the rules for identifying of norms of *jus cogens*, including the question of the sources of *jus cogens*, “that is, whether *jus cogens* emanate from treaty law, customary international law, general principles of law or other sources. In the light of the debate that took place in the Commission during the sixty-eighth session, the Special Rapporteur has proposed that the Commission change the name of the

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<sup>23</sup> P.R.China, Sixth Annual Session 2017.

<sup>24</sup> VietNam, Fifty-Sixth Annual Session 2017.

<sup>25</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>26</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>27</sup> VietNam, Fifty-Sixth Annual Session 2017.



topic from “*Jus cogens*” to “Peremptory norms of international law (*Jus cogens*)”. Furthermore, the Special Rapporteur has also proposed six draft conclusions in this report.

Draft conclusion 4 that talks about the criteria of *Jus cogens*, provides that in order for a norm on international law to be considered a *Jus cogens*, it needs to meet two criterion; namely that it must be a norm of general international law and that it must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.<sup>28</sup> This understanding is in accordance with Article 53 of the Vienna Convention on Law of Treaties which establishes the concept of *Jus cogens* in international law.

Draft conclusion 5 is on *Jus cogens* norms as norms of general international law. It provides that; a norm of general international law is one which has a general scope of application; that customary international law is the most common basis for the formation of *jus cogens* norms; that general principles of law within the meaning of Article 38(1)(c) of the Statute of the ICJ can also serve as the basis for *jus cogens* norms of international law; and that a treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.<sup>29</sup> With regard to this conclusion a point needed to be noted: the customary international law basis for the formation of *Jus cogens* is appealing; but it also raises a critical issue; while the latter is binding on all States, the former does permit the persistent objectors to remain unbound.

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<sup>28</sup>**Draft conclusion 4 Criteria for *jus cogens***

To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

- (a) It must be a norm of general international law; and
- (b) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

<sup>29</sup>**Draft conclusion 5 *Jus cogens* norms as norms of general international law**

1. A norm of general international law is one which has a general scope of application.
2. Customary international law is the most common basis for the formation of *jus cogens* norms of international law.
3. General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.
4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

Draft conclusion 6 that talks about acceptance and recognition as a criterion for the identification of *jus cogens* provides that a norm of general international law is identified as *jus cogens* when it is accepted and recognized as a norm from which no derogation is permitted and that this requirement requires an assessment of the opinion of the international community of States as a whole.<sup>30</sup> The existence of a higher category of norms which are of fundamental value to the international community as a whole has also been recognized in the jurisprudence of international courts.

Draft conclusion 7 is on the concept of international community of States as a whole.<sup>31</sup> It says that norms need to be accepted and recognized by the international community of States as a whole to be able to become norms of *Jus cogens*. This proposition appears uncontroversial as Article 53 of the VCLT indicates that the international community of States as a whole is the author of *Jus cogens* because the whole of the international community of States is the presumptive organ that provides voice and substance to public order norms in international law. This Draft conclusion also provides that though the attitude of non-State actors are also considered to be relevant, it rightly points out that these could not, of themselves constitute acceptance of the same by the international community. More importantly, it also rightly mentions that acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens* ruling out unanimity. However, what perhaps could have been added here is a reference to the major/principal legal systems of the world.

Draft conclusion 8 that talks about acceptance and recognition as a criterion, provides that it differs from acceptance as law for the purposes of identification of

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<sup>30</sup>**Draft conclusion 6 Acceptance and recognition as a criterion for the identification of *jus cogens***

1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.

2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

<sup>31</sup>**Draft conclusion 7 International community of States as a whole**

1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.

2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.

3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

customary international law and also from the general principles of law within the meaning of Article 38(1) (c) of the Statute of the ICJ. It goes on to add the non-derogable nature of the norms of *Jus cogens* (from being merely accepted as being law).<sup>32</sup> The non-derogable nature of *Jus cogens* is critical for there could be norms that are universally accepted without their having become *Jus cogens* norms (for example, the sanctity of diplomatic mail).

Draft conclusion 9 is on the evidence of acceptance and recognition.<sup>33</sup> It provides that this can be reflected in a variety of materials and can take various forms. Specifically, a host of materials have been identified as may be providing evidence of acceptance and recognition: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

One needs to point out here that true, resolutions adopted by international organizations could be used as evidence. But it does not identify other related issues that beg question: Can simple statements of a state be treated as sufficient to provide a basis for *Jus cogens* status for it is not certain that in a concrete situation the state would necessarily act the same way. What sort of terminology would support a view in favour of *Jus cogens* status? What significance should be placed in the voting record on a resolution? What weight should be given to comments

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<sup>32</sup>**Draft conclusion 8 Acceptance and recognition**

1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.

2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

<sup>33</sup>**Draft conclusion 9 Evidence of acceptance and recognition**

1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.

2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a *jus cogens* norm of international law.

4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials.

made in the preceding debate? What significance should be given to comments made by states in other venues? How significant is the time period over which a particular position is maintained? These questions need further elaboration.

The Draft conclusion also rightly says that judgments and decisions of international courts and tribunals could serve as evidence of acceptance and recognition of *Jus cogens* norms of international law. In practice, Courts and tribunals have been instrumental to the recognition of peremptory norms in their adjudicative capacity. For example the ICJ has identified most peremptory norms either explicitly or by reference to obligations *erga omnes* deriving therefrom including the prohibitions of slavery,<sup>34</sup> war crimes,<sup>35</sup> crimes against humanity,<sup>36</sup> aggression,<sup>37</sup> genocide<sup>38</sup> and torture.<sup>39</sup> The draft conclusion also adds that other materials, such as the work of the ILC, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted.

### **Immunity of State Officials from Foreign Criminal Jurisdiction**

As regards the topic “*Immunity of State officials from foreign criminal jurisdiction*”, the Commission had before it the Fifth Report of the Special Rapporteur which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Since at the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations, the debate in the Commission was commenced, involving members wishing to comment on the Fifth Report at the Sixty-Eighth session, and would be continued at the sixty-ninth session of the

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<sup>34</sup> Jurisdictional immunities of the State (Germany Vs Italy : Greece Intervening), Judgement ICJ reports 2012, p.99, para 93. Barcelona Traction, Light and Power Company Limited (Belgium Vs Spain), Judgement ICJ reports 1970, p.3, paras 33-34.

<sup>35</sup> Jurisdictional immunities of the State (Germany Vs Italy: Greece Intervening), Judgement ICJ reports 2012, p.99, para 95. Legal Consequences of the Construction of a Wall in OPT, Advisory opinion, ICJ reports, 2004, p.136, para 157.

<sup>36</sup> Jurisdictional immunities of the State (Germany Vs Italy: Greece Intervening), Judgement ICJ reports 2012, p.99, para 95.

<sup>37</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Reports 2010, p.403, para. 81.

<sup>38</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina Vs Serbia and Montenegro), Judgement ICJ reports 2007, p.43, para 161.

<sup>39</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium Vs Senegal) Judgement, ICJ reports 2012, p.422, para 99.

Commission. Upon its consideration of the report of the Drafting Committee on work done previously and taken note of by the Commission during its sixty-seventh session, the Commission provisionally adopted draft articles 2 (f) and 6, together with commentaries thereto.

In their deliberations on this topic, the Member States of AALCO were requested to focus on few areas of critical importance: draft article 2 that deals with the definitional aspects and draft article 6 on the scope of immunity *ratione materiae*.

### **Comments of the Member States**

Many delegations commended the work of the Special Rapporteur, Ms. Concepción Escobar Hernández and her Fifth Report on the topic in which she has carefully analyzed the questions of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. One delegation believed that immunity is procedural in nature and that it fell under an entirely different category of rules from the substantive rules that determine the lawfulness of a given act.<sup>40</sup>

Explaining the rationale behind the concept, some delegations pointed out that immunity of State officials from foreign criminal jurisdiction while performing official acts is a direct consequence of the principle of sovereign equality and its recognition by international law is aimed at protecting sovereignty and ensuring peaceful international relations.<sup>41</sup>

A view was expressed that the legal status of the Head of the State in international law falls under the diplomatic law which is a branch of international law and that since international law recognizes the principle of sovereign equality of States, all sovereign Heads of States deserve similar international treatment.<sup>42</sup> It was mentioned further that the Head of the State, by virtue of being the highest authority of the State, enjoys autonomy and decision making power and that the State shall bear all the consequences of the actions and administrative steps of the

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<sup>40</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>41</sup> I.R.Iran, Japan and Sudan, Fifty-Sixth Annual Session 2017.

<sup>42</sup> Sudan, Fifty-Sixth Annual Session 2017. This statement was made in Arabic and what is reflected here is the unofficial English translations of its statement.

Head of the State on the ground that head of the State is the highest representative of a State.<sup>43</sup>

In his view, the rules of international law clearly establish that the head of State has to be protected against arrest or detention and this is a guaranteed right of the Head of the State in all circumstances. So, State authorities cannot arrest Head of the State or keep him in detention anywhere whether he is in other states or in his own State.<sup>44</sup> He also added that besides the personal immunity granted to a Head of the State, there is a near agreement in the jurisprudence that a Head of the State present outside his State in his official capacity enjoys full criminal immunity making him exempted from criminal jurisdiction of the host state. The immunity to Head of the state from criminal jurisdiction of other states is an absolute immunity whether the conduct of the Head of the State is in his official capacity or personal capacity.<sup>45</sup>

While noting that for those countries that have not ratified the Rome Statute, the immunity to their Heads of the State remains part of the customary international law rules, it was added by the delegation that that (hence), no country is allowed to take measures that violate the rights of the Head of the State as long as that country is not signatory to the Statute. The immunity of Head of the State remains absolute before the national judiciary of the countries even if he commits international crimes, the delegation added.<sup>46</sup>

A view was also expressed that immunity of State officials from foreign criminal jurisdiction originates from customary international law.<sup>47</sup> Moreover in the view of *one delegation*, immunity *ratione materiae* must be guaranteed to all State officials in respect to acts defined as acts performed in official capacity whether they are in office or have left the office.<sup>48</sup> It was also pointed out that the immunity of State officials from foreign criminal jurisdiction in foreign courts and in international criminal judicial bodies are different issues and that it would be

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<sup>43</sup> Sudan, Fifty-Sixth Annual Session 2017.

<sup>44</sup> Sudan, Fifty-Sixth Annual Session 2017.

<sup>45</sup> Sudan, Fifty-Sixth Annual Session 2017.

<sup>46</sup> Sudan, Fifty-Sixth Annual Session 2017.

<sup>47</sup> VietNam, Fifty-Sixth Annual Session 2017.

<sup>48</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

questionable to copy indiscriminately theories and practice of the latter when determining rules applicable to former.<sup>49</sup>

As regards the question of exception to immunity a variety of views were expressed. A *view* was expressed that there is no exception in respect of immunity *ratione personae* and that the three exceptions to immunity *ratione materiae* as proposed by the Special Rapporteur are mostly evidenced by, a few dissenting opinions of ICJ judgements and civil cases before some national courts and international judicial bodies, such as the European Court of Human Rights. Hence, in the view of this delegation whether such evidences are convincing and are of relevance to this issue is an open question.<sup>50</sup> Regarding crimes in respect of which immunity does not apply, a view was also put forth that a distinction needs to be made between “crimes of international law” and “international crimes” and that while the importance of fight against the former cannot be overstated, it is the latter that seem to have reached status of customary international law, and as such enjoy wide acceptance by the international community.<sup>51</sup>

A *view* was also expressed that the Special Rapporteur’s report did not provide sufficient evidence that these three categories of limitations and exceptions are already established categories to which the immunity of State officials from foreign criminal jurisdiction does not apply. Hence, the question of exceptions and limitations needs to be studied further.<sup>52</sup> One *delegation* agreed with the methodology used by the Special Rapporteur and the usage of the title of draft article 7- *Crimes in respect of which immunity does not apply* given the normative implications of the phrase “limitations and exceptions.”<sup>53</sup> In relation to the issue of exception, a concern was also expressed that the Commission needed to proceed cautiously in deciding whether it should focus on codification or progressive development of international law (*lex lata* or *lex ferenda*) given the highly complex and political sensitivities involved in this question.<sup>54</sup>

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<sup>49</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>50</sup> P.R.China, Fifty-Sixth Annual Session 2017.

<sup>51</sup> I.R.Iran, Fifty-Sixth Annual Session 2017.

<sup>52</sup> Japan, Fifty-Sixth Annual Session 2017.

<sup>53</sup> India, Fifty-Sixth Annual Session 2017.

<sup>54</sup> India, Fifty-Sixth Annual Session 2017.

Another concern was expressed that the relationship and fundamental difference between *ratione personae* and immunity *ratione materiae* are not sufficiently analyzed and that further discussions are needed on the same.<sup>55</sup> Another delegation mentioned that exceptions to criminal jurisdiction warranted further debate and that it will be necessary to clarify the concept of “acts performed in an official capacity.”<sup>56</sup> In the view of this delegation, the view that international crimes should not be considered as acts performed in an official capacity should be carefully considered and that greater clarity should be given to the crimes that constitute “international crimes.”<sup>57</sup> Another delegation considered that the “crimes of corruption” proposed in para 1 of sub para (b) of the draft Article 7 needed to be supported with sufficient state practice to convince that its character would constitute a serious international crime similar to those of the other international crimes listed therein.<sup>58</sup> In his view, a determination should be made whether or not the acts of corruption fall within the “acts performed in an official capacity” and thus fall within the scope of immunity *ratione materiae*.<sup>59</sup>

Mr. Chairman,

Barring the three topics that were the subject of deliberations at the Fifty-Sixth Annual Session, comments were also made on two other things: one, on some other agenda items of the ILC and two, on the AALCO-ILC cooperation. Permit me to cover those two areas as well.

### **Identification of Customary International Law**

One Delegation expressed his appreciation for the Special Rapporteur of this topic Sir Michael Wood for his Fourth Report which addressed the suggestions of States on previously adopted draft resolutions as well as ways and means to make the evidence of customary international law more readily available.<sup>60</sup> In the view of

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<sup>55</sup> Japan, Fifty-Sixth Annual Session 2017.

<sup>56</sup> VietNam, Fifty-Sixth Annual Session 2017.

<sup>57</sup> VietNam, Fifty-Sixth Annual Session 2017.

<sup>58</sup> India, Fifty-Sixth Annual Session 2017.

<sup>59</sup> India, Fifty-Sixth Annual Session 2017.

<sup>60</sup> India, Fifty-Sixth Annual Session 2017. India is the only Member State which made comments on topics other than the three topics that were discussed at the Fifty-Sixth Annual Session.



this delegation, the 16 draft conclusions (that had been adopted by the ILC in 2016) reflected the valuable efforts of the Commission on this topic.

Drawing attention to draft conclusion 4 (3) concerning the ‘role of the conduct of other actors’ in the assessment of the evidence of a rule of customary international law, and its commentary that includes ‘non-State armed groups’ as one such other actors along with NGOs, transnational corporations and private individuals, he clarified that the commentary which stipulates that the reaction of States to the conduct of non-State armed groups may be constitutive or expressive of customary international law is incorrect. This is because in his view the conduct of non-state armed groups can in no circumstances be constitutive or expressive of CIL.

While agreeing with draft conclusion 8 that provides that the relevant practice must be general, he stated that though universal participation is not required, it is important that participating States do represent the various geographical regions and are particularly involved in the relevant activity or those States that had an opportunity or possibility of applying the rule. He also agreed with the draft conclusion 9 that the general practice be accepted as law (*opinio juris*) meant that the practice in question must be undertaken with a sense of legal right or obligation.

On draft conclusion 10 that refers to government legal opinions as a form of evidence of acceptance as law, he agreed to this proposition in principle. However he went on to add that it may be difficult to identify them as many countries do not publish the legal opinions of their law officers.

On draft conclusion 11 which concerns the significance of treaties, especially widely ratified multilateral treaties for the identification of CIL, he was of the view that all treaty provisions are not equally relevant as evidence of rules of customary international law and that only fundamental norm creating treaty provisions could generate such rules. Strong opposition to a particular treaty, though from a few countries, could be a factor which needs to be taken into account while identifying customary international law, he added. The delegation also agreed to draft

conclusion 12 that a resolution by an international organization or an intergovernmental conference cannot create a rule of customary international law.<sup>61</sup>

### **Provisional Application of Treaties**

*One Delegation* welcomed the Fourth Report of the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo on the topic which considered the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties, as well as the question of provisional application with regard to international organizations.<sup>62</sup>

He noted that the provisional application of a treaty will depend on the provisions of domestic law, including the manner of expressing consent. While stating that his Country is a dualistic State, he pointed out that a treaty will not automatically form part of the domestic law and that it will be applied only as a result of its acceptance by internal procedures. Hence, he was of the opinion that resort to provisional application of treaties (i.e., treaties being applicable/binding on the States before its entry in to force), will go against the principle of dualism.

It is to be noted that with regard to this topic of “Provisional Application of Treaties”, that the UN Secretariat released a Memorandum on the 24 of March, 2017, for the benefit of the Member States as well as the future work of the ILC. The Memorandum is a study that has reviewed State practice with regards to bilateral and multilateral treaties, which have been deposited or registered with the UN Secretary-General in the last 20 years (treaties deposited/registered with the Secretariat since 1 January, 1996), and which provide for provisional application, including treaty actions thereto. It is to be noted that the scarcity of the availability of State practice has hindered the work of the Special Rapporteur in this respect, and at its Sixty-Eighth Session, the ILC had requested the UN Secretariat to prepare a Memorandum analyzing State practice in this respect, with regard to the treaties deposited/registered with itself, in the last 20 years. The present memorandum analyses over 400 bilateral treaties, and over 40 relevant multilateral treaties.

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<sup>61</sup> The ILC is not taking up this topic in its 2017 Session.

<sup>62</sup> India, Fifty-Sixth Annual Session 2017.

The present analysis comprehensively examines the treaties with regards to the various factors that relate to their provisional application, namely: a) The kind of clauses in a treaty that provide for their provisional application, including the nomenclature of such clauses, and also cases where there are separate agreements concluded that provide for provisional application; b) The conditions (procedures or external events) on which the commencement of such provisional application may be dependent; c) The limitations that the treaty in question may impose on the scope of such provisional application, including the reference to internal law or rules of the Organization; and d) The various ways in which the treaties make references for the termination of the provisional application of treaties.

On the basis of the present analysis the UN Secretariat came to the conclusion that ‘provisional application of treaties’ is a flexible tool available to States and international organizations to tailor their treaty relations.

It is to be further noted that the Drafting Committee has adopted draft guidelines 10 to 12, with regard to this topic, in the meeting that it held in May, 2017.<sup>63</sup> The draft guideline 5 that was referred to its last year has not been considered by it due to lack of time. As mandated by the Plenary at its meeting, held on 2 May, 2017,

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**<sup>63</sup>Draft guideline 10 Internal law of States or rules of international organizations and observance of provisionally applied treaties**

1. A State that has agreed to the provisional application of a treaty or part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

**Draft guideline 11 Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties**

1. A State may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

**Draft guideline 12 Agreement regarding limitations deriving from internal law of States or rules of international organizations**

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise on the provisional application of the treaty or part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

draft guidelines 1 to 4 and 6 to 9 were referred back to the Drafting Committee, which adopted a consolidated text this year.<sup>64</sup>

### **Protection of the Environment in Relation to Armed Conflicts**

Taking note of the Third Report on the topic that deals with the post-conflict phase submitted by the Special Rapporteur Marie G. Jacobsson, *One Delegation* stated that the draft principles proposed under this topic should not be in conflict with the obligations arising from existing conventions and that the work on this topic should not duplicate the efforts already undertaken in the existing regimes.<sup>65</sup>

### **Crimes Against Humanity**

As regards the topic—Crimes against Humanity- the brief of AALCO Secretariat prepared in 2017 discussed the contents of the Second Report of the Special Rapporteur submitted in 2016 and the views expressed by AALCO Member States on the topic at the UN General Assembly Sixth Committee at its seventy-first session in 2016. In the Fifty-Sixth Annual Session of AALCO held in Nairobi in May 2017, Member States made no specific comments or statements on this topic.

In January 2017, Sean D. Murphy, Special Rapporteur, submitted his Third Report on the topic and it was made available in the public domain in April 2017. It discusses a series of additional issues on the topic—including extradition provisions included in various treaties addressing crimes; principle of *non-refoulement*; the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings; participation and protection of victims, witnesses and others in relation to proceedings; relationship of the present draft articles with the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court; and monitoring mechanisms and dispute settlement. As you all know, the Commission is currently holding discussions on this Report in the ongoing session and it is

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<sup>64</sup> Draft guidelines 1 to 4 and 6 to 12 may be found in Doc. A/CN.4/L.895.

<sup>65</sup> India, Fifty-Sixth Annual Session 2017.

expected that the Member States will comment on the Report in the upcoming Sixth Committee.

## **Concluding Remarks**

Allow me, at the end, to say a few words on the AALCO-ILC cooperation. Indeed, the need to strengthen AALCO's relationship with the ILC was stressed by few member States at the Fifty-Sixth Annual Session.<sup>66</sup> Over the years, there have been active interactions between AALCO and ILC, and it has been a regular feature of our Annual Sessions for the past 5 years or so, that we devote Half-Day to discuss some selected agenda items of the Commission. We invite the distinguished members of the ILC to attend this meeting. It has contributed a great deal to the Member States of AALCO, much more so when members of ILC have been present in these meetings as Panelists.

However, due to the difficulty in the arrangement of the meeting time of the AALCO Annual Sessions, we are not always in a position to get the ILC Members to participate in these Special Meetings. However we will do our best to change this in the future Sessions. All this in turn has also benefited ILC very much because the voices of Asia and Africa on various agenda items of ILC should be duly considered by the Commission if it were to make a significant contribution to its primary mandate of developing international law with maximum participation. I hope to continue this tradition in the years to come as well, and increase interactions between the ILC and AALCO.

Furthermore, in my future presentations, I will endeavor, as and when necessary, to also talk about our activities that contributes to the development and evolution of international law in general.

I thank you.

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<sup>66</sup> Japan, P.R.China and I.R.Iran, Fifty-Sixth Annual Session 2017.